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February 2, 2021

To: The Honorable William C. Smith, Jr.
Chair, Judicial Proceedings Committee

From: Steven M. Sakamoto-Wengel
Consumer Protection Counsel for Regulation, Legislation and Policy

Re: Senate Bill 327 – Civil Actions – Financial Exploitation of Vulnerable Adults (Maryland SAFE Act) (CONCERNS)

The Consumer Protection Division of the Office of the Attorney General is concerned that some of the provisions of Senate Bill 327, sponsored by Senator Waldstreicher, which would establish a private right of action for victims of financial exploitation of vulnerable adults, could create confusion that would make actions to help vulnerable adults more difficult. The Division supports efforts to encourage private attorneys to assist senior citizens and vulnerable adults who have been victims of financial exploitation to recover the assets taken from them. However, the Division is concerned that Senate Bill 327 could harm the Division's ability to assist those same victims.

The General Assembly first gave the Consumer Protection Division authorization to bring cases on behalf of victims of financial exploitation by Chapter 114 (2016). Chapter 794 (2018) gave similar authority to the Securities Commissioner. Chapter 160 enacted last session expanded the Division's authority by making financial exploitation of the elderly or vulnerable adults a violation of the Consumer Protection Act. And the General Assembly passed Senate Bill 407 last session, which would have required the Governor to appropriate money each year for a Senior and Vulnerable Adult Asset Recovery Unit in the Attorney General's Office, but that measure was vetoed by the Governor.

Since the attorney overseeing the program was first hired in January 2017 through the end of calendar year 2020, the Office has been able to open more than 190 investigations and has settled or obtained judgments totaling more than \$1.6 million in 21 cases. Chapter 160, which became effective October 1, 2020, allows victims of financial exploitation as defined in § 8-801 of the Criminal Law Article to bring a private right of action under § 13-408 of the Consumer Protection Act and collect reasonable attorneys' fees. The Division believes that the treble damages remedy proposed in Senate Bill 327 would enhance the ability of victims to recover funds taken from them

through financial exploitation by encouraging even more private attorneys to bring actions on their behalf.

However, rather than enhance the penalties currently available to victims of financial exploitation, Senate Bill 327 would create an entirely new cause of action, which could result in different court interpretations as to what constitutes financial exploitation of senior citizens and vulnerable adults. Section 8-801(b) of the Criminal Law Article, which is the operative section for actions by the Division as well as for criminal prosecutions of financial exploitation, sets forth the following prohibition:

- (1) A person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is a vulnerable adult with intent to deprive the vulnerable adult of the vulnerable adult's property.
- (2) A person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is at least 68 years old, with intent to deprive the individual of the individual's property.

Senate Bill 327 includes an expansive definition of "Financial Exploitation" beginning on page 3, line 16 down through page 4, line 22. Without expressing an opinion as to whether one definition of what constitutes financial exploitation is better, having two different definitions of what constitutes financial exploitation would only serve to create conflicting court interpretations of whether an alleged perpetrator's actions meet the definition and could lead a court to conclude that, by providing different definitions, the General Assembly intended one of the causes of action to be read more narrowly than the other.

Similarly, § 8-801 defines "Deception" by referencing § 7-101 of the Criminal Law Article, meaning knowingly to:

- (i) create or confirm in another a false impression that the offender does not believe to be true;
- (ii) fail to correct a false impression that the offender previously has created or confirmed;
- (iii) prevent another from acquiring information pertinent to the disposition of the property involved; or
- (iv) promise performance that the offender does not intend to perform or knows will not be performed;

(2) "Deception" does not include puffing or false statements of immaterial facts and exaggerated representations that are unlikely to deceive an ordinary individual.

By contrast, SB 327 defines "Deception" as "a misrepresentation or concealment of a material fact relating to services rendered, disposition of property, or the use of property intended to benefit a vulnerable adult."

Additionally, SB 327 defines “Intimidation”, which § 8-801 does not, and the two laws have differing definitions of what constitutes a “Vulnerable Adult”. There are other terms in SB 327 and existing law that are also have different definitions. Again, without determining which approach is better, the Division is concerned that having two different Maryland laws defining prohibited conduct inconsistently will only create confusion and result in courts applying the standards differently to the same conduct.

The Division has reached out to the Estates and Trusts Section of the Maryland State Bar Association and would be willing to work with that Section and this Committee to address our concerns. Since § 8-801 is a criminal statute as well, the Division believes that the views of prosecutors should be made part of the conversation to ensure that any changes do not impact criminal prosecutions of those who would engage in financial exploitation of senior citizens and vulnerable adults.

Consequently, the Consumer Protection Division requests that the Judicial Proceedings Committee take our concerns into account when considering Senate Bill 327.

cc: The Honorable Jeff Waldstreicher
Members, Judicial Proceedings Committee