

## OLDER ADULT PROTECTIVE SERVICES – PROPOSED AMENDMENTS

April 19, 2018

Pennsylvania, as has many other states, passed legislation for purposes of protecting abused, neglected, exploited or abandoned elderly individuals, with a uniform statewide reporting and investigating system that dovetails with protective service resources. As of 1987, Pennsylvania’s Older Adult Protective Services Act, 35 p.s. Sec. 10225.101, et seq (hereinafter referred to as the “Act”) provides protective services to individuals age 60 and over.<sup>i</sup> Governor Wolf recently proposed amendments to the Act. PAELA provides the following comments to the proposed amendments on behalf of the families we represent in their efforts to provide a safe environment for their loved ones.

Currently, the primary focus of the Act is mandatory reporting of suspected **physical or sexual** abuse to a resident of a care facility by any employee or administrator of that facility. All reports of abuse are to be reported to the local area agency on aging (AAA) and licensing agencies, with possible additional reporting requirements to the Department of Aging and local law enforcement if the abuse is in the nature of sexual abuse or serious physical injury. As currently enacted, there is no companion provision for financial abuse or exploitation.

The need to enhance protections for financial abuse and exploitation of elders was outlined in the Elder Abuse and Neglect portion of the Pennsylvania Supreme Court Elder Law Task Force Report issued in 2014.<sup>ii</sup> The proposed amendments expand the definition of elder abuse to include **financial abuse and exploitation**. Since financial institutions can play a vital role in preventing and responding to this type of abuse, the proposed amendments also place a voluntary reporting requirement upon financial institutions.<sup>iii</sup>

The proposed amendments essentially endorse the wholesale adoption of the FINRA rules recently adopted in February, 2018.<sup>iv</sup> FINRA is the Financial Industry Regulatory Authority which enacted rules to address financial exploitation of seniors and vulnerable adults, putting in place the first uniform national standards applicable to interaction between seniors and **investment firms**. One rule requires making reasonable efforts to obtain the name and contact information of a trusted contact person for a customer’s account. A second rule permits the FINRA member to place a temporary hold on disbursement of funds or securities where there is a reasonable belief of financial exploitation and to notify the trusted contact of the temporary hold. In general, we question the wholesale adoption of this second rule in the broader context of financial abuse and exploitation that occurs outside the investment firm setting. Our specific concerns include the following:

1. The amendments suggest but do not require a training program. If bank staff has the authority to freeze accounts, significant training will need to be done to allow front line bank tellers to **identify** exploitative behaviors and to help back office bank administrators to **respond** appropriately to suspicious activities.
2. The amendments provide for significant delay in accessing the principal’s funds (15 business days, with possible addition of 10 more days). A distinction exists between infrequent, often

larger, securities transactions that occur in the investment firm setting viz-a-viz daily, usually smaller, banking transactions. The FINRA rules do not translate 100% to daily banking situations.

3. Definition of “financial exploitation” – Refers to acts by guardians for which other highly developed statutory provisions (prohibitions, penalties, etc.) already exist.
4. Definition of “financial exploitation” – Ordinary business transactions by an agent under power of attorney acting under exigent circumstances may involve large amounts and irreversible transactions, but these transactions may very well be clearly within the scope of a legally enforceable grant of authority under the Power of Attorney. We have concern that a front line employee of a bank or credit union will substitute his or her judgment for that of the agent, impinging on the legal rights of customers to privacy and self-determination. Given that the monthly private pay cost of care in a skilled nursing facility can be upwards of \$12,500, significant transactions can occur in the context of obtaining health care, including accessing and depleting accounts to fund long-term care.
5. Immunity provided to financial services providers is overly broad in that financial services providers face no civil or criminal liability whatsoever for identification of, or failure to identify at all, financial exploitation.<sup>v</sup> In contrast, an agent under a power of attorney who is incorrectly flagged by a financial services provider for financial exploitation runs the risk of having his personal accounts frozen for up to 25 days. Regarding this later point, will the risk of frozen personal accounts deter potential agents from being willing to serve as agents? See §301.3(a).
6. Section 301.3(b) indicates that an agency or law enforcement official provides information to the financial services provider demonstrating that it is reasonable to believe that financial exploitation of an older adult may have occurred; the financial services provider may refuse to disburse funds. Issues unaddressed are:
  - a. What is the definition of agency?
  - b. What if information comes from another source (not an agency or law enforcement official)?
  - c. What about trust accounts for multiple beneficiaries?
  - d. What if an agent engages in gifting clearly authorized under a General Durable Power of Attorney for purposes of income tax, death tax or other planning?

We offer for additional consideration the following activities that financial services providers could perform in their efforts to assist AAA’s and law enforcement to protect vulnerable seniors:

1. AAA’s currently engaged in investigations report great difficulty in obtaining financial records from financial institutions. Financial services providers could expedite documentation requests from AAA’s and provide documents to investigative personnel at no or reduced cost.
2. Extend the FINRA rule for trusted contact concept to financial services providers by allowing older account holders to consent to information sharing with trusted third parties.
3. Financial services providers might also offer opt-in, age-friendly services to enhance protections against financial exploitation such as cash withdrawal limits, geographic

transaction limits, alerts for specified account activity, and view-only access for authorized third parties.

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<sup>i</sup> In 2010, the Adult Protective Services Act of October 7, 2010, P.L. 484, No 70 was enacted to provide protective services to adults between the ages of 18-59.

<sup>ii</sup> <http://www.pacourts.us/assets/files/page-543/file-4023.pdf?cb=1524152425055>

<sup>iii</sup> The proposed legislation also includes important provisions that expand the definition of facilities to include assisted living necessitated by the enactment of Pennsylvania law and regulations creating this additional category of facility.

<sup>iv</sup> See <http://www.finra.org/newsroom/2018/new-finra-rules-take-effect-protect-seniors-financial-exploitation>.

<sup>v</sup> See Section 301.3.(g) of proposed legislation.