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Written testimony in Support SB 175

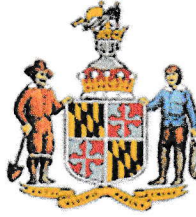
I am Jeffrey H. Myers. For 26 years, from 1995 up to and including January of 2022, I was Principal Counsel to the Maryland Department of Aging. I support the passage of SB 175. Attached hereto is the original submission the Office of the Attorney General made in support of the bill. I continue to stand behind that position.

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January 17, 2022

Senate Finance Committee  
Senator Dolores G. Kelley, Chair

Written Support of the Office of the Attorney General in favor of SB 175

Dear Madam Chair:

I am pleased to report that the Office of the Attorney General supports the passage of SB 175, which amends current law to facilitate communication between fiduciary institutions and Adult Protective Services (APS) when APS is investigating possible financial abuse or exploitation of vulnerable adults.

Senate Bill 175 exists because of Project SAFE. Project SAFE is a long standing Maryland coalition of public and private entities, including the Office of the Attorney General, concerned about elder financial exploitation. You can learn more about Project SAFE on the Maryland Department of Aging's website. Go to: <https://aging.maryland.gov/Pages/elder-financial-exploitation.aspx>.

Last year a Project SAFE workgroup worked to create a standard form that all APS offices in the State could use to request financial records when investigating reports of financial exploitation. (APS is the unit of each local department of social services mandated to investigate reports of abuse of vulnerable adults, including financial exploitation. *See*, Family Law Article, Title 14, Subtitle 3.)

The standard form was to be based on a national model promulgated by the National Adult Protective Services Association. The National Association promulgated its model because the federal Gramm-Leach-Bliley Act had removed certain language in federal law that had been possible impediments to a fiduciary institution sharing customer information with an APS office investigating financial exploitation.

A standard Maryland form was desirable because various local APS offices had reported difficulties getting timely responses to record requests from some institutions. It was roundly believed that an official standard form would help in that regard.

Unfortunately, Project SAFE found that there were certain uncertainties and potential conflicts in State law that made it difficult to adopt a Maryland standard request form with which all fiduciary institutions could be comfortable. See the attached April 5, 2021, memorandum from myself to the Project SAFE workgroup describing the Maryland issues.

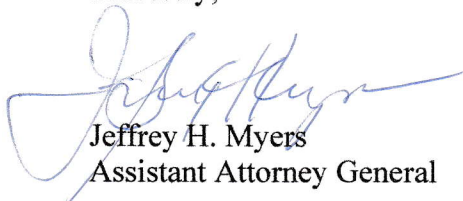
Senate Bill 175 makes certain technical changes and clarifications in the relevant statutes to resolve those issues.

In addition, SB 175 provides an additional benefit. The Project SAFE workgroup included representation from the Maryland Bankers Association, the Maryland/DC Credit Union Association, the Maryland Department of Human Services, the Maryland Association for Bank Security, and the Maryland Commissioner of Financial Regulation, and the Office of the Attorney General. Through the workgroup's efforts, we realized there was another issue that could and should be addressed: fiduciary institutions were reporting difficulty getting feedback from APS after the institution had reported financial exploitation or abuse. This turned out to be an issue caused by certain language in a Department of Human Services statute, Human Services Article, Section 1-201.

Therefore, we also drafted SB 175 to clarify that APS may, and indeed to encourage APS to, disclose the status or final disposition of a report of possible financial exploitation or abuse made by a fiduciary institution.

If passed, SB 175 will be a win for APS and a win for fiduciary institutions. But more importantly, it will be a win for Maryland's vulnerable adults and seniors who are subjected to financial exploitation and abuse.

Sincerely,



Jeffrey H. Myers  
Assistant Attorney General



To: Antonio Salazar, Commissioner of Financial Regulation; Mindy Lehman, Maryland Bankers Association; John Bratsakis, Maryland/DC Credit Union Association; Dorinda Adams, Department of Human Resources; Robert Hyde, Maryland Association for Bank Security; Ken Krach, OAG; Cathy Dryden, OAG.

From: Jeff Myers

April 5, 2021

**Re: Status of draft Maryland APS template for requesting financial records when investigating possible financial exploitation of a vulnerable adult**

On December 3, 2020, a draft protocol<sup>1</sup> for all Maryland Adult Protective Service offices to use to request records from fiduciary institutions<sup>2</sup> was distributed to certain Project SAFE members for comment, including the Maryland Bankers Association (MBA) and the Maryland/DC Credit Union Association (MDDCCUA). Thank you to all who commented on the draft. It is through the exchange of ideas like this that we can make the most effective progress.

What follows is my summary of and analysis of the feedback. Note Section III below concerns feedback received on a different, but related matter—information flow from APS to fiduciary institutions.

This is my personal effort, and does not reflect official viewpoints or policy positions of the Office of the Attorney General or the Maryland Department of Aging (let alone the Departments of Human Services or Labor).

As described in the draft protocol, the Gramm- Leach- Bliley Act, removed federal privacy impediments that might have stopped a fiduciary institution from sharing customer information with an Adult Protective Services office investigating possible financial exploitation of a vulnerable adult. However, there is apprehension among some that certain Maryland laws may contain impediments.

- I. While Maryland Family Law Article § 14-303 indicates a fiduciary institution may provide financial records to an Adult Protective Services (APS) office investigating the exploitation of a suspected vulnerable adult, Financial Institutions Article § 1-302 reads to the contrary.

*A. Family Law Article § 14-303:*

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<sup>1</sup> The model protocol promoted by the National of Adult Protective Services Association served as the basis for the draft.

<sup>2</sup> While we frequently use the generic term “financial institution,” Financial Institutions Article (FIA) 1-306 is applicable only to fiduciary institutions: banks, credit unions, and savings and loans. See, FIA 1-301(b). “Financial Institutions” is a technical and broader term under the FIA as it includes all entities regulated by the FIA, including for example mortgage loan originators, which are not fiduciary institutions. See, FIA 1-101(j).

It seems clear in APS's statutory framework in the Family Law Article that a fiduciary institution may provide information in response to an APS request for records to facilitate an investigation of financial exploitation or abuse. Family Law Article, Section 14-303(c)(2) and (e) provide, with respect to APS investigations of abuse and exploitation that:

(c)(2) As appropriate, the local office on aging or the Department of Aging, local geriatric evaluation service, or any other public or private agency providing services or care to the alleged vulnerable adult or whose information or expertise may be of assistance in assessing risk or planning services may assist in the investigation on the request by the local department.

(e) Parties participating in an investigation may share pertinent client information relevant to the investigation.

(Emphasis added.)

Moreover, Family Law Article 14-309, part of APS's statutory framework, seemingly would provide immunity to a fiduciary institution sharing information with APS—even if it has not previously reported to APS. Section 14-309 states, “Any person who makes or participates in making a report under this subtitle or participates in an investigation or a judicial proceeding resulting from a report under this subtitle shall have the immunity from liability described under § 5-622 of the Courts and Judicial Proceedings Article.” Supplying records in response to an investigatory request from APS should qualify a person as one who “participates in an investigation” and thereby provide immunity.

*B. Financial Institutions Article § 1-302:*

On the other hand, it was pointed out that there is conflicting statutory language elsewhere in the Maryland Code. Financial Institutions Article (FIA) Section 1-302 is titled “Confidentiality of Financial Records.” It provides that, except as otherwise provided in the subtitle, a fiduciary institution may not disclose any financial records of a customer unless the disclosure meets certain specified circumstances listed in Section 1-302. There are circumstances for providing financial records to the Department of Human Services, of which APS is a part, but they all relate to determining financial eligibility for public benefits. See e.g., FIA Section 1-302(1)(v). Those circumstances do not apply to APS. There are other exceptions in the subtitle, but they include disclosing documents in response to a subpoena or after filing a report of financial abuse or exploitation.

Thus, Family Law Article, Title 14, Subtitle 3, and Financial Institutions Article, Title 1, Subtitle 3, are not well synchronized and seem to conflict. Understandably, a fiduciary institution with a conservative nature (which is virtually all fiduciary institutions) might err on the side of a statute that says, “thou shall not,” as opposed to one that says, “thou may.”



II. Is a request to a fiduciary institution from APS for financial records for an exploitation investigation, a sufficient basis for a fiduciary institution to make a report to APS under FIA Section 1-306?

The MBA posed this interesting question: Can a request from APS stating that it is investigating alleged financial exploitation of a vulnerable adult and seeking a customer's records serve as a sufficient basis for a fiduciary institution to believe that a "customer has been subjected to financial exploitation" or to "have reasonable cause to suspect that" an "elder adult is the victim of financial abuse"<sup>3</sup>? Currently, there is not a definitive legal answer to this question for each and every case. Each institution has to answer this question for itself—probably on a case-by-case basis.

The answer might depend on whether APS is seeking the records of an alleged victim or perpetrator of financial exploitation or abuse. If seeking the financial records of an alleged perpetrator, a FIA Section 1-306 report would not be appropriate because FIA Section 1-306 reports are for customers who may be victims.

In some cases, a fiduciary institution might conclude that the information in the APS request is a sufficient basis to believe that a "customer has been subjected to financial exploitation" or to "have reasonable cause to suspect that" an "elder adult is the victim of financial abuse." In other matters, where the information from APS is sparse, a fiduciary institution might take the receipt of a records request from APS as a cue to conduct some internal inquiry, such as reviews of transaction records or discussions with tellers or branch managers. That internal inquiry might provide additional information that alone, or in conjunction with the APS request, could serve as the basis for filing a FIA Section 1-306 report with APS before responding to the APS request for a customer's financial records.

Some have suggested that perhaps the Commissioner of Finance could issue guidance stating that a request for records from APS should be considered a sufficient basis for a fiduciary institution to suspect financial exploitation or abuse. Then, upon receiving a request from APS, a fiduciary institution could first file a report under FIA Section 1-306, if it deemed a report appropriate, and then safely respond to the APS records request.<sup>4</sup>

III. Can APS provide information to a fiduciary institution that has reported suspected financial abuse or exploitation?

In addition, in response to the draft protocol we received several comments indicating that financial institutions want information from APS when they have reported to APS that a

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<sup>3</sup> Note that while we speak frequently of financial exploitation and financial abuse as interchangeable terms, FIA Section 1-306 defines these terms distinctly and differently. In FIA Section 1-306, "Financial Exploitation" is the broader term. It refers to any misuse of a customer's funds; while "Financial Abuse" is narrower and only includes misuse of the property of an "elder adult"—someone 65 or older. *See*, FIA Section 1-306(a)(4) and (5).

<sup>4</sup> Fortunately, we do not have this issue with broker-dealers or investment advisers as Corporations & Associations Article § 11-307(f) makes clear that a report to APS is not a prerequisite to sharing information.

customer may be the victim of financial abuse or exploitation. The institutions are frustrated when a customer seems to continue to be duped and they have not heard back from APS as to whether an investigation was opened or closed, whether APS found financial abuse or exploitation, etc. Institutions are often trying to decide whether to report again or whether to freeze or close an account.

Perhaps the reticence of APS's staff is based on the APS regulations, which provide in COMAR 07.02.16.06F, "The local department shall inform the referring party when the investigation begins and the name of the assigned caseworker. Except in accordance with a court order, local departments may not share information on a case unless it furthers the investigation or service provision or is required in reports to law enforcement officials." (Emphasis added.)

While informing the fiduciary institution that an investigation was closed, or that it was closed with a finding of exploitation or closed as unsubstantiated, might assist the institution, it will not further the investigation, and it is unlikely to further any services APS is providing.

The MBA pointed to a California statute that it felt would be beneficial in Maryland:

Notwithstanding any provision of law, a local adult protective services agency, a local law enforcement agency, and the Department of Business Oversight may disclose to a mandated reporter of suspected financial abuse of an elder or dependent adult or their employer, upon request, the general status or final disposition of any investigation that arose from a report made by that mandated reporter of suspected financial abuse of an elder or dependent adult pursuant to this section.

Cal. Welf. & Inst. Code § 15630.2(k).

#### IV. Conclusion.

It is my belief that we should convene ourselves as a subgroup of Project SAFE to develop legislation for next session that would clarify and enhance communication between APS and fiduciary institutions when financial exploitation or abuse is suspected. I have been gathering statutory language from other states that would be helpful to such an endeavor if you all are willing to work on a joint piece of legislation.

Cc: Melanie Senter Lubin, Securities Commissioner