New York State Bar Association

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Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION

February 1, 2017

Elder #1

S.2008; Part AA	By:	BUDGET
A.3008; Part AA	By:	BUDGET
	Senate Committee:	Finance
	Assembly Committee:	Ways and Means

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THE PROPOSED AMENDMENT TO THE BANKING LAW ADDING A NEW SECTION 4-d REGARDING TRANSACTION HOLDS

Part AA of this bill would add a new section to the New York State Banking Law to give institutions broad discretion to put transaction holds on accounts even when the account is a guardianship or trust account. Protection against financial exploitation is a laudable goal, which is supported by the Elder Law and Special Needs Section. However, the Section is concerned that this proposal would encourage banks to put needless transaction holds on the accounts of vulnerable seniors, regardless of the circumstances, with minimal or no consequences to the banking institution.

There are many planning tools employed in our practice that involve the use of a power of attorney, trust or guardianship that a bank employee would not understand. A principal signs a power of attorney or trust for ease of administration if they do not have the capacity to handle their own affairs and, as written, this law frustrates that purpose. Often the actions that are being undertaken by an agent, trustee, or guardian are necessary and in the best interest of a senior or disabled person, e.g., Medicaid planning, sheltering assets from dissipation by a vulnerable senior, or disability planning. While we understand that banks are absolutely correct to make inquiries regarding irregular transactions and also perhaps to make referrals to protective services agencies, we have a number of serious concerns with this legislation, as proposed, which are explained in more detail below.

1. **The amendment to the Banking Law should not include guardianship and trust accounts as these accounts already have other protections.**

Proposed Banking Law Section 4-d(2)(a)(ii) states that a transaction hold can be put on all accounts including guardianship and trust accounts. This is an unnecessary and

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redundant provision. Guardians have been approved and appointed by the Court, have filed a bond, when required to do so, and have annual accounting requirements to the Court. Any guardian that has been appointed by a court is already subject to judicial oversight and scrutiny, so there is no need for additional protections on guardianship accounts.

With respect to trust accounts, a grantor creates a trust with the expectation that the person named as trustee will act on behalf of the trust estate. Similar to a guardianship, the grantor had the opportunity to impose a bond on the trustee if she deemed it necessary and has the ability to build in requirements on the trustee to account. Since a trustee is the actual legal owner of the Trust property, the grantor may not have a legal right to access those funds. In addition, all trust beneficiaries have the ability to bring accounting and turnover proceedings in Surrogate's court. Moreover, a trustee must act in the best interest of the trust beneficiary(ies), subject to duties of good faith and fiduciary duty, violations of which are treated seriously by the courts.

This amended law should not apply to guardianship or trust accounts.

2. **The amendment to the Banking Law does not include adequate notice requirements.**

Proposed Banking Law Section 4-d(2)(c)(i) states that the institution must make "reasonable efforts" to contact persons authorized to transact business on the account. This notice can be made orally or in writing. At the very least, a writing by mail to the home address of the principal account holder should be mandated. Since the institution has broad discretion to place a transaction hold on the account, the account holder has a right to know this is being done, so as to avoid late payments and bounced checks.

Further, the institution should not be required to give notice of the transaction hold to the agent performing the transaction. If the bank truly suspects the agent of financial wrongdoing, then giving that agent notice of the transaction hold could cause them to retaliate and harm the principal account holder, if, in fact, it is a case of financial exploitation.

3. **Adult protective services and law enforcement agencies do not have the resources for proper investigation in a timely manner.**

Proposed Banking Law Section 4-d(2)(c)(ii) requires the institution placing the transaction hold to notify adult protective services or law enforcement immediately, but in no more than one business day. The concern is that, especially in the metropolitan areas of the state, adult protective services and law enforcement are already over-burdened and are unlikely to be able to properly address issues of financial exploitation in a timely manner. The priority for these agencies is persons in danger of physical harm; financial harm is a secondary concern. As such, regardless of the timeframe within which the institution must notify adult protective services or law enforcement, these agencies may not act immediately, thus potentially causing the agent and/or the account

holder serious financial harm (e.g., late fees, penalties, defaults in obligations, and account closures).

4. **The standard for payment of expenses during the transaction hold is vague.**

Proposed Banking Law Section 4-d(2)(c)(iv) make funds available to pay expenses. However, the provision does not state to whom the funds will be made available and/or who will be responsible for making the timely payments. If the principal account holder lacks the capacity to handle his or her own finances and the agent under the power of attorney is the agent performing the transaction, there is no person to make these payments. A vulnerable individual who depends on a family member or agent to pay for vital services could, in fact, be placed at risk if access to his or her funds is withheld.

Further, the decision as to what funds will be released is to be made by adult protective services, law enforcement or a non-profit that often deals in this area. The concern is that there is no real decision-maker identified and no standard for what is to be treated as an emergency expense. It would be very easy for each agency to pass on the responsibility of this determination to the next, all the while neglecting the expenses. The bureaucratic delay in obtaining access to their own funds could endanger the health and safety of a population already at risk.

5. **A court's decision to prolong the transaction hold should be determined after a hearing on notice to the principal account holder, alleged exploiter, and the proposed recipient of funds.**

A court order pursuant to proposed Banking Law Section 4-d(3)(c) extending the transaction hold should only be made after a hearing is held on notice to the principal account holder, the agent performing the transaction, and the proposed recipient of the funds. The parties should be afforded the opportunity to appear in court prior to a determination of a further transaction hold. If an institution, adult protectives services, or law enforcement believe that the transaction hold should be imposed longer than the 20 days contemplated by this proposal, then they should be required to bring a proceeding requesting a court determination on the matter.

6. **Reasonable basis standard for bank immunity is not sufficient.**

The reasonable basis standard for liability to the banking institution contained in Banking Law Section 4-d(4) is too vague. There is no definition to the standard which, in effect, gives the banking institution *carte blanche* to place transaction holds on any account with an elderly or disabled account holder. This, coupled with the lack of training as discussed below, will not serve a vulnerable individual's best interests.

7. **Banking institutions should be required to receive certification pursuant to proposed Banking Law Section 4-d(5), before they are authorized to put a transaction hold on a customer's account.**

The department *must* develop the certification program to ensure responsible behavior on the part of the banking institutions. The bill gives no guidance as to how the employees of the institution will be trained to recognize and differentiate exploitation from legitimate activity or the frequency of trainings. The decision to place a transaction hold is left in the hands of often transient bank employees who may or may not have received adequate training.

8. Regulations must be implemented.

Proposed Banking Law Section 4-d(6) should state that regulations *must* be implemented. Banking institutions will need guidance regarding the factors they will use to establish a claim of potential financial exploitation. Without a mandate that regulations be implemented, this propoal would give broad discretion to place these transaction holds with no liability to an institution that improperly places a hold.

Based on the foregoing, the Elder Law and Special Needs Section OPPOSES this legislation.