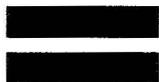


GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Office of the Attorney General



ATTORNEY GENERAL  
KARL A. RACINE

Legal Counsel Division

~~PRIVILEGED AND CONFIDENTIAL~~  
~~ATTORNEY-CLIENT COMMUNICATION~~

**MEMORANDUM**

**TO:** Mina Q. Malik  
Deputy Attorney General  
Public Safety Division

**FROM:** Janet M. Robins  
Deputy Attorney General  
Legal Counsel Division

Handwritten signature in cursive, appearing to read "JMR/Janet Robins".

**DATE:** July 17, 2018

**SUBJECT:** Legal Analysis – Authority to Enforce the Financial Exploitation of  
Vulnerable Adults and the Elderly Amendment Act of 2016  
(AL-18-362)

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You asked whether the Office of the Attorney General (“OAG”), rather than the United States Attorney (“USAO”), has the authority to pursue civil penalties and injunctive relief, and to issue subpoenas under the Financial Exploitation of Vulnerable Adults and the Elderly Amendment Act of 2016 (“2016 Act”).<sup>1</sup> In our view, OAG may exercise all three of these powers.

**BACKGROUND**

In 2016, the Council expanded the protections in the Criminal Abuse and Neglect of Vulnerable Adults Act of 2000 (“2000 Act”).<sup>2</sup> The 2016 Act added a new section 203a to the 2010 Act, entitled “Financial exploitation of a vulnerable adult or elderly person.”<sup>3</sup> That provision, which the Committee Report describes as “the crime of ‘Financial Exploitation of a Vulnerable Adult

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<sup>1</sup> Effective November 23, 2016 (D.C. Law 21-166; 63 DCR 10733).

<sup>2</sup> Effective June 8, 2001 (D.C. Law 13-301; D.C. Official Code § 22-931 *et seq.* (2012 Repl. and 2017 Supp.)).

<sup>3</sup> D.C. Official Code § 22-933.01 (2017 Supp.).

or Elderly Person,”<sup>4</sup> established the conditions under which “[a] person is guilty of financial exploitation of a vulnerable adult or elderly person.”<sup>5</sup> It also provided an “affirmative defense,” which must be “established by a preponderance of the evidence,” when “the accused knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed.”<sup>6</sup>

The 2016 Act also added new criminal and civil penalty provisions for violations of section 203a. A new section 206a, entitled “Criminal penalties for financial exploitation of a vulnerable adult or elderly person,”<sup>7</sup> established criminal penalties for “[a]ny person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of section 203a.”<sup>8</sup> Anyone who violates section 203a faces fines and imprisonment, with the amount depending on property or legal obligation in question.<sup>9</sup> Violators also face the consequence that triggered your question here: “In addition to the penalties set forth in paragraphs (1) and (2) of this subsection, a person shall make restitution, before the payment of any fines or civil penalties.”<sup>10</sup> We will refer to this as the “restitution-first requirement.”

Similarly, a new section 207, entitled “Civil penalties for financial exploitation of a vulnerable adult or elderly person,”<sup>11</sup> states that “[i]n addition to other penalties provided by law, a person who violates section 203a shall be subject to” a civil fine, revocation of pertinent permits, certificates, and licenses, and a temporary or permanent injunction.<sup>12</sup> Section 207(b)<sup>13</sup> also reaffirms the restitution-first language from section 206a: “[r]estitution under section 206a shall be paid before the payment of any fines or civil penalties under this section.”

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<sup>4</sup> Cmte. on the Judiciary, “Report on Bill 21-0326, the ‘Financial Exploitation of Vulnerable Adults and the Elderly Amendment Act of 2016’” (“2016 Report”), Apr. 21, 2016, <http://lims.dccouncil.us/Download/34292/B21-0326-CommitteeReport1.pdf> (last visited July 16, 2018).

<sup>5</sup> D.C. Official Code § 22-933.01(a) and (b) (2017 Supp.)

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* § 22-936.01.

<sup>8</sup> *Id.* § 22-936.01(a).

<sup>9</sup> *Id.* § 22-936.01(a)(1) and (2).

<sup>10</sup> *Id.* § 22-936.01(a)(3). The 2016 Act does not specify how restitution will operate, but Title 16 of the D.C. Official Code does. The Superior Court has the authority to “require a person convicted of any offense to make reasonable restitution or reparation,” “as a condition or probation or as a sentence itself.” D.C. Official Code § 16-711(2012 Repl.). An order of restitution “constitutes a judgment and lien against all property of a liable defendant for the amount the defendant is obligated to pay under the order and may be recorded in any office for the filing of liens against real or personal property.” *Id.* § 16-711.01(a). Moreover, a “judgment of restitution may be enforced by the U.S. Attorney for the District of Columbia, [OAG], a victim entitled under the order to receive restitution or reparation, a deceased victim’s estate, or any other beneficiary of the judgment in the same manner as a civil judgment.” *Id.* § 16-711.01(b).

<sup>11</sup> *Id.* § 22-937 (2017 Supp.).

<sup>12</sup> *Id.* § 22-937(a).

<sup>13</sup> *Id.* § 22-937(b).

The 2016 Act supplied two additional tools to supplement these civil and criminal penalties. It added a new section 208, which authorizes the Attorney General for the District or the United States Attorney to petition the court for injunctive relief “[w]hen the Attorney General or the United States Attorney has reason to believe that a person has engaged in financial exploitation of a vulnerable adult or elderly person.”<sup>14</sup> It also expanded the Attorney General’s powers under the Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2010,<sup>15</sup> authorizing the Attorney General to “issue subpoenas for the production of documents and materials or for the testimony of witnesses under oath, or both, for the purposes of seeking relief under [sections 207 and 208 of the 2016 Act].”<sup>16</sup>

## ANALYSIS

To determine whether OAG has the authority under the 2016 Act to pursue civil penalties and injunctive relief, and to issue subpoenas, we examined the controlling language of the Act, against the backdrop of the Act’s history and structure,<sup>17</sup> giving its terms their “ordinary of natural meaning in the context of the statutory scheme.”<sup>18</sup> We also considered that language in the context of existing law.<sup>19</sup> That review persuades us that the power to pursue civil penalties, injunctive relief, and subpoenas under the 2016 Act rests with OAG, not USAO.

To begin with, USAO lacks the authority to pursue any of these remedies. For USAO to have that authority, it would need to have received it from an Act of Congress, because only Congress may alter the powers and duties of the U.S. Attorney.<sup>20</sup> Congress has given USAO the power to prosecute serious criminal offenses under local law,<sup>21</sup> but it has not given USAO any general authority to pursue civil penalties, injunctive relief, or subpoenas connected to civil penalties or injunctive relief. Nor has Congress given USAO those civil enforcement tools in this particular context.<sup>22</sup>

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<sup>14</sup> D.C. Official Code § 22-938(a) (2017 Supp.). The Attorney General or United States Attorney may seek a temporary restraining order, a temporary injunction, an order temporarily freezing the person’s assets, or any other relief the court deems just. *Id.* § 22-938(a)(1)-(4).

<sup>15</sup> Effective May 27, 2010 (D.C. Law 18-160; D.C. Official Code § 1-301.81 *et seq.* (2012 Repl. and 2017 Supp.)).

<sup>16</sup> D.C. Official Code § 1-301.88e(a) (2017 Supp.).

<sup>17</sup> See *Exxon Mobile Corp. v. Allapattah*, 545 U.S. 546, 568 (2005) (“the authoritative statement [of law] is the statutory text,” and legislative history plays a role “to the extent that [it] shed[s] a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms”).

<sup>18</sup> *Blackmon-Malloy v. United States Capitol Police Bd.*, 573 F.3d 699, 708 (D.C. Cir. 2009).

<sup>19</sup> See *Branch v. Smith*, 538 U.S. 254, 281 (2003) (“courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part”).

<sup>20</sup> See D.C. Official Code § 1-206.02(a)(8) (2012 Repl.) (the Council may not “[e]nact any act or regulation . . . relating to the duties or powers of the United States Attorney”).

<sup>21</sup> See D.C. Official Code § 23-101 (2012 Repl.).

<sup>22</sup> *But see* D.C. Official Code § 42-3102 (USAO “may file an action in the Superior Court of the District of Columbia to abate, enjoin, and prevent” a drug-, firearm-, or prostitution-related nuisance”) (potentially distinguishable on grounds of a permissible extension of USAO authority under the congressionally adopted, pre-Home Rule bawdy-house statute now codified at D.C. Official Code § 22-2714).

Conversely, these remedies fit comfortably within the statutory functions of the Attorney General. By statute, the Attorney General has “charge and conduct of all law business” of the District “and all suits instituted by and against the government thereof,” and possesses “all powers afforded the Attorney General by the common and statutory law of the District,” including the “power to control litigation and appeals.”<sup>23</sup>

Moreover, the structure of the 2016 Act makes clear that all three of these powers rest with OAG. Under the Act, these three powers are closely intertwined. Civil penalties supply a long-term remedy for financial exploitation, injunctive relief protects against immediate harm to vulnerable adults and elderly persons, and subpoenas make it possible to gather the information necessary to pursue civil penalties or injunctive relief. It makes sense that all three of these interconnected tools would be vested with the same enforcement body, and that is what the Act does. It explicitly vests subpoena power with OAG, and it states that the purpose of that power is to enable OAG to seek civil penalties and injunctive relief.<sup>24</sup>

The history of the 2016 Act confirms our reading. The portion of the Committee Report discussing these three interlocking provisions notes that the Act “provides investigatory and subpoena power to the Office of the Attorney General,” which “empowers OAG to move forward with a civil action against the perpetrator” of financial exploitation.<sup>25</sup> The Report elaborates that the Act “provides injunctive relief to the victim, which may be sought by either the United States Attorney for the District of Columbia or OAG.”<sup>26</sup> Giving OAG these enforcement tools will, as the Committee Report observes, “protect the victim to the furthest extent possible.”<sup>27</sup>

We considered whether the restitution-first requirement discussed above, which requires that a person convicted of financial exploitation must “make restitution[] before the payment of any fines or civil penalties,”<sup>28</sup> supports a contrary conclusion. It does not. That language does not, and could not, authorize USAO to seek civil remedies in financial exploitation cases. Moreover, by its plain terms, it says nothing about who may seek civil penalties or even when civil penalties may be sought. It simply describes what a person must do if he or she has been convicted of financial exploitation, and therefore owes restitution, but also owes civil fines or penalties. That person must pay restitution before paying any civil fines or penalties that he or she owes.

If you have any questions, please contact Assistant Attorney General Joshua Turner at 442-9834, or me at 724-5524.

JMR/jat

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<sup>23</sup> *Id.* § 1-301.81(a)(1) (2012 Repl. and 2017 Supp.).

<sup>24</sup> *Id.* § 1-301.88e(a) (2017 Supp.).

<sup>25</sup> 2016 Report, *supra*, at 7.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> D.C. Official Code § 22-936.01(a)(3) (2017 Supp.).