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Written Testimony to the Advisory Council on Employee Welfare and Pension Benefit Plans

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**Regarding Diminished Capacity - Considerations for Recognizing and Addressing Participants with Diminished Capacity**

My name is Michael Hagenlock. I am honored to have this opportunity to speak with you – the members of the 2020 Advisory Council on Employee Welfare and Pension Benefits Plans. While I serve as the Director of the state of Montana’s Adult Protective Services (APS) program, I am here in my capacity as President of the Board of Directors of the National Adult Protective Services Association (NAPSA). NAPSA is pleased to be invited to share our insights and expertise to assist the Advisory Council as you undertake your important review of **“how various industries, professionals and service providers identify and address the unique challenges associated with individuals who may demonstrate diminished mental capacity.”**

Let me share a story with you: Jean’s Story<sup>1</sup>

My name is Jean. I am 65 years old and I am a victim of financial exploitation. For the past couple of years, I have struggled emotionally because of personal problems. I felt overwhelmed and could not handle my financial affairs. My brother, Bob, offered to help and I gratefully accepted. I gave him complete access to my money. But instead of managing my finances, he stole my life’s savings, more than \$304,000. I trusted my brother to look out for my interests, but he instead took advantage of that trust and took all my funds and left me financially destitute.

I didn’t realize what was happening and it was not until I began working with APS that I found out what my brother had done. They discovered that he pillaged my retirement accounts, opened installment loans and credit card accounts in my name without my permission or knowledge, used my credit card without my permission, and failed to pay my bills and income taxes.

Unfortunately I went to APS too late to save my house from foreclosure, but they were able to help me save my car, cancel the credit cards he took out in my name, and remove him from my savings and checking accounts.

With APS’s help I am trying to get my financial affairs together again. They are helping:

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<sup>1</sup> This is a composite case study. Names have been changed.

- Resolve my credit problems,
- Negotiate with the IRS regarding my back taxes, and
- Get restitution from my brother for the money he stole from me.

Thanks to APS, I have a future.

We at NAPSA applaud your goal of helping employers, plan sponsors and plan service providers to protect those they serve from potential fraud and financial abuse. While financial exploitation of older adults is seemingly rampant and it further seems that all older adults – indeed, all adults – may be susceptible to fraud, abuse and exploitation, there is no question that those whose mental capacity is diminished to the point of impairing their judgment are especially vulnerable to outright fraud and exploitation, as well as undue influence in making decisions not in their best interest. It is important to note, however, that undue influence affects not just those with diminished mental capacity, but also those susceptible to the outside influence of others for a variety of reasons. Isolation and loneliness are increasingly being recognized as a powerful risk factor. Undue influence also includes following the lead of unscrupulous individuals trusted by the victim – either because of their relationship or the perceived expertise or power of trusted others.

### Who is APS?

Let me tell you a little about Adult Protective Services (APS). APS is a social services program provided by state or county governments nationwide serving individuals age 60 and older and adults with disabilities who may be victims of abuse, neglect, or exploitation. APS workers are typically the first responders in cases of abuse, neglect, or exploitation, and they work closely with a wide variety of allied professionals such as health care providers, firefighters, law enforcement officers and others.

APS is statutorily authorized under each state's law to receive and investigate reports of abuse, neglect, and financial exploitation, and to protect victims. Moreover, some American Indian and Native Alaskan (AIAN) tribal communities have also established APS programs. In federal fiscal year 2018, the most recent year for which we have data from the National Adult Maltreatment Reporting System (NAMRS), **APS programs nationwide responded to 791,161 reports of abuse – that is, approximately 65,930 each month.** Of these, approximately 18% relate to financial abuse or exploitation – more than 142,000 reports to APS in 2018. (Aurelien, et al., 2019).

In almost all states, APS serves all adults with significant disabilities age 18 and above; in a few states, any older person may be served based on advanced age alone (i.e., it is not necessary for a person over age 60 or 65 to have a disability); and in a few states APS serves older persons only.

Most seniors and adults with disabilities live independently in the community without assistance. However, far too many experience abuse or neglect by others and need trained professionals to intervene on their behalf. The most significant prevalence study of elder abuse found that about 1 of 10 older adults are victims of abuse or neglect each year (Acierno, et al., 2010). According to the U.S. Census Bureau, there were more than 54 million adults age 65 and over in 2019 (U.S. Census Bureau, 2020) . That would suggest more than 5 million abuse victims in that age cohort. Looked at another way, each day almost 148,000 elders experience abuse.

In recent decades the older generation's combined net worth has experienced a rapid growth rate compared to younger generations and may be seen as a potentially lucrative target for financial exploitation and fraud (Howe, 2018). However, disparities in individual wealth are significant and even a

small loss can be devastating to low- or moderate-income victims. APS may be especially crucial in cases in which the amount stolen or otherwise inappropriately gained may be seen as too insignificant an amount for law enforcement and prosecutors to pursue. Sadly, due to a variety of reasons, the majority of abuse cases, including those involving financial abuse, do not come to the attention of APS, law enforcement or others.

APS' responsibilities include investigating, validating, and stopping any abuse, as well as improving the victim's safety and well-being. APS conducts "civil investigations," as authorized in the privacy law exceptions of the Gramm-Leach-Bliley Act (12 U.S.C. § 1811). In order to carry out a civil investigation of a report of fraud or other form of financial exploitation, APS must have access to current and accurate information about the client's financial situation.

Adult Protective Services programs and staff promote safety, independence, and quality-of-life for older persons and persons with disabilities who are being maltreated or are in danger of being maltreated, and who are unable to protect themselves, including for reason of diminished mental capacity.

It is important to state at the outset that there is great variation among states' APS programs. To date, there remains NO federal funding dedicated to APS available to states<sup>2</sup>. In the absence of federal funding – and therefore, federal policies or requirements – the development and implementation of APS programs has been entirely up to individual states. As a result, for example, there is no consistency among states as to what types of abuse, neglect and exploitation fall within the jurisdiction of APS, nor how APS must respond to reports of abuse. Moreover, states vary as to whom APS is obligated to serve – the type of circumstance or level of disability that makes one eligible for APS services. As noted earlier, while most states' APS serve the 18 and older population – provided they meet the individual states' definition of eligibility, a few serve only those over a certain age, and in a few states there are separate APS programs for older adults and for non-elderly adults with disabilities. In about the half the states APS is authorized to respond to reports of abuse, neglect, and exploitation in nursing homes – thus in half of the states, nursing residents do not have to access to APS. And state laws vary considerably as to who is obligated to report suspected abuse to APS. The most recent trend in states has been to make banking personnel and other financial services industry personnel mandated reporters.

A major focus of NAPSA is to bring about greater consistency in practice among states' APS programs. Key to this would be adequate federal funding to states for their APS programs. That is a major policy aim of NAPSA, one in which we are engaged with Congress on a daily basis.

### **Who Is NAPSA?**

Let me share a little bit more about the National Adult Protective Services Association. NAPSA is a national non-profit 501(c)(3) organization. Our members include APS professionals, allied professionals (including the financial industry), and researchers from all fifty states, the District of Columbia, and the territories. Formed in 1989, the purpose of NAPSA is to provide Adult Protective Services (APS) programs a forum for sharing information, solving problems, and improving the quality of services for victims of elder and vulnerable adult mistreatment. Its mission is to strengthen Adult Protective Services programs in order to improve the safety and quality of life of at-risk adults who are victims of abuse, neglect, self-

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<sup>2</sup> States have the option of spending their Social Services Block Grant (SSBG) allocation on any or all of 29 categories of services allowable under SSBG. APS is one of those services. As of 2017 some 37 states opted to spend some portion of their SSBG funds to support some or all of their respective APS program

neglect, or financial exploitation (adult maltreatment). This mission includes representing the interests of APS at the national level including participating in proceedings such as this one.

NAPSA, partners with many diverse organizations to provide a cohesive network of research, practice, and policy to meet the diverse needs of the ever-changing population of vulnerable adults. NAPSA also:

- Actively conducts national research on topics such as APS training activities, services to self-neglecting adults, and national APS data collection as well as partnering with academic researchers on elder and vulnerable adult mistreatment studies.
- Produces resources for the field including webinars, a certificate program, and technical assistance. Particularly note-worthy with respect to financial exploitation, NAPSA produced template financial records request forms and guidance to assist APS programs in obtaining financial records for investigative purposes, and is involved in a Department of Justice funded project to create a platform for financial institutions to securely report abuse and share records with APS.
- Hosts an annual conference, the World Elder Abuse Awareness Day Global Summit, and a **national summit on financial exploitation** featuring nationally known and respected professionals who share their expertise on cutting-edge issues applicable to APS practice and other disciplines, including experts in cognitive capacity.
- Works to increase national awareness of elder and vulnerable adult mistreatment through education and advocacy.

With respect to financial exploitation, NAPSA 's Financial Exploitation Advisory Board includes organizations such as SIFMA (Securities Industry and Financial Markets Association), FINRA (Financial Industry Regulatory Authority), ABA (American Bankers Association) and NASAA (North American Securities Administrators Association).

### **What APS Sees as Financial Exploitation**

APS has found that elder financial exploitation is a substantial and complex social, justice and health problem. The 2019 Consumer Financial Protection Bureau report, *Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends*, found that SARs filings on elder financial exploitation quadrupled between 2013 and 2017. One-third of victims who lost money were over age 80, adults ages 70 to 79 had the highest average monetary loss, and losses were greater when the older adult knew the suspect. This last finding is significant because it relates to the role that "trusted others" play in financial exploitation and underscores the role of undue influence (U.S. Consumer Financial Protection Bureau, 2019).

Elder abuse increases the likelihood of early mortality. Of the five types of elder abuse (caregiver neglect, financial exploitation, physical abuse, emotional abuse and polyvictimization), financial exploitation ranked second highest in the link to early mortality, ahead of physical abuse (Burnett, et al., 2016). In one study, almost one in ten financial exploitation victims had to turn to taxpayer-financed Medicaid as a direct result of their own monies being stolen (Gunther, 2011).

Financial exploitation causes economic losses for Medicare, Medicaid, the financial services industry, caregivers, and families, as well of course as older people themselves. It can and does lead to impoverishment, homelessness, increased use of publicly funded services, and death. As older persons are the fastest growing segment of our population, elder abuse is expected to increase in the coming years due to demographic factors alone.

Financial institutions play an important role in preventing and stopping financial exploitation, as they are often in a position to first spot suspicious activities in an older person's account; are required to report suspected financial exploitation to APS in over half the states; and want to protect their customers and their assets. Financial institutions include banks, credit unions, broker-dealers, investment advisors, insurance companies, and others. Because each of these entities has different federal laws they must comply with, it is helpful for APS to know which type of company it is dealing with in a case. In most cases, APS deals with banks, credit unions and/or broker-dealers (securities firms).

Partnerships between financial Institutions and APS create significant opportunities to prevent and reduce elder financial exploitation. The Senior Safe Act, passed by Congress and signed into law in 2018, provides immunity from liability for good faith reports of suspected financial exploitation of older adults when financial professionals have been trained to identify and report the suspected exploitation. In addition, financial professionals who report suspected elder financial exploitation, in good faith, have immunity for their disclosures in all states (12 U.S.C. § 3423). NAPSA, in collaboration with the APS program of the Philadelphia Corporation for Aging, received funding from the Huguette Clark Foundation for Protection of Elders to create guidelines and template forms for requesting records from financial institutions. Updated in 2019, these materials cover institutions including banks, credit unions, broker-dealers, investment advisors and insurance companies. Materials were reviewed and improved by the Securities Industry and Financial Markets Association (SIFMA), Financial Industry Regulatory Authority (FINRA) and the North American Securities Administrators Association (NASAA) (Snyder & Quinn, 2020). Overall, APS programs that found success with the forms noted that partnerships and relationships were crucial.

### **Why Diminished Capacity is an Important Issue**

Capacity is the set of skills that people use in order to receive and evaluate information in order to make and communicate decisions. Capacity is not all or nothing, it can fluctuate over time, situations, and tasks. Consent requires individuals to be able to understand the transaction or activity, make judgements about it, and decide if it is something they choose. Impaired judgment may lead to seemingly irrational actions and risk-taking behavior. A person will begin to make decisions that seem silly, irresponsible, or even inappropriate and are a marked departure from past behavior, such as dressing improperly for the weather or no longer being able to assess for themselves what is safe. This is the arena in which family members are understandably concerned when their 89-year grandfather purchases a brand new shiny red Corvette. Is this fulfillment of a life-long dream, an utterly out-of-character decision, or the influence of his 58-year girlfriend?

Undue influence refers to a dynamic between an individual and another person. It describes the intentional use of social influence, deception, and manipulation to gain control of the decision-making of another. So, in the example of the 89-year old and the red Corvette, if the victim is buying the Corvette for his girlfriend when he is on a limited income, it may well be considered "controlling the decisions of another."

Undue influence is the improper use of power or trust in a way that deprives a person of his or her free will and substitutes the objectives of another person. Undue influence in this context is the exploitation of trust, dependence, or fear of another person to deceptively gain control over that person's decision making or assets.

There are many questions to consider when we say that someone "lacks capacity" since capacity can be divided into categories such as medical, sexual, financial, testamentary, driving, and independent living.

Capacity means an individual's ability to understand the significant benefits, risks, and alternatives associated with individual decisions. Different decisions require different capacity levels. So, for example, making financial decisions for your commercial business may require greater capacity than deciding which of your children to write into your will.

Any discussion about mental capacity must also consider the prevalence of Alzheimer's disease and other forms of dementia. According to the Centers for Disease Control and Prevention, approximately 5 million adults over age 65 had dementia in 2014 and the number is expected to grow to 14 million older adults by 2060. As dementia becomes more severe, those who suffer from it are often unable to make both routine and complex decisions in their day-to-day lives. As a result, those suffering from Alzheimer's disease or other dementias are at risk when making financial decisions and are vulnerable to financial abuse and exploitation. It is noteworthy that the CDC's Healthy Brain Initiative Road Map for Public Health Agencies action items includes recognition of the vulnerability to elder abuse among victims of Alzheimer's disease and the need to promote awareness, prevention, and intervention (U.S. CDC & Alzheimer's Association, 2018).

The Center for Financial Inclusion defines financial capacity as, "The combination of attitude, knowledge, skills, and self-efficacy needed to make and exercise money management decisions that best fit the circumstances of one's life, within an enabling environment that includes, but is not limited to, access to appropriate financial services" (Stuart, 2013). According to *Protecting Older Investors: The Challenge of Diminished Capacity*, published by the AARP Public Policy Institute in November 2011, "Financial capacity is one of the first abilities to decline as cognitive impairment encroaches, yet older people, their families and others are frequently unaware that these deficits are developing. Declining skills are detectable before cognitive impairments progress to a diagnosis of Alzheimer's disease. Once an individual has mild Alzheimer's, skills such as understanding investment options and determining returns decline rapidly" (Karp & Wilson, 2011).

With the shifting demographics of the population over age 60 – the aging of the baby boomers – and the increase in the population of individuals over 80, we face a significant and growing challenge with the numbers of individuals with problems in decision-making capacity. Most older adults will not experience impaired mental capacity, but many certainly will. Alzheimer's disease and other dementias will impair capacity, and the prevalence of such dementias increases with age.

Apart from Alzheimer's disease and other diagnosable dementias, mental capacity can be affected by numerous other factors such as mental health related issues, physical health issues, traumatic brain injuries, intellectual and cognitive disorders, and even inappropriately prescribed or used medications. NAPSA, along with the states' Adult Protective Services programs and mental health services, have strong commitments to protecting the rights and autonomy of a person. This gets complicated when an adult refuses services from APS, medical providers, or mental health services. Difficulties arise in cases involving individuals with diminished mental capacity who are at imminent risk or harm to self or others, but who refuse help. Collaboration between APS and mental health services are essential to improved communication and better service for at-risk clients.

### **How APS Addresses Diminished Capacity and Assessment Tools**

APS personnel assume all persons have capacity until proven otherwise. When a report is made to APS that someone is being abused or neglected – or that they are engaging in self-neglect, APS staff must examine the issues and facts surrounding the individual and what choices the individual is trying to

make or is not making. Does the individual understand the choices and consequences for each decisions to achieve the intended goals?

Functional assessment is a common component of gerontological assessment and has been appreciated by clinicians who categorize functioning into activities of daily living (ADLs) – e.g., grooming, toileting, eating, transferring, dressing, and instrumental activities of daily living (IADLs) – e.g. transportation, shopping & meal preparation, managing finances (Scoggin & Perry, 1986). Many tools exist to assist in assessment of decision-making capacity. Some of the most commonly used tools that are reliable but also easy for office use are the Aid to Capacity Evaluation (ACE), Hopkins Competency Assessment Tool (HCAT), and Understanding Treatment Disclosure (UTD). Other tools used are the Assessment of Capacity for Everyday Decision Making (ACED), Short Portable Mental Status Questionnaire (SPMSQ), Montreal Cognitive Assessment (MOCA), and The Saint Louis University Mental Status (SLUMS). These tools also help APS investigators determine if further assessment and diagnosis by a medical professional is needed.

APS will also assess the person's support system. If the individual appears to lack capacity but is receiving appropriate care from their family, APS will likely not take any action. However, if there is no support system or if those who should be providing support are unable or unwilling to provide support or are abusing that responsibility, then APS may make a referral to the court system for a conservatorship or guardianship (terms differ by state). I should note that many individuals present with mildly impaired capacity that can only be reliability confirmed by a psychologist or psychiatrist. In these cases, the individual may be making bad financial decisions but if they refuse help from APS we have no standing to force them to let us provide services. We are not able to "diagnosis" impaired capacity.

I would like to close with several recommendations for your consideration.

#### **Recommendations:**

- 1. Train personnel of employers, plan sponsors and plan service providers to recognize abuse and how to report it, and to identify indicators of potential capacity issues.**
- 2. Make reports to APS. Contact information for APS in all states is available at <https://www.napsa-now.org/get-help/help-in-your-area/>.**
- 3. Ask plan participants and beneficiaries to identify a "trusted contact" who plan sponsors, plan service providers and other can contact if they see problems much like FINRA and the SEC's Office of Investor Education recommends (<https://www.finra.org/investors/insights/consider-adding-trusted-contact-to-your-account>).**  
 According to the FINRA Investor Bulletin a "trusted contact person" is "a person that you authorize your brokerage firm to contact in limited circumstances, such as if your broker has trouble reaching you or has a reasonable belief that your account may be exposed to possible financial exploitation. A trusted contact person must be age 18 or older. Naming someone as a trusted contact person does not give that person any authority to act on your behalf, execute transactions or engage in activity in your account."
- 4. Ask plan participants and beneficiaries to review their trusted contact person preferences on at least an annual basis.**

**5. Consider that your employees are also aging and may themselves experience diminished capacity while still working and handling accounts.**

Thank you for this opportunity to provide our thoughts to you today. This is an incredibly important matter and one that will only become increasingly more significant over time due to demographics trends alone. Please do not hesitate to call upon us at any time as you consider how you provide guidance to those you serve.

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