

***CAN BANK TELLERS TELL? –  
LEGAL ISSUES RELATING TO  
BANKS REPORTING FINANCIAL ABUSE OF THE ELDERLY***

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By Sandra L. Hughes, J.D.<sup>2</sup>

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The partner organizations comprising the National Center on Elder Abuse include the National Association of State Units on Aging, the ABA Commission on Law and Aging, the Clearinghouse on Abuse and Neglect at the University of Delaware, the National Association of Adult Protective Services Administrators, the National Committee for the Prevention of Elder Abuse, and the San Francisco Consortium for Elder Abuse Prevention, Institute on Aging. For more information about the National Center on Elder Abuse, visit [www.elderabusecenter.org](http://www.elderabusecenter.org).

Copies of this report and of a shorter, summary version are available on the websites of the National Center for Elder Abuse, [www.elderabusecenter.org](http://www.elderabusecenter.org), and of the ABA Commission on Law and Aging, [www.abanet.org/aging](http://www.abanet.org/aging). Hard copies can also be ordered for a fee from the ABA, 740 15<sup>th</sup> Street, N.W., Washington, D.C. 20005, 202-662-8690,

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Finally, the members of the elder abuse e-mail list sponsored by the National Center on Elder Abuse were an invaluable and very generous source of information regarding both the laws in their states and their experiences with elder abuse reporting by banks and bank reporting projects. E-mail list members sent numerous messages in response to my queries, many of which are quoted and cited in this report.

*Mr. M, an elderly bank customer, appeared confused about his checking account and why his checks were no longer clearing. After investigating, bank personnel learned that Mr. M's bank debit card had been used numerous times, but Mr. M denied that he was responsible for the transactions. The bank, which had established a relationship with the local adult protective services agency, filed a report of possible financial abuse. The agency's investigation revealed that Mr. M had befriended Tim, a young man who had been stealing from Mr. M and using his debit card to finance his drug addiction. In addition, Tim had stolen jewelry from Mr. M's landlady, who had held Mr. M responsible and evicted him. Adult Protective Services helped Mr. M to find new housing and to open a new bank account that would be monitored for unusual transactions. Although a warrant was issued for Tim's arrest, he fled the area and escaped prosecution.<sup>3</sup>*

*When 86-year old Florence Harter was hospitalized in 1996, she confided to a hospital employee that she was worried that some of her bills might be missed and go unpaid while she was in the hospital. The aide, Maria Galacia, volunteered to help, and Harter gave Galacia the keys to her apartment so she could bring Harter her checkbook. After being discharged from the hospital, Harter discovered that her apartment had been burglarized. Harter confronted Galacia, who threatened to sue Harter for accusing her of taking her jewelry. Galacia then intimidated*

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<sup>3</sup> Gillian Price and Craig Fox, "The Massachusetts Bank Reporting Project: An Edge Against Elder Financial Exploitation," 8 (4) J. Elder Abuse of Neglect 59, 60-61 (1997).

*Harter into making regular cash payments to Galacia in exchange for Galacia's agreement not to sue Harter. This scheme continued for over a year until one day, Galacia and Harter went together to Harter's bank and Galacia, who claimed to be Harter's caretaker, attempted to withdraw \$10,000 in cash. This aroused the suspicion of a bank vice president, who questioned Galacia about the transaction. Galacia left the bank without making the withdrawal, but returned with Harter a week later and attempted again to withdraw \$10,000 in cash. This time the bank contacted the Chicago police. Galacia was subsequently convicted of theft by deception and ordered to pay \$45,000 in restitution to Harter.<sup>4</sup>*

The situations described above are not usual. In the communities studied for the National Elder Abuse Incidence Study, reports to APS about “financial/material exploitation” accounted for 30.2 percent of all the substantiated reports.<sup>5</sup> As illustrated by these case histories, banks<sup>6</sup> have the potential to play a critical role in preventing the financial abuse of older persons by reporting suspicious activity to adult protective services agencies and local law enforcement.

In order to induce banks to fulfill this critical role, some state adult protective services (APS) agencies and local organizations have revised their state statutes in order to encourage or require bank personnel to report suspected financial abuse of older persons. Some have also established projects to train bank personnel to recognize and

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<sup>4</sup> Michael Sneed, “Ordeal exposed many problems,” Chicago Sun-Times, December 17, 2001. Although the bank’s intervention brought a halt to Galacia’s exploitation of Harter, the bank vice president felt he could have done more, which prompted him to become active in a county task force to address financial exploitation. *Id.*

<sup>5</sup> The National Center on Elder Abuse, The National Elder Abuse Incidence Study, 1-9 (1998).

<sup>6</sup> Throughout this report, the term “banks” is used to refer collectively to banks, savings associations, and credit unions.

report this exploitation (these projects will be referred to as “bank reporting projects” throughout this paper).

However, despite the obvious potential benefits to their customers, banks have often resisted efforts to require or encourage their personnel to report suspected financial abuse. The objection most commonly voiced by the banking industry is concern that disclosure of confidential information relating to a customer may result in liability. Whether such a concern is well-founded turns on whether the government and/or the customer involved have a legal basis for claiming that the disclosure violated state or federal privacy laws. This report first discusses the possible legal obstacles to greater participation by banks in state and local programs to prevent financial abuse. It then compares the experience in states where bank reporting is mandatory and where it is voluntary and concludes with a discussion of the recent efforts in several states to enact laws mandating bank personnel to report suspected elder abuse.

## **I. Background**

Although the adult protective services statutes in forty nine-states and the District of Columbia now recognize financial abuse or exploitation as a reportable form of elder abuse,<sup>7</sup> the precise definition of the term varies considerably from state to state. However, all definitions focus on the central concept of misuse of the elder’s money or property. Alabama defines “exploitation” as “[t]he expenditure, diminution, or use of the property, assets, or resources of a protected person without the express voluntary consent

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<sup>7</sup> The Oregon APS statute is the only APS statute that does not identify financial abuse as a reportable form of abuse. The Oregon APS agency, however, has adopted administrative rules that contain an expanded definition of abuse. This expanded definition includes “Financial exploitation, which is the illegal or improper use of another individual’s resources for personal profit or gain.” Oregon Administrative Rules §411-020-0002(1)(b), available at [http://arcweb.sos.state.or.us/rules/OARS\\_400/OAR\\_411/411\\_020.html](http://arcweb.sos.state.or.us/rules/OARS_400/OAR_411/411_020.html).

of that person or his or her legally authorized representative.”<sup>8</sup> Louisiana defines the same term somewhat differently: “Exploitation” is the illegal or improper use or management of an aged person’s or disabled adult’s funds, assets, or property, or the use of an aged person’s or disabled adult’s power of attorney or guardianship for one’s own profit or advantage.”<sup>9</sup> In contrast to these relatively general definitions, Minnesota has adopted a lengthy definition that appears to encompass all aspects of financial abuse.<sup>10</sup>

Regardless of the definition used, financial abuse can cause irreparable and devastating harm to the elderly victim.<sup>11</sup> By the time the financial abuse is discovered,

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<sup>8</sup> AL ST §38-9-2(8). Throughout this article, citations to statutes are given in WestLaw format.

<sup>9</sup> LA R.S. §14:403.2(B)(6).

<sup>10</sup> MN ST §626.5572 subd. 9, provides that “Financial exploitation” means:

- (a) In breach of a fiduciary obligation recognized elsewhere in law, including pertinent regulations, contractual obligations, documented consent by a competent person, or the obligations of a responsible party under section 144.6501, a person:
  - (1) engages in unauthorized expenditure of funds entrusted to the actor by the vulnerable adult which results or is likely to result in detriment to the vulnerable adult; or
  - (2) fails to use the financial resources of the vulnerable adult to provide food, clothing, shelter, health care, therapeutic conduct or supervision for the vulnerable adult, and the failure results or is likely to result in detriment to the vulnerable adult.
- (b) In the absence of legal authority, a person:
  - (1) willfully uses, withholds, or disposes of funds or property of a vulnerable adult;
  - (2) obtains for the actor or another the performance of services by a third person for the wrongful profit or advantage of the actor or another to the detriment of the vulnerable adult;
  - (3) acquires possession or control of, or an interest in, funds or property of a vulnerable adult through the use of undue influence, harassment, duress, deception, or fraud; or
  - (4) forces, compels, coerces, or entices a vulnerable adult against the vulnerable adult’s will to perform services for the profit or advantage of another.

<sup>11</sup> Seymour Moskowitz, “Saving Granny from the Wolf: Elder Abuse and the Neglect – the Legal Framework,” 31 Conn. L. Rev. 77, 101 (Fall, 1998). (“Older persons may have less ability to recover from financial exploitation because of fixed incomes or short

the perpetrator has usually spent or otherwise dissipated the elderly victim's assets. Efforts at restitution therefore are likely to result in only partial recovery at best.<sup>12</sup> The elderly victim often experiences a permanent decline in his or her standard of living,<sup>13</sup> but many victims suffer even more from the feelings of betrayal that typically accompany financial abuse.<sup>14</sup>

Banks have the potential to be the "first line of defense"<sup>15</sup> against financial abuse, by identifying the abuse at its outset, before the elder's assets have been dissipated. "No institution is in a better position to observe and report" suspicious behavior,<sup>16</sup> such as the following:

- An unusual volume of banking activity.
- Banking activity inconsistent with a customer's usual habits.
- Sudden increases in incurred debt when the elder appears unaware of transactions.
- Withdrawal of funds by a fiduciary or someone else handling the elder's affairs, with no apparent benefit to the elder.

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remaining life spans. The loss of a home lived in for many years may be particularly traumatic because of its familiarity, memories, and the trauma of being moved.")

<sup>12</sup> "Banks: The Front Line Defense Against Financial Exploitation," videotape produced by the New York State Office of Children and Family Services.

<sup>13</sup> Carolyn L. Dessin, "Financial Abuse of the Elderly," 36 Idaho L. Rev. 203, 205 (2000) ("The likelihood that an elder person's income is relatively fixed may make it extremely difficult to recover from a financial loss.").

<sup>14</sup> "A New Training Cycle, New Materials As The Bank Reporting Project Enters Its Fourth Year," Massachusetts Banker (Spring, 1999), quoting a 78 year old woman who was defrauded by her longtime housekeeper: "We had become very attached. She became my daughter. As serious as the loss of money is the loss of trust."

<sup>15</sup> "Banks: The Front Line Defense Against Financial Abuse," *supra* note 11. More than half of the assets deposited in banks belong to the elderly. *Id.* See also Dessin, *supra* note 12, at 205.

<sup>16</sup> "Banks: The Front Line Defense Against Financial Abuse," *supra* note 11.



- Implausible reasons for banking activity are given either by the elder or by the person accompanying him/her.<sup>17</sup>

It is this potential for early intervention that has prompted a number of states and counties to develop programs that train bank employees to recognize and report suspected financial abuse.

## **II. The Legal Issues**

The major obstacle to widespread participation of banks in reporting projects is concern about potential legal liability. Such liability could take several forms. The primary concern is the possibility that the bank may incur civil and/or criminal penalties for violation of federal and state laws regulating the disclosure of personal financial information. Banks are also fearful that a customer may bring an action for damages against the bank for revealing private information. In states that have enacted or considered enacting mandatory reporting laws covering banks, there is the additional fear that the bank may be liable if it fails to report suspected financial abuse.

As explained below, for the most part these fears are unfounded, but to the limited extent that potential liability is a real concern, banks can be protected by the enactment of minor changes in state law.<sup>18</sup>

### **A. State Elder Abuse Reporting Laws**

Financial abuse is a reportable form of elder abuse in forty-nine states and the District of Columbia.<sup>19</sup> As of the end of 2002, the adult protective services (“APS”) laws

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<sup>17</sup> Price and Fox, *supra* note 2, at 67.

<sup>18</sup> Because of the variation in state adult protective services and financial privacy laws, the American Bankers Association has not actively taken a position on or become directly involved in bank reporting projects, but has shared information and materials with state bankers associations. Telephone interview with Susan Cole, Managing Director of the American Bankers Association’s Education Foundation, dated April 12, 2002.

<sup>19</sup> See note 6, *supra*.

of forty-four states and the District of Columbia mandate reports of suspected elder abuse by “any person” or by specified categories of reporters, or both.<sup>20</sup> Forty-nine states and the District of Columbia encourage both voluntary and mandatory reporting by including immunity provisions in their APS laws that provide protection from liability under state law to individuals who make such reports in good faith.<sup>21</sup> (However, under the Supremacy Clause of the United States Constitution,<sup>22</sup> such an immunity provision is *not* effective to provide immunity from liability under federal laws, such as federal financial privacy legislation.<sup>23</sup>)

Of the states with mandatory reporting laws, only three states, Florida, Georgia and Mississippi,<sup>24</sup> identify banks as mandatory reporters.<sup>25</sup> Fifteen additional states require “any person” to report, which would include employees of banks.<sup>26</sup> A few other states

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<sup>20</sup> The six states whose APS statutes do not provide for mandatory reporting are Colorado, New Jersey, New York, North Dakota, South Dakota and Wisconsin.

<sup>21</sup> The exception is South Dakota, which provides immunity only to institutions and “any employee, agent or member of a medical or dental staff thereof” who report abuse. SD ST §22-46-6. The immunity provisions in APS statutes are discussed in greater detail in Section II(D), *infra*.

<sup>22</sup> The second clause of Article VI of the United States Constitution provides in relevant part: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

<sup>23</sup> Under the same supremacy principle, a *federal* immunity provision could have the effect of superceding state law under which a reporter might otherwise be liable. See discussion of the Annunzio-Wylie Anti-Money Laundering Act in Section II(D), *infra*.

<sup>24</sup> FL ST §415.1034(1)(a)(8); GA ST 30-5-4(a)(1)(B); and MS ST §43-47-7(1)(a)(vii). Both Florida and Mississippi mandate reporting by “any person” but in addition list specific categories that are required to report abuse.

<sup>25</sup> Kansas lists bank trust officers as mandatory reporters. KS ST §39-1431(a). However, it is typically bank tellers and other bank employees who have frequent contact with customers, rather than bank trust officers, who are in a position to observe and report suspicious behavior. Therefore, in this report, Kansas is not categorized as a state in which banks are mandatory reporters of suspected elder financial abuse.

<sup>26</sup> These states are Delaware, DE ST TI 31, §3910(a); Indiana, IN ST 12-10-3-9(a); Kentucky, KY ST §209.030(2); Louisiana, LA R.S. 14:403.2(C); Missouri, MO ST §660.255; New Hampshire, NH ST §161-F:46; New Mexico, NM ST §27-7-30(A); North Carolina, NC ST §108A-102(a); Oklahoma, OK ST T. 43A §10-104(A); Rhode Island,

encourage, but do not mandate, reporting by banks. For example, the Virginia APS statute includes a separate subsection stating that “Any financial institution that suspects that an adult customer has been exploited financially *may* report such suspected exploitation....”<sup>27</sup> Similarly, the Colorado statute, which provides only for voluntary reporting, includes “[p]ersonnel of banks, savings and loan associations, credit unions, and other lending or financial institutions” in a listing of occupations “urged” to report suspected abuse.<sup>28</sup> The Idaho APS statute identifies “officer[s] and employee[s] of a financial institution” as voluntary reporters – but it also provides that the Idaho Commission of Aging and the state’s area agencies on aging “shall make training available to officers and employees of financial institutions in identifying and reporting instances of abuse, neglect or exploitation involving vulnerable adults.”<sup>29</sup>

In most states that have tried to make banks mandatory reporters, the banking industry has opposed such efforts,<sup>30</sup> citing the risk of incurring liability for failure to report. However, the risk of liability is small. First, the primary purpose of mandatory reporting laws is to induce those in a position to observe abuse to bring their suspicions to the attention of APS. The goal is to encourage reporting, rather than punish potential reporters for failing to report. Statutory penalties for failure to report are not severe; the typical statutory penalty is a misdemeanor.<sup>31</sup> Historically, there have been few

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RI ST §42-66-8; South Carolina, SC ST §43-35-25(A) (South Carolina mandates reporting only by any person “who has actual knowledge” of abuse); Tennessee, TN ST §71-6-103(b)(1); Texas, TX HUM RES §48.051(a) and (c); Utah, UT ST §62A-3-305; and Wyoming, WY ST 35-20-103(a).

<sup>27</sup> VA ST §63.1-55.3(D) (emphasis supplied).

<sup>28</sup> CO ST §26-3.1-102(b)(XIII). *See also* WA ST 74.34.020(10) (“Permissive reporter” means any person, employee of a financial institution....”).

<sup>29</sup> ID ST 39-5303(3) and (4).

<sup>30</sup> *See* the discussion of efforts to amend state reporting laws in Section III(C), *infra*.

<sup>31</sup> *See, e.g.,* Arizona, AZ ST §46-454(J) (penalty for failure to report is a class 1 misdemeanor); Hawaii, HI ST §346-224(e) (petty misdemeanor); Idaho, ID ST §39-5303(2) (misdemeanor); Kansas, KS ST §39-1431(e) (class B misdemeanor); Nevada,

prosecutions of mandatory reporters for failure to report. The few reported cases have generally involved situations where the defendant failed to report physical abuse or neglect that resulted in a death or serious injury.

Except in the four states where the APS statute specifically provides for such liability for damages that are proximately caused by the failure to report,<sup>32</sup> civil liability to a customer for damages allegedly resulting from a failure to report financial abuse is also unlikely. The result of the only reported case on that issue indicates why. In that case, the plaintiff argued that a bank was liable under the state's mandatory reporting statute for damages allegedly caused by its failure to report suspected financial abuse of an elderly customer, but the court rejected the plaintiff's theory of liability.<sup>33</sup> The plaintiff,

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NV ST 200.5093(9) (misdemeanor); and New Mexico, NM ST §27-7-30(C) (misdemeanor).

<sup>32</sup> The four states are Arkansas, Iowa, Minnesota and Michigan. In each of these states, the mandatory reporter is liable only for the damages proximately caused by the failure to report. The Arkansas APS statute provides that “[a]ny person or caregiver required by this chapter to report a case of suspected abuse, neglect, or exploitation who purposely fails to do so shall be civilly liable for damages proximately caused by the failure.” AR ST §5-28-202(b). The Iowa APS statute provides in relevant part that “[a] person required by this section to report a suspected case of dependent adult abuse who knowingly and willfully fails to do so... is civilly liable for the damages proximately caused by the failure.” IA ST §235B.3(10). The Michigan APS law provides that “[a] person required to make a report pursuant to section 11a who fails to do so is civilly liable for the damages proximately caused by the failure to report....” MI ST 400.11e(1). The Minnesota APS statute provides that “[a] mandated reporter who negligently or intentionally fails to report is liable for damages caused by the failure.” MN ST §626.557, subd. 7. The Minnesota courts have held that the damages for such a negligent or intentional failure to report are limited to any additional damages that resulted from the failure to report. Thelen By and Through Helen Thelen v. St Cloud Hosp., 379 N.W.2d 189 (Minn. App. 1985). In addition, the following language in the Washington APS statute could be interpreted as implying that there can be liability for failure to file a mandatory report: “The making of permissive reports as allowed in this chapter does not create a duty to report and no civil liability shall attach for any failure to make a permissive report as allowed under this chapter.” WA ST 74.34.050(1).

<sup>33</sup> Ahrendt v. Granite Bank, 144 N.H. 308, 315, 740 A.2d 1058, 1064 (N.H. 1999). There is also a 1993 Florida case in which the plaintiff unsuccessfully sought to impose liability on a bank for failure to halt and investigate large cash withdrawals by an elderly customer. Republic National Bank of Miami v. Johnson, 622 So.2d 1015 (Fl. Dist. Ct. App. 1993). The events in the case predated the amendment to the Florida APS statute

Ethel Ahrendt, had sent notes to the bank authorizing a series of cash withdrawals totaling \$50,500 to pay a repairman for alleged repairs to her home. Although the bank had called her to confirm that the withdrawals were authorized, Ahrendt contended that the bank had an obligation to investigate the situation further. In dismissing her claims, the court rejected her argument that New Hampshire's mandatory reporting law created a legal duty to customers to report suspected abuse: "Even if the bank was required to report under the statute, its failure to do so cannot be the basis for civil liability where no common law duty exists and the legislature has not expressly or implicitly created such liability."<sup>34</sup> The court also refused to find that a fiduciary relationship – that is a "relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of their relationship"<sup>35</sup> – existed between the customer and the bank.<sup>36</sup>

Moreover, the existence of a mandatory reporting law may actually *protect* banks from liability. In addition to the possibility of a suit for failure to report suspected abuse, banks also fear lawsuits by a customer who objects to the reporting. The bank is in a better position to defend itself in such a suit if the bank made the report under a mandatory reporting law than under a voluntary reporting law – that is, the bank would have the defense that it was legally obligated to make the report.

Finally, banks can protect themselves against potential liability under a mandatory reporting law by adopting and making a good faith effort to follow a policy and protocol

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that made banks mandatory reporters, so the court "express[ed] no opinion on the question whether failure to comply [with the newly enacted reporting obligation] would result in civil liability." 622 So.2d at 1017, n. 5. The Fourth District Court of Appeal of Florida has since ruled "that a violation of the reporting requirement in [the Florida APS statute] does not result in a civil cause of action." Mora v. South Broward Hospital District, 710 So.2d 633,633 (Fl. Dist. Ct. 1998).

<sup>34</sup> 144 N.H. at 315, 740 A.2d at 1064.

<sup>35</sup> Black's Law Dictionary 640 (Bryan A. Garner, et al, eds., 7<sup>th</sup> Ed. 1999).

for reporting suspected financial abuse. A bank that has such a policy is unlikely to incur criminal or civil liability for an isolated instance in which it failed to recognize and report financial abuse.<sup>37</sup>

## **B. Federal Bank Privacy Laws**

Banks are also concerned about the possibility of being charged with a violation of federal statutes that govern the disclosure of private financial records. (Potential liability under state bank privacy laws is discussed in the next section.) Federal law protecting the privacy of financial records has its genesis in United States v. Miller, a 1976 decision by the United States Supreme Court that held that a bank customer had “no legitimate ‘expectation of privacy’” regarding his banking transactions and that the federal government therefore acted constitutionally when it obtained subpoenaed bank records without prior notice to the customer.<sup>38</sup> The Supreme Court reasoned that the documents obtained through the subpoena, “including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.”<sup>39</sup> “The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.”<sup>40</sup> In the absence of any constitutionally protected privacy interest in the records, the case was “governed by the general rule that the issuance of a subpoena to

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<sup>36</sup> 144 N.H. at 312, 740 A.2d at 1062.

<sup>37</sup> See also Annotation, “Existence of Fiduciary Relationship between Bank and Depositor or Customer So As to Impose Special Duty of Disclosure upon Bank,” 70 ALR3d 1344, 1350 (1976), noting that “the conventional bank-depositor relationship does not ordinarily impose a fiduciary duty of disclosure upon the bank.”

<sup>38</sup> 425 U.S. 435, 442 (1976).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 443.

a third party to obtain the records of that party does not violate the rights of a defendant.”<sup>41</sup>

Recognizing that bank customers generally *do* expect their banks to keep their transactions confidential, in 1978 Congress effectively overruled the Miller decision by passing the Right to Financial Privacy Act (“RFPA”).<sup>42</sup> The RFPA provides that in most circumstances, a customer must be given prior notice and an opportunity to challenge the government’s action in court *before* the government can obtain customer information from a bank. However, the limitations of the RFPA apply only to the *federal* government and, thus, place no restrictions on the actions of state or local authorities in obtaining financial records.<sup>43</sup> Therefore, if a bank reveals customer financial information to APS or to state or local law enforcement, either as part of a voluntary or mandatory report of suspected financial abuse or in response to a request for bank records in connection with an APS investigation, the bank does not risk prosecution by the federal government for a violation of the RFPA.

However, the Financial Services Modernization Act of 1999, popularly known as the Gramm-Leach-Bliley Act, does contain extensive provisions regulating the privacy of financial records that apply both to the federal government and to state and local governments.<sup>44</sup> The primary purpose of the Act is “to enhance competition in the financial services industry by providing a prudential framework for the affiliation of banks, securities firms, insurance companies, and other financial service providers,”<sup>45</sup>

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<sup>41</sup> Id. at 444.

<sup>42</sup> The RFPA is codified at 12 U.S.C. §3401 *et seq.*

<sup>43</sup> See 12 U.S.C. §3401(3), defining “Government authority” as “any agency or department of the United States, or any officer, employee, or agent thereof.” See also Matter of Grand Jury Applications for Court-Ordered Subpoenas and Nondisclosure Orders, 142 Misc.2d 241, 248, 536 N.Y.S.2d 939, 943 (N.Y. S. Ct. 1988).

<sup>44</sup> PL 106-102 (S. 900) (1999).

<sup>45</sup> H.R. Conf. Rep. No. 106-434, at 245 (1999), *reprinted in* 1999 U.S.C.C.A.N. 245, 245.

including the sharing of customer financial information by these entities. However, Congress realized that this kind of information sharing “could exacerbate the concerns of consumers regarding the dissemination of personal financial information.”<sup>46</sup> To address these concerns, Title V of the Act contains strong privacy protections,<sup>47</sup> including the requirement that customers be given notice and an opportunity to opt out of this information sharing.<sup>48</sup>

Of more significance to reporting by banks of suspected financial abuse, Section 502(e) of the Act contains several exemptions that permit the disclosure of “nonpublic personal information” to “nonaffiliated third parties” (which includes government officials) *without* prior notice to the customer and an opportunity to opt out.<sup>49</sup> Several of the exemptions contained in Section 502(e) are applicable to both mandatory and voluntary reporting. Subsection (e)(3)(B) permits disclosure “to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability.”<sup>50</sup> Subsection (e)(5) permits disclosure “to the extent specifically permitted or required under other provisions of law... to law enforcement agencies... or for an investigation on a matter related to public safety.”<sup>51</sup> In addition, Subsection (e)(8), which permits disclosure “to comply with Federal, State, or local laws, rules, and other applicable legal requirements,”<sup>52</sup> would allow disclosures in connection with an APS investigation. These exemptions also appear in the regulations promulgated under the Act.<sup>53</sup>

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<sup>46</sup> Individual Reference Services Group, Inc., v. F.T.C., 145 F.Supp.2d 6, 11 (D.D.C. 2001).

<sup>47</sup> Title V is codified at 15 U.S.C. §6801 *et seq.*

<sup>48</sup> 15 U.S.C. §6802.

<sup>49</sup> Section 502(e) is codified at 15 U.S.C. §6802(e).

<sup>50</sup> 15 U.S.C. §6802(e)(3)(B).

<sup>51</sup> 15 U.S.C. §6802(e)(5).

<sup>52</sup> 15 U.S.C. §6802(e)(8).

<sup>53</sup> *See, e.g.,* the Gramm-Leach-Bliley Act regulations of the Federal Deposit Insurance Corporation, 12 C.F.R. §332.14-15.



In an opinion letter regarding the legality of Michigan's bank reporting procedures, the seven federal regulatory agencies responsible for enforcement of the Gramm-Leach-Bliley Act stated that reporting suspected financial abuse falls within the exceptions to the Act that were discussed above.<sup>54</sup> However, the opinion letter indicated the importance of Michigan's investigation and reporting protocols as a factor in formulating the opinion, and it is uncertain whether the same result would have been reached if these protocols did not exist.

APS agencies may, if appropriate, want to consider developing or revising their protocols to address reporting by bank personnel. APS agencies may also want to request a similar opinion letter about their state's law and procedures. Agency directors, state banking officials, and other government officials may request an opinion letter from the federal agencies, or they may ask their Congressional representatives to request such a letter. Regardless of what entity solicits the opinion letter, in order to expedite the response, any request should include copies of pertinent statutes, regulations, and protocols. Agencies that do not currently have protocols may want to submit bank training and other pertinent materials in addition to their state statute(s) and regulation(s).

### **C. State Bank Privacy Laws**

#### **1. Potential liability to the state for violating the state's financial privacy laws**

Most states have statutes, case law, or both that protect the privacy of the records maintained by banks and specify the circumstances under which banks can lawfully

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<sup>54</sup> The seven agencies are Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Securities and Exchange Commission, and the Federal Trade Commission. The text of the letter is available on the websites of the National Center for Elder Abuse, [www.elderabusecenter.org](http://www.elderabusecenter.org), and of the ABA Commission on Law and Aging, [www.abanet.org/aging](http://www.abanet.org/aging).

disclose customer information. The statutory provisions regulating disclosure of financial records vary greatly from state to state, making it impossible to generalize about whether disclosure as part of a report to APS risks violating a state's financial privacy rules.<sup>55</sup> On the one hand, Nevada law provides that a bank may "in its discretion" initiate contact with and disclose "the financial records of a customer to appropriate governmental agencies concerning a suspected violation of any law."<sup>56</sup> Similarly, Connecticut law authorizes "disclosures to appropriate officials of federal, state or local government upon suspected violations of the criminal law."<sup>57</sup> These provisions would seem to apply to both mandatory and voluntary reports, whereas the Alaska provision, which permits disclosures "required by federal or state law or regulation," would apply only to a mandatory report.<sup>58</sup> In other states, the statutory provisions specifying the circumstances in which disclosure is permitted do not apply to either mandatory or voluntary reporting.<sup>59</sup>

The state of Maryland amended its provision on "allowable financial disclosures by fiduciary institutions" to specify that disclosure to APS is a permissible disclosure:

Notwithstanding any other provision of law, a fiduciary institution or an officer, employee, agent, or director of a fiduciary institution may disclose financial records and any other information relating to a customer of the fiduciary institution if the fiduciary institution or its officer, employee, agent, or director:

- (1) Believes that the customer has been subjected to financial exploitation; and

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The opinion letter was issued on July 3, 2002, in response to a request from United States Senator Debbie Stabenow (D-MI).

<sup>55</sup> For an excellent overview of state financial privacy laws, see Chapter 5 in L. Richard Fischer, The Law of Financial Privacy (2001).

<sup>56</sup> NV ST §239A.070(3).

<sup>57</sup> CT ST §36A-44(7).

<sup>58</sup> AK ST §06.05.175(a)(2).

<sup>59</sup> See, e.g., MT ST §32-6-105(1)(b) (disclosure permitted only if records are subpoenaed); NJ ST 17:16K-3 and 17:16K-4 (same).

- (2) Makes the disclosure in a report to the adult protective services program in a local department of social services.<sup>60</sup>

In states where there is any doubt about the lawfulness of bank reports to APS, one solution is to enact an amendment along these lines. Other solutions are discussed later in this section and in Section II (D).

Finally, it should be noted that although in most states bank privacy statutes regulate the privacy of financial records, the state's constitution might also place limits on the government's ability to access personal financial information. Most state constitutions contain a provision similar to the Fourth Amendment restrictions on search and seizure that the Miller case interpreted as not applicable to a bank's disclosure of customer financial records.<sup>61</sup> Although some states have followed Miller, other states have not.<sup>62</sup> Some states also have constitutional provisions specifically guaranteeing a citizen's right to privacy, and such provisions may provide another basis for restricting the government's ability to obtain financial records.<sup>63</sup>

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<sup>60</sup> MD FIN INST §1-306(b). This law was enacted after "[t]he bank industry made it clear that it would oppose any bill that required mandatory reporting. Prior to 2000 few banks called in exploitation cases because they were afraid a report would violate our Confidential Financial Records Act." E-mail message from Jeffrey H. Myers, Assistant Attorney General and Principal Counsel, Maryland Department of Aging, dated January 29, 2001.

<sup>61</sup> Fischer, *supra* note 54, at 5-4.

<sup>62</sup> *Id.* at 5-4 – 5-11, and Annotation, "Search and Seizure of Bank Records Pertaining to Customer as Violation of Customer's Rights under State Law," 33 ALR5th 453 (1995), which contains a detailed discussion of the state court decisions following and declining to follow Miller.

<sup>63</sup> For example, the Florida constitution was amended in 1980 to add a provision which provides in relevant part that "Every natural person has the right to be let alone and free from government intrusion into his private life except as otherwise provided herein." Florida Constitution Article I, Section 23. (The United States Constitution does not contain such a provision.) Relying on this provision, Supreme Court of Florida has held that "the law in the State of Florida recognizes an individual's legitimate expectation of privacy in financial institution records." Winfield v. Division of Para-Mutuel Wagering, Department of Business Regulation, 477 So. 2d 544, 548 (Fl. 1985).

If the law in a particular state does not permit disclosure of private financial or account information, a bank may still be able to report other information, such as the names of the customer and perpetrator and the nature of the suspected abuse, without running afoul of the privacy law.<sup>64</sup> Providing this limited information probably will be sufficient to trigger an APS investigation, and APS can then subpoena or otherwise obtain any financial records it may need to complete its investigation.<sup>65</sup> Similarly, if the state's financial privacy law permits reporting to "law enforcement," but not APS, the bank can make its initial report to law enforcement, which can in turn refer the report to APS. Finally, it is important to note that a state's mandatory reporting law and/or the immunity provision in the APS statute<sup>66</sup> may be interpreted as overriding the restrictions in the state's privacy law.

## **2. Potential lawsuits by customers for damages allegedly caused by the bank's report to APS**

Although there are a number of court decisions in which bank customers have sued their banks for damages allegedly resulting from the banks' disclosure of damaging or embarrassing financial information, there do not appear to be any reported cases in

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<sup>64</sup> The viability of this approach will depend on the precise wording of the state's bank privacy law.

<sup>65</sup> Some APS statutes specify the procedures for subpoenaing bank records and some APS statutes authorize APS to obtain bank records upon request. For an example of a subpoena provision, *see* ME ST T. 22 §3480(1)(A), providing that "[t]he commissioner, his delegate or the legal counsel for the department may:... issue subpoenas requiring persons to disclose or provide to the department information or records in their possession which are necessary and relevant to an investigation of a report of suspected abuse, neglect or exploitation..." This section of the statute also provides immunity "from civil or criminal liability that might otherwise result from the act of turning over or providing information or records to the department." ME ST T. 22 §3480(1)(A)(2). For an example of a statute authorizing APS to obtain financial records, *see* AR ST 5-28-210(d)(2)(B) ("Financial records maintained by a bank or similar institution shall be made available to the department for the purpose of conducting an evaluation or review under this subsection."), which was added to the Arkansas APS law in 2001.

<sup>66</sup> *See* the next section of this report, which discusses the immunity provisions in state APS laws

which a customer sued a bank for disclosing information in an effort to protect the customer from the suspected unlawful conduct of another person.<sup>67</sup> Nonetheless, there are several theories under which a customer might sue a bank for disclosure of private information, including breach of a contractual duty of confidentiality, defamation, and invasion of privacy.<sup>68</sup> To the extent that the theoretical possibility of such a lawsuit, however remote, may deter banks from reporting that it suspects elder abuse, the simplest solution is to ensure that the bank is adequately protected by an immunity statute.

#### **D. State and Federal Immunity Laws.**

The APS statutes in forty-nine states and the District of Columbia include provisions that provide immunity from civil or both civil and criminal liability to reporters of abuse who act in good faith.<sup>69</sup> If a bank falls within the scope of the APS statute's immunity provision, the bank should be protected both from liability to the state for violation of the state's financial privacy law and from liability to the customer for alleged damages.<sup>70</sup>

The typical state immunity provision gives immunity to "any person" or "anyone" who makes a report of suspected abuse.<sup>71</sup> This raises the question whether such a

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<sup>67</sup> See Annotation, "Bank's Liability, under State Law, for Disclosing Financial Information Concerning Depositor or Customer," 81 ALR4th 377 (1990), and Fischer, *supra* note 54, at 5-11 – 5-23.

<sup>68</sup> *Id.*

<sup>69</sup> South Dakota's immunity statute does not apply to all reporters of abuse. See note 20, *supra*. The laws of five states, Maine, Maryland, Michigan, New York, and Oregon, provide only for immunity from civil liability. ME ST T. 22 §3479-A(1); MD FAMILY §14.309; MI ST 400.11c(1); NY SOC SERV §473-b; and OR ST §124.075(1). Some immunity provisions additionally provide that a reporter's good faith "shall be presumed." See, e.g., AR ST §5-28-215(b).

<sup>70</sup> Although state immunity laws are not effective to provide immunity for violations of federal law, banks have no reason to fear potential liability under federal financial privacy statutes, as previously explained in Section II (B).

<sup>71</sup> Some states have provisions that are somewhat different. For example, New Hampshire provides immunity for "[a]ny person or agency," NH ST §161-F:47, Illinois for "[a]ny person, institution or agency," IL ST CH 320 §20/4(b), and Arkansas for "[a]ny person, official, or institution," AR ST §5-28-215(a). Alabama is unusual in

provision protects both the reporter and the company or institution that employs the reporter, which is almost surely the intent of the statute, or whether only the employee who makes the report is protected. The answer turns on whether the term “any person” or “anyone” is interpreted to describe only natural persons or whether it also includes corporations, associations, and other similar entities.<sup>72</sup> In many states, the term “person” has been interpreted broadly to include corporations and other entities unless such an interpretation is inconsistent with the legislative intent. For example, a District of Columbia court found that the “[s]tatutory use of the word persons to include corporations is so general that to hold corporations are not included requires clear proof of legislative intent to exclude them.”<sup>73</sup> In other states, there is a statutory provision that defines the term for all state laws. Washington law provides that “[t]he term ‘person’ may be construed to include... any public or private corporation or limited liability company, as well as an individual.”<sup>74</sup> Similarly, in New Hampshire, “[t]he word ‘person’ may extend and be applied to bodies corporate and politic as well as to individuals.”<sup>75</sup> In Colorado, the APS statute itself defines the term “person” as “one or more individuals, limited liability companies, partnerships, associations, corporations, legal representatives, trustees, receivers, or the state of Colorado....”<sup>76</sup>

In states where the immunity provision is ambiguous or limited in its scope, leaving banks uncertain about whether they are fully protected, the provision can be amended to

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providing immunity for “[a]ny person, firm or *corporation* making or participating in the making of a report...” AL ST §38-9-9 (emphasis supplied).

<sup>72</sup> The United States Code provides that for purposes of federal law, “the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies and joint stock companies, as well as individuals.” 1 U.S.C. §1.

<sup>73</sup> Central Amusement Co. v. District of Columbia, 121 A.2d 865, 866 (D.C. 1956).

<sup>74</sup> WA ST §1.16.080(1).

<sup>75</sup> NH ST §21:9. *See also* WI ST 990.01(26) (“‘Person’ includes all partnerships, associations and bodies politic or corporate.”).

<sup>76</sup> CO ST §26-3.1-101(5).

clarify and expand its application. In Texas, which is currently attempting to implement a bank reporting project modeled on the Oregon and Massachusetts projects, the APS statute's immunity provision was amended in 2001 to reassure the banking community.<sup>77</sup>

The statute now specifically provides that an "employer whose employee [makes a report of elder abuse] is immune from civil or criminal liability on account of an employee's report, testimony, or participation in any judicial proceedings arising from a petition, report, or investigation."<sup>78</sup> Similarly, the Georgia APS law provides that:

Any financial institution..., including without limitation officers and directors thereof, that is an employer of anyone who makes a report pursuant to this chapter in his or her capacity as an employee, or who testifies in any judicial proceeding arising from a report made in his or her capacity as an employee, or who participates in a required investigation under the provisions of this chapter in his or her capacity as an employee, shall be immune from any civil or criminal liability on account of such report or testimony or participation of its employee....<sup>79</sup>

Language such as that in the Texas and Georgia provisions should be more than sufficient to reassure banks that they can report suspected elder abuse without risking either law suits by customers or potential liability under state bank privacy law.<sup>80</sup>

Finally, federal law may provide additional protection against possible liability to customers under state law. In 1992, the Annunzio-Wylie Anti-Money Laundering Act

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<sup>77</sup> E-mail message from Paul M. Mixson, Division Administrator, APS Strategic Planning and Program Support, Texas Department of Protective and Regulatory Services, dated November 26, 2001.

<sup>78</sup> TX HUM RES §48.054(d). Texas is a state in which all persons are mandated to report suspected abuse. TX HUM RES §48.051(a).

<sup>79</sup> GA ST 30-5-4(c).

<sup>80</sup> See also the 2002 amendments to the Wyoming the APS statute which added the following language to the immunity provision:

The immunity provided under this subsection applies only to those persons whose professional communications are generally confidential or subject to the Wyoming Public Records Act,... including:...(vii) Bank, savings and loan or credit union officers, trustees or employees.

WY ST §35-20-114(a).

amended the federal Bank Secrecy Act to include the following “safe harbor” for banks that voluntarily report suspected violations of the law to the government:

Any financial institution that makes a voluntary disclosure of any violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State,... for such disclosure or for failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.<sup>81</sup>

Although the term “government agency” is defined to include only the federal government,<sup>82</sup> at least one court has assumed that the term “any other authority” encompasses disclosures to local law enforcement.<sup>83</sup> Therefore, a disclosure that results from a report under a mandatory reporting law, and probably also a voluntary reporting law, cannot provide the basis for legal action by a customer.

#### **E. Proposed Federal Legislation to Encourage Reporting of Financial Abuse**

In an effort to promote reports of abuse by banks, in 1999 Representative Carolyn B. Maloney introduced legislation that would have amended the Right to Financial Privacy Act to provide broad protection for banks that report financial exploitation of older or disabled individuals.<sup>84</sup> The proposed amendment provided that nothing in Title 12 of the United States Code, which covers Banks and Banking, would “preclude a

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<sup>81</sup> 31 U.S.C. §5318(g)(3)(A).

<sup>82</sup> 31 U.S.C. §101.

<sup>83</sup> See Nevin v. Citibank, 107 F.Supp.2d 333 (E.D.N.Y. 2000), in which a credit card company reported suspected fraud by a customer to the store involved, rather than to local law enforcement. The court held that *Annunzio-Wylie* did not extend to a communication between a financial institution and a private entity, even if the ultimate intention was to contact local law enforcement. *Id.* at 342. See also 12 C.F.R. §208.62(k) stating that the safe harbor applies to all reports of suspected crimes and suspicious activities “to law enforcement and financial institution supervisory authorities.”

<sup>84</sup> H.R. 2062, introduced in 106<sup>th</sup> Congress, June 8, 1999.



financial institution, or officer, employee, or agent thereof, from reporting suspected financial exploitation of an older or disabled individual to State, Federal, or local law enforcement entities, or government-regulated adult protective services entities.” In addition, the bill contained the following blanket immunity provision: “Any financial institution, or officer, employee, or agent thereof, making a disclosure of information and documentation pursuant to this paragraph shall not be liable to the customer under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure.”<sup>85</sup>

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<sup>85</sup> The full text of the bill is as follows:

#### A BILL

To amend the Right to Financial Privacy Act of 1978 with respect to financial exploitation of older or disabled individuals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

#### SECTION 1. SHORT TITLE.

This Act may be cited as the “Financial Privacy Act Amendments of 1999.”

#### SEC. 2. FINANCIAL EXPLOITATION.

Section 1103(d) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3403(d)) is amended by inserting after paragraph (2) the following:

“(3) Nothing in this title shall preclude a financial institution, or officer, employee, or agent thereof, from reporting suspected financial exploitation of an older or disabled individual to State, Federal, or local law enforcement entities, or government-regulated adult protective services entities. Such report may include only the name or other identifying information concerning an older or disabled individual, the account involved, and the nature of any suspected financial exploitation, including pertinent documentation. Any financial institution, or officer, employee, or agent thereof, making a disclosure of information and documentation pursuant to this paragraph shall not be liable to the customer under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision

Because any such federal law would supercede or preempt a conflicting state law, Maloney's bill would have effectively eliminated any concern about liability for violation of federal banking law or to customers under state law, but the proposed legislation apparently did not consider or address the possibility of state imposed sanctions for violation of the state's financial privacy law. In any case, after the bill was referred first to the House Committee on Banking and Financial Services and then to the Subcommittee on Financial Institutions and Consumer Credit, no action was taken.<sup>86</sup>

### **III. The Experience in the States**

The variation among the states in their APS provisions relating to banks provides an opportunity to examine the extent to which those provisions can help or hinder efforts to encourage banks to report suspected financial abuse. One question is whether the presence of a mandatory reporting law facilitates bank reporting projects. Another question is whether the absence of a mandatory reporting law has hindered the bank reporting projects that have been implemented in several voluntary reporting states. A final question is what has been the experience in states that have attempted to amend their APS statutes by adding a mandatory reporting provision for banks.

#### **A. The Experience in States Where Banks Are Mandatory Reporters**

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thereof, for such disclosure. For purposes of this paragraph, the term "older or disabled individual" means an individual who is 65 years of age or older or disabled, and the term "exploitation" means any fraud, abuse, or other conduct that constitutes a violation of any Federal or State law, including any legally enforceable professional standard applicable with regard to any profession or occupation, and the unauthorized use of an older or disabled individual's funds, property, or resources for another person's profit or advantage."

<sup>86</sup> The text and status of the bill are available at <http://thomas.loc.gov/cgi-bin/bdquery/D?d106:1:./temp/~bd5w7y:@@L&summ2=m&l/bss/d106query.html> (visited February 4, 2002).

Three states, Florida,<sup>87</sup> Georgia<sup>88</sup> and Mississippi,<sup>89</sup> list banks as mandatory reporters in their APS statutes. Fifteen other states require “any person” to report suspected abuse,<sup>90</sup> but do not specifically identify banks as mandatory reporters. The experience in both categories of states seems similar: the presence of a mandatory reporting law is not sufficient *in and of itself* to result in a marked increase in reports by banks, but the presence of such a law, coupled with educational efforts and/or a formal bank reporting project, can have a significant impact. The following analyses by state APS personnel illustrate their experience.

Chris Shoemaker, the Acting Director of Florida’s Adult Services Program, describes the Florida law as having had a very positive impact, with even better results expected after a statewide bank reporting project is implemented:

In Florida, we have had no opposition from the banking industry in regards to the mandatory reporting provision contained in our APS law. In fact, we are modeling a “banking project” after the Oregon model, and we have the five largest banks in Florida anxious to help set this project in motion. Through various training that has occurred at the local level, banks have been very cooperative in understanding their legislative mandate for reporting. On numerous occasions, I personally have received phone calls from banking officials who have noticed unusual activity with a client’s account and have reported it to our hotline.<sup>91</sup>

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<sup>87</sup> FL ST §415.1034(1)(a)(8) mandates reporting by any “[b]ank, savings and loan, or credit union officer, trustee, or employee, who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited.”

<sup>88</sup> GA ST 30-5-4(a)(1)(B) provides in relevant part that “any employee of a financial institution... having reasonable cause to believe that a disabled adult or elder person has been exploited shall report or cause reports to be made....” Subsection 30-5-4(a)(1)(B) refers to the definition of “financial institutions” in GA ST 7-1-4(21), which includes, *inter alia*, banks, trust companies, building and loan associations, and credit unions.

<sup>89</sup> MS ST §43-47-7(1)(a), which requires that “any person who knows or suspects that a vulnerable adult has been or is being abused, neglected or exploited, shall immediately report such knowledge or suspicion,” was amended effective July 1, 2001, to additionally list specific occupations which are mandated to report, including “any officer or employee of a bank, savings and loan, credit union or any other financial service provider.” MS ST §43-47-7(1)(a)(vii).

<sup>90</sup> See note 25, *supra*, listing these states and the citations for their mandatory reporting laws.

<sup>91</sup> E-mail message from Chris Shoemaker dated January 2, 2002.

However, two other observers in Florida view the mandatory reporting law as having only a limited effect. One reports that “I don’t believe that there has been resistance to the mandate that I can see, but nor have I seen a tremendous influx of those we have been able to identify.”<sup>92</sup> An APS worker in Tampa makes a similar comment about the experience in her part of the state: “We have had some reports from bank personnel we might never have had otherwise but there hasn’t been a huge influx of reports from banks such that it has had an impact on workload.”<sup>93</sup>

In Georgia, the mandatory reporting law was enacted despite some resistance from the banking industry.<sup>94</sup> The state legal services developer reports that since the law was enacted, “smaller scale attempts at local training have been initiated with small steps being made in the progression of getting folks on board.”<sup>95</sup> Both she and the state APS program consultant do not believe that the mandatory reporting law has resulted in a significant increase in reporting by banks (the state does not keep statistics on the sources of referrals).<sup>96</sup>

Mississippi’s mandatory reporting statute, which requires “any person” to report suspected abuse, was amended effective July 1, 2001, to list specific occupations, including employees of banks, that are mandated to report.<sup>97</sup> A social worker with the state’s Division of Family and Children’s Services reports: “Mississippi has not yet experienced a significant increase in reports as a result of the legislative amendment.

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<sup>92</sup> E-mail message from Investigator Melissa Otto, Supervisor of Elder Services Unit, Office of the State Attorney, dated January 25, 2002.

<sup>93</sup> E-mail message from Sarah Holbert, Adult Protective Services, Suncoast Region, dated January 25, 2002.

<sup>94</sup> E-mail message from Natalie Thomas, State Legal Services Developer, Georgia Division of Aging Services, dated January 25, 2002.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* and e-mail message from Mary Martha Allen, APS Program Consultant, Georgia Division of Family and Children’s Services, dated January 25, 2002.

This may be because, to date, there has not been an aggressive public awareness campaign to ensure that banks (and other entities) are aware of their duty to report.”<sup>98</sup>

The experience in Louisiana, as described by Robert J. Seemann, Director of the Elderly Protective Service in the Louisiana Governor’s Office of Elderly Affairs, is typical of the “any person” states that have not implemented education or training programs to make banks aware of their duty to report:

Although the Louisiana Law, R.S. 14:403.2, requires mandated reporting of all reports of suspected elder abuse, I do not think all financial institutions are aware of this requirement. This lack of reporting is probably related to the lack of formal education and training on the complexities of financial abuse. Our state has never attempted a coordinated statewide education and training effort with financial institutions.<sup>99</sup>

Jan Stiles of the Wyoming Division of Protective Services similarly comments: “I have no knowledge of any report being received from a financial institution. I suspect they have little awareness of their duty to report.”<sup>100</sup>

On the other hand, states that already have a mandatory reporting law appear to have an advantage in convincing the banking industry to cooperate in training programs. This has been the experience in Utah, which initiated a bank training program three years ago. As described by C. Ronald Stromberg, Assistant Director of the Utah State Division of Aging and Adult Services:

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<sup>97</sup> See note 88, *supra*.

<sup>98</sup> E-mail message from Edna C. Clark, Social Worker Advanced, Protection Unit – Division of Family and Children’s Services, Mississippi Department of Human Services, dated January 29, 2002.

<sup>99</sup> Letter from Robert J. Seemann, Director, Elderly Protective Service, Louisiana Governor’s Office of Elderly Affairs, dated February 15, 2002.

<sup>100</sup> E-mail message from Jan Stiles, Adult Protective Services Program Consultant, Division of Protective Services, Wyoming Department of Family Services, dated February 5, 2002.

We first met with the State Bankers Association leadership. They were reluctant at first...[because] they were worried about negative publicity implying that their banks might be allowing people to take money from the accounts of elderly customers. They wanted to make sure we did not inform the press of our training or “Bank Reporting Project.” We agreed.

We then met with the Bank Security Committee consisting of the Security Directors from the banks. They were very receptive, welcomed our involvement and training, and went to the Banker's Association and supported our project. If we were to do it again, we would start with the security people....

...We have had a number of very successful results from the banks reporting. Banks are responsible for about 3% of the total referrals we receive from all sources for abuse, neglect and exploitation....

*I think having the mandatory reporting law definitely helps. It pretty much ends the discussion about whether a bank should report and changes the focus to what they need to do to report and how we can work together to help provide their customers with the protections provided in the law.<sup>101</sup>*

## **B. Reporting Projects in Voluntary Reporting States**

Beginning in the 1990s, a number of states and local communities developed projects designed to train bank employees to recognize and report unusual banking activity by elderly customers that might signal elder abuse. These projects typically involved several components: (1) securing the cooperation of the banking industry, which often required enacting legislation to reassure banks regarding potential liability; (2) preparing materials to be used in training bank personnel to recognize signs of financial abuse; (3) development by the banks of an internal protocol to deal with suspected abuse, such as requiring bank employees to report suspected abuse to the bank's security director or branch manager for a determination whether the incident should be reported to APS

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<sup>101</sup> E-mail message from C. Ronald Stromberg, Assistant Director, Utah State Division of Aging and Adult Services, dated February 6, 2002 (emphasis added).

and/or local law enforcement; and (4) implementation of training and the protocol for reporting.<sup>102</sup>

The first statewide project that followed this model was the Massachusetts Bank Reporting Project, which was developed in 1996 after efforts to launch a similar program at the local level were unsuccessful.<sup>103</sup> A state-wide task force was formed, but “[t]he key to success was gaining the sponsorship and active participation in the task force of the private sector, the Massachusetts Bankers Association.”<sup>104</sup> The Massachusetts project differed from earlier projects “because it aimed to engage the banking industry rather than individual banks.”<sup>105</sup> An important part of the project was “the creation of incentives so that banks would participate voluntarily, for example, offering points toward [federal] Community Reinvestment Act approval” for participating banks.<sup>106</sup>

According to Gillian Price and Craig Fox, two APS workers involved in the development of the project, in Massachusetts, as in several other states, obtaining the cooperation of the banking industry required a compromise on the issue of mandatory reporting:

Bank employees are not mandated reporters of elder abuse in Massachusetts although they are, as are all reporters, provided with statutory protection from liability for “good faith” reporting. The project considered changes in legislation that would mandate bank employees to report elder abuse, thus providing them with greater protection from liability. This option was resisted by the industry. The Project decided that, given the resistance, gaining the voluntary cooperation of the industry would prove more effective in encouraging reporting than proposing further legislation.<sup>107</sup>

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<sup>102</sup> Many bank reporting projects have also developed training materials that banks can use to conduct consumer education seminars for seniors. These seminars are designed to teach seniors to be alert to financial scams and other ways in which they may be financially exploited.

<sup>103</sup> Price and Fox, *supra* note 2, at 63.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 69.

<sup>106</sup> *Id.* at 63.

<sup>107</sup> *Id.* at 64.

Alan Herman, a researcher at the JDC-Brookdale Institute for Gerontology and Human Development who has studied the Massachusetts project, believes that the absence of mandatory reporting has not hindered the project. He reports that most banks now participate in the project on a voluntary basis:

Though most bank customer service reps statewide have been trained to recognize the signs of elder abuse, reporting to law enforcement offices is not mandatory and solutions are often found at the branch level. Still, the number of reports to law enforcement yearly continues to increase. And, as you know, the difference between mandatory and voluntary is not great in an environment where there is peer pressure to join, prevent and take action.<sup>108</sup>

Drawing on the experience in Massachusetts and other states, the State of Oregon developed a statewide project that was intended to serve as a national model for bank reporting projects. Initially, the state's attorney general met with the chief executive officer of the Oregon Bankers Association ("OBA") to discuss involving banks in reporting elder abuse:

As the ability of bankers to contact local authorities about possible violations was already covered in state law, the attorney general and the OBA decided to add an immunity clause to the Oregon statutes addressing financial institutions. The OBA made it clear that it did not want banking institutions to become "mandatory reporters." All on the attorney general's task force agreed that since the bankers *wanted* to report, they did not need to be mandatory reporters. This resulted in smooth passage of the legislation [amending the Oregon financial privacy law].<sup>109</sup>

Subsequently a public/private partnership consisting of the Oregon Bankers Association, the Oregon Department of Justice, the Oregon Senior and Disabled Services

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<sup>108</sup> E-mail message from Alan Herman dated January 8, 2002.

<sup>109</sup> Aileen P. Kaye and Stephen J. Schneider, "Financial Exploitation and Consumer Fraud, Workshop 3: Innovative Approaches to Financial Exploitation," in Our Aging Population: Promoting Empowerment, Preventing Victimization, and Implementing Coordinated Intervention, a report of proceedings at a national symposium sponsored by the United States Department of Justice, Office of Justice Programs, and the United States Department of Health and Human Services, Appendix 3 at 17-18 (2000) (emphasis



Division and the Oregon AARP was formed to address the problem of financial exploitation of the elderly. The partnership obtained a substantial grant from the Office for Victims of Crime of the United States Department of Justice to develop a training “kit” for a bank reporting program that could easily be replicated by other states. The training kits, which include both video and audio tape instructional materials, are “designed for self-training; however, the kit information recommends that banks contact Adult Protective Services (APS) and law enforcement to assist with training.”<sup>110</sup> Free copies of the kit were sent to the state bankers association, the attorney general and the state APS office in every state.<sup>111</sup> A complimentary copy was also sent to each branch bank in Oregon and to each bank president in the state.<sup>112</sup> A total of 1600 kits have been distributed, including kits requested by individual banks in other states, prosecutors’ offices, attorney generals’ offices, law enforcement, APS offices, area agencies on aging, and five foreign countries.<sup>113</sup>

Oregon’s figures on reports filed with APS by banks have grown from 43 in 1999, to 76 in 2000, and to 130 in 2001.<sup>114</sup> To cope with this three-fold increase in reports, Oregon has developed a second program, Retiree Response Technical Teams, or “R2T2,” to assist APS offices in investigating financial abuse. The program uses the voluntary

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in original). The amendments to the Oregon law on Private Financial Records are OR ST §192.555(2)(a) and §192.575(5).

<sup>110</sup> “Preventing Elder Financial Exploitation: How Banks Can Help,” report prepared for the Senate Special Committee on Aging by the Oregon Department of Human Services, Senior and Disabled Services Division, dated July 19, 2001.

<sup>111</sup> E-mail message from Aileen P. Kaye, Abuse Prevention Program Coordinator, Abuse Prevention Unit, Seniors and People With Disabilities, Oregon Department of Human Services, dated January 29, 2002.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Letter from Aileen P. Kaye dated February 22, 2002. However, “the[se] numbers are lower than in reality as some offices keep their own data and not all offices turn in their statistical reports as they should. The main thing is that the number of bankers who report in Oregon has consistently gone up every year.” *Id.*

services of retired bankers, accountants and other financial experts to assist local APS and other multidisciplinary team members in collecting and analyzing financial records for possible prosecution.<sup>115</sup>

Aileen Kaye, the state's Abuse Prevention Program Coordinator, and Stephen J. Schneider, an attorney with the Abuse Prevention Unit, both of whom were instrumental in developing the program, have summarized the "lessons learned" from the program:

The key lesson learned is that it is necessary to start the program with strong statewide partners, especially the state bankers association. Bankers trust other bankers and will check with each other before adopting the project. Also, it is very important to realize that bankers are extremely busy and must keep up with numerous regulations. Timeliness and a businesslike attitude are crucial to gain their trust.<sup>116</sup>

California, on the other hand, has had a very different experience from that in Oregon and Massachusetts. At the state level, for the last two years there has been a contentious battle with the banking industry over various proposed amendments to the state's APS law, including an amendment that would make banks mandatory reporters, with the larger banks in the state leading the opposition.<sup>117</sup> Meanwhile, several very successful training projects have been undertaken at the local level by the California Community Partnership for the Prevention of Financial Abuse (CCPPFA) and by local law enforcement.

Using the Massachusetts program as a model, what is now the CCPPFA began as the Marin Bank Reporting Project in 1997. The original project was run by the city of Novato through its senior center program, with the assistance of local APS and the Bank of Marin.<sup>118</sup> In 1999, under the leadership of the Novato Community Bank, the program

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<sup>115</sup> Kaye and Schneider, *supra* note 108, at 18.

<sup>116</sup> *Id.*

<sup>117</sup> The ongoing effort to amend the California APS law is discussed in the next section of this report.

<sup>118</sup> Telephone conversation with Jenefer Duane, Executive Director of CCPPFA, dated April 19, 2002.

expanded by inviting other Marin County banks to participate.<sup>119</sup> In 2000 the program became an independent nonprofit organization. It has since conducted training for over 500 bank employees at 25 banks throughout California.<sup>120</sup> Most banks have been very enthusiastic about the program: one bank official told CCPPFA Executive Director Jenefer Duane that he didn't care if his bank was sued,<sup>121</sup> and as Duane notes, bank employees typically share his strong motivation to help customers:

Bank staff are (sic) people with mothers, fathers, aunts, uncles and grandmothers.... Many say they don't care what corp[orate] headquarters say, they don't ask permission, they just do the right thing and sleep well at night.... Many I have spoken to have personal experience with financial abuse in their own family.<sup>122</sup>

CCPPFA's latest project is the development of a training video to be used statewide. Several California banks will fund this video, and an ad hoc legal committee of the California Bankers Association will review the script, which discusses liability issues under California law.<sup>123</sup> As in the Massachusetts program, a significant incentive for participation in CCPPFA training programs, including use of the video, was the availability of Community Reinvestment Act credit.<sup>124</sup>

Other counties in California have developed locally based programs to address financial abuse. For example, in San Diego, Deputy District Attorney Paul Greenwood conducted extensive training for local community banks.<sup>125</sup> In Los Angeles County, the Fiduciary Abuse Specialist Team (FAST) "works closely with bank personnel to gather

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Telephone interview with Jenefer Duane, dated January 26, 2002.

<sup>122</sup> E-mail message from Jenefer Duane dated April 11, 2002.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* and telephone conversation with Jenefer Duane dated January 26, 2002.

<sup>125</sup> E-mail message from Paul Greenwood, Deputy District Attorney and Head of the Elder Abuse Prosecution Unit, San Diego District Attorney's Office, dated January 29, 2002

information and secure assets of older persons at risk of exploitation.”<sup>126</sup> In San Luis Obispo County, Kristy Askling, the Elder and Dependent Adult Advocate in the District Attorney’s Office, prepared “Recognizing and Reporting Elder Financial Abuse,” a curriculum for training bank employees that was also used in Santa Barbara County and Ventura County.<sup>127</sup> The District Attorney’s Office for the County of Lake developed a similar financial abuse training curriculum for banks.<sup>128</sup>

Another example of a very successful locally initiated program is that developed by Protective Services for Older Adults of Erie County, New York.<sup>129</sup> The centerpiece of the project is a 29-minute videotape used in training bank personnel to identify abuse. Entitled “Banks: The Front Line Defense Against Financial Exploitation,” the video includes scenes in which bank employees intervene to prevent or report suspicious transactions. James E. Mayer, Director of Protective Services for Older Adults in Erie County, describes the program’s success in uncovering financial abuse:

Before the [program], banks only accounted for making two or three referrals to our APS program each quarter of the year. Now we receive between 14 and 18 referrals per quarter. The best thing is that the referrals are now made before the senior’s money is gone. If banks are approached in the right manner they are more than cooperative in helping APS uncover elder abuse.<sup>130</sup>

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<sup>126</sup> “Financial Exploitation and Consumer Fraud: -- Workshop 3: Innovative Approaches to Financial Exploitation,” in Our Aging Population, *supra* note 108, at 21.

<sup>127</sup> E-mail message from Kristy Askling dated November 26, 2001.

<sup>128</sup> Letter from Sam Laird, Lake County District Attorney’s Office, dated January 30, 2002.

<sup>129</sup> The Elder Abuse Committee of the Erie County Multi-Disciplinary Coordinating Council received the 2001 Elder Abuse Prevention Award from the National Committee to Preserve Social Security and Medicare. New York is one of the six states that do not have a mandatory reporting law. The New York APS statute contains an immunity provision that covers “any person” who makes a report of suspected abuse “in good faith.” NY SOC SERV §473-b.

<sup>130</sup> E-mail message from James E. Mayer, Director of Protective Services for Older Adults, Erie County Department of Senior Services, dated January 25, 2002.

Finally, the state of Washington has encouraged banks to report both financial abuse *and* other problems of the elderly using a rather different approach.<sup>131</sup> Developed in 1978 by the late Raymond Raschko of the Spokane Mental Health Center, the Gatekeeper Model has been used to identify “at risk” older adults in need of a variety of services, not just victims of abuse. Under the model, “gatekeepers” who come in regular contact with the elderly, especially the isolated elderly, such as meter readers, postal carriers and bank employees, are trained to recognize and report the “signs and symptoms that indicate an older adult is at risk of not being able to remain in the community.”<sup>132</sup> Although the program originated in Spokane, it now operates throughout the state of Washington and in other jurisdictions as well.

With regard to the positive role played by banks, one of the researchers involved in the Gatekeeper Project comments:

Bank tellers are great! They learn about signs and symptoms that might indicate the older person needs help, including those who are victims of elder abuse and neglect or “self-neglect.” They are also great at referring older adults who have dementia and may be at risk of future elder abuse/exploitation.<sup>133</sup>

### **C. Attempts to Amend APS Statutes to Make Banks Mandatory Reporters**

In both Massachusetts and Oregon, where the state bankers associations strongly opposed mandatory reporting, a decision was reached to compromise on the issue and instead enact legislation that would reassure bankers regarding potential liability. In most other states that have recently attempted to enact legislation identifying banks as

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<sup>131</sup> Banks are voluntary reporters in Washington. See WA ST 74.34.035(b) and 74.34.020(10), defining “permissive reporter” to include “any...employee of a financial institution.”

<sup>132</sup> Evelyn R. Florio, Todd H. Rockwood, Michael S. Hendryx, Julie E. Jensen, Raymond Raschko, and Dennis G. Dyck, “A Model Gatekeeper Program to Find the At-Risk Elderly,” 5 Journal of Case Management 106, 107 (1996).

<sup>133</sup> E-mail message from Julie E. Jensen, PhD, Research Associate, Washington Institute for Mental Illness Research and Training, dated January 25, 2002.

mandatory reporters, the results have been similar. This is so even though banks are likely to have more protection from liability if they make reports under a mandatory reporting law than under a voluntary reporting law.

In the last five years, only one state has amended its APS statute to list banks as mandatory reporters. The Mississippi APS statute, which requires “any person” to report suspected abuse, was amended in 2001 by adding a list of occupations that are mandated to report, including “any officer or employee of a bank, savings and loan, credit union or any other financial service provider.”<sup>134</sup> It is significant that banks were already subject to a reporting obligation under the “any person” clause of the statute and that this amendment therefore had the effect only of making that legal obligation more explicit.

The experience in Maine is more typical. Several years ago a study group on crimes against the elderly recommended that the reporting provision of the APS law, which listed a variety of medical and law enforcement professionals as mandatory reporters, be amended by adding bank employees. After the two state bankers associations objected, a compromise was negotiated under which the banks agreed to a training program, the Maine Reporting Project for Financial Institutions, which followed the Massachusetts model.<sup>135</sup> An important element of this training was assurance by the Maine Bureau of

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<sup>134</sup> MS ST §43-47-7(1)(a)(vii).

<sup>135</sup> Telephone conversation with Elizabeth Gattine, Legal Services Developer, Bureau of Elder and Adult Services, Maine Department of Human Services, dated March 12, 2002. The Maine Credit Union League did not oppose the legislation, and several reports from the elder abuse e-mail list members indicate that in general, credit unions are more willing than banks to file reports and cooperate with APS investigations. For example, Marianne Bltisch, the Executive Vice President of the Point Mugu Federal Credit Union in California, supports mandatory reporting legislation for financial institutions:

We are much in favor of this type [of mandatory reporting] legislation. We currently have a training program in place for our staff to notify us of suspected abuse of a dependent adult. We do, however, have to be very careful because we are not mandated reporters.... This type of legislation would in fact protect us from liability if we were wrong in our suspicion

Banking that disclosure of information regarding suspected abuse did not violate the state's financial privacy law.<sup>136</sup>

In 2001, several states unsuccessfully attempted to enact legislation listing banks as mandatory reporters. In Virginia, a proposed amendment to the state's APS law was strongly opposed by small rural banks, which feared that if they reported suspected financial abuse, relatives and friends of the suspected abuser would learn of the report and close their bank accounts in retaliation.<sup>137</sup> Legislators agreed to a compromise with

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but referred in the interest of the potential victim. We do understand that many financial institutions do not view it this way but as just another legal requirement, responsibility and expense they don't believe is their domain. We disagree.

E-mail message from Marianne Blitsch dated January 25, 2002.

<sup>136</sup> Telephone conversation with Elizabeth Gattine dated February 15, 2002.

<sup>137</sup> Telephone conversation with William Lukhard, former member of the AARP's Virginia state legislative committee, dated April 8, 2002. The opposition from smaller banks in Virginia is unusual – APS officials and bank reporting programs in several states reported that smaller community banks are generally more cooperative than state-wide or national banks. Typical of such comments is the following statement by Julie Jensen, a researcher who has studied the Gatekeeper Project in Washington State (see discussion in Section III (B), *supra*):

The smaller banks have been more receptive to the training because they already have people in mind but don't know what to do about them or the situation and it seems like the RIGHT thing to do. Some of the larger banks have cooperated and some haven't – especially the really big ones like Bank of America – no way. It seems more and more difficult to get these huge corporate banks' involvement --- you never seem to find the right person to talk to – someone at the corporate office in another state, for example.

E-mail message from Julie E. Jensen, PhD, Research Associate, Washington Institute for Mental Illness Research and Training, dated January 25, 2002 (emphasis in original). Similarly, Paul Greenwood, Deputy District Attorney and Head of the Elder Abuse Prosecution Unit, San Diego District Attorney's Office, comments that in his experience, "local community banks are much more receptive to such outreach and training and realize that it makes good customer sense." E-mail message dated January 29, 2002.

the banking industry under which “financial institutions” are now specifically identified as voluntary reporters.<sup>138</sup>

In New Hampshire, which mandates “any person” to report suspected abuse but also lists specific occupations that are required to file reports, the banking industry defeated an effort to add “financial officers” to this list during the 2001 legislative session. Although the state bankers association initially did not oppose the bill, which was intended simply to clarify the legal obligation of banks under the existing universal reporting statute, the association subsequently changed its position, arguing primarily that federal financial privacy laws do not permit such reporting.<sup>139</sup>

Finally, California has been the site of what is perhaps the most intense legislative battle to date over mandatory reporting by banks. In the past few years, both a bill intended to encourage voluntary reporting and a mandatory reporting bill have been introduced in the California legislature. The first bill, Assembly Bill 2253,<sup>140</sup> was introduced in 2000 and was intended to encourage voluntary reporting. As originally drafted, the bill would have amended the California APS law by: (1) clarifying that notwithstanding other provisions of California law, an officer, employee or agent of a bank may disclose customer information and the facts that form the basis of suspicion

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<sup>138</sup> *Id.* See also discussion at note 26, *supra*. William Lukhard reports that since passage of the law, voluntary reporting by banks has increased and some banks are providing training to their employees. Telephone conversation with William Lukhard dated August 30, 2002. The texts of both the bill as originally proposed and the bill as amended and approved can be found at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=011&typ=bil&val=hb1581>.

<sup>139</sup> E-mail message from Carol Stamatakis, Legal Coordinator, Division of Elderly and Adult Services, New Hampshire Department of Health and Human Services, dated November 26, 2001.

<sup>140</sup> The text of the bill, including its various amended versions, along with committee reports in the Assembly and the Senate, are available at <http://www.leginfo.ca.gov/>.



when reporting suspected financial abuse;<sup>141</sup> and (2) added an immunity provision that provided an absolute privilege for disclosures in connection with reporting by banks.<sup>142</sup> The final version of the bill passed by the California Senate redrafted the immunity provision so that it applied only to “reasonable and good faith” disclosures.<sup>143</sup> This version also included a provision requiring representatives from banks to organize, develop and implement a model training program.<sup>144</sup>

The Senate’s version of the bill provoked strong opposition by the banking industry. The senior counsel for Wells Fargo issued a memorandum to California legislators contending that the bill as amended would give banks less protection than under existing law and would therefore actually *discourage* participation in voluntary reporting by banks:

As originally introduced, Assembly Bill 2253 displayed laudatory intentions and goals: fostering the protection of elders and dependent adults from the crime of financial abuse by encouraging financial institutions to report suspected financial abuse without running the liability gauntlet....

...Financial institutions currently enjoy protection under the law in reporting suspected crimes, including suspected financial abuse: that protection would be compromised if AB 2253 were enacted....

...[T]he unanticipated result of [the bill as amended] is that it will have a chilling effect on such reporting because it converts the current “absolute” privilege financial institutions enjoy under §47(b)(3) of the Civil Code in reporting all crimes, including suspected financial abuse, to a qualified privilege when suspected financial abuse is reported.<sup>145</sup>

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<sup>141</sup> Proposed section 15631.5(a), available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_2251-2300/ab\\_2253\\_bill\\_20000224\\_introduced.htm](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2251-2300/ab_2253_bill_20000224_introduced.htm).

<sup>142</sup> Proposed section 15631.5(b), available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_2251-2300/ab\\_2253\\_bill\\_20000224\\_introduced.htm](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2251-2300/ab_2253_bill_20000224_introduced.htm).

<sup>143</sup> Proposed section 15631.5(b), available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_2251-2300/ab\\_2253\\_bill\\_20000825\\_amended\\_sen.htm](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2251-2300/ab_2253_bill_20000825_amended_sen.htm).

<sup>144</sup> Proposed section 15631.5(d), available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_2251-2300/ab\\_2253\\_bill\\_20000825\\_amended\\_sen.htm](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2251-2300/ab_2253_bill_20000825_amended_sen.htm).

<sup>145</sup> Memo entitled “Wells Fargo Urges the California Legislature to Vote ‘No’ on AB 2253” from Ted Teruo Kitada, Senior Counsel, Wells Fargo Law Department, dated August 28, 2000.

These arguments were effective and the bill was withdrawn.<sup>146</sup>

In 2001, a second bill, Assembly Bill 109, was introduced. As originally written, this bill would have added “any officer, trustee, or employee of a bank, savings and loan association, or bank [sic]” to the list of mandated reporters in Section 15630(a) of the Welfare and Institutions Code<sup>147</sup> and it would have provided immunity for “good faith disclosure of information and facts.”<sup>148</sup> At a subsequent committee hearing on the bill, the California Bankers Association argued that the bill exposed financial institutions to unreasonable risks of liability:

A chief concern raised by the banking industry is the conflict between federal and state laws governing the right to privacy and the requirement to report. “The immunity from liability under this proposed California law will not protect the mistaken bank employee from a Federal claim for privacy violations.” The California Bankers Association states that as drafted, the measure creates unacceptable risks to financial institutions that include the risk of incurring litigation expenses to defend against civil claims of privacy invasion if a financial institution follows the proposed statute *and* a litigation risk if the financial institution fails to prevent elder financial abuse.<sup>149</sup>

As a result of this opposition, the bill was radically revised: “Rather than making bank employees mandated reporters and based on other concerns raised by both the financial institutions and local government, AB 109 was amended simply to establish the pilot programs in [three] named counties so that a training program

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<sup>146</sup> Telephone interview with Jenefer Duane, Executive Director, California Community Partnership for the Prevention of Financial Abuse, dated January 26, 2002.

<sup>147</sup> Proposed amendments to Section 15630(a) are available at [http://www.leginfo.ca.gov/pub/bill/asm/ab\\_0101-0150/ab\\_109\\_bill\\_20010118\\_introduced.html](http://www.leginfo.ca.gov/pub/bill/asm/ab_0101-0150/ab_109_bill_20010118_introduced.html).

<sup>148</sup> Proposed new subsection (i) to Section 15630 is available at [http://www.leginfo.ca.gov/pub/bill/asm/ab\\_0101-0150/ab\\_109\\_bill\\_20010118\\_introduced.html](http://www.leginfo.ca.gov/pub/bill/asm/ab_0101-0150/ab_109_bill_20010118_introduced.html).

<sup>149</sup> Report on April 17, 2001, hearing of the Assembly Committee on Aging and Long Term Care at 3-4, available at [http://www.leginfo.ca.gov/pub/bill/asm/ab\\_0101-0150/ab\\_109\\_cfa\\_20010416\\_142832\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/bill/asm/ab_0101-0150/ab_109_cfa_20010416_142832_asm_comm.html).

may be developed for statewide implementation if the program is shown to improve identification and reporting of such incidents.”<sup>150</sup>

Although additional proposals for legislation are still being considered in California,<sup>151</sup> the success and growth of locally-based bank reporting programs suggests that this is where future efforts are likely to be focused.

#### **IV. CONCLUSIONS**

The extensive and varied experience in the states, both with legislative changes intended to promote bank reporting of financial abuse and with the implementation of local and statewide bank reporting projects, supports the following conclusions:

1. Bank reporting programs in both mandatory reporting states and in voluntary reporting states have been very effective in increasing reports of financial abuse and preventing additional losses to the victims.<sup>152</sup> Although many states

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<sup>150</sup> Report of the Senate Judiciary Committee at 4-5, available at [http://www.leginfo.ca.gov/pub/bill/asm/ab\\_0101-0150/ab\\_109\\_cfa\\_20010705\\_095726\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/bill/asm/ab_0101-0150/ab_109_cfa_20010705_095726_sen_comm.html).

<sup>151</sup> E-mail message from Jenefer Duane, Executive Director of the California Community Partnership for the Prevention of Financial Abuse, dated April 12, 2002.

<sup>152</sup> At least in the state of Massachusetts, an additional benefit of the bank reporting project has been increased cooperation by banks in investigations of reports of financial abuse from sources other than financial institutions. According to Gregory Giuliano, Director of Elder Protective Services (EPS) for the state of Massachusetts, before the state’s bank reporting project, banks viewed EPS’s requests for financial records and other information with suspicion and were often uncooperative. However, banks now understand the investigation process, and EPS is able to get records much more easily. Giuliano believes that “this may be the most important result of the project.” Telephone interview with Gregory Giuliano dated April 12, 2002.

have successfully initiated statewide projects, in other states locally initiated projects have been more successful.<sup>153</sup>

2. Enactment of a mandatory reporting law alone does not seem to result in a significant increase in reporting by banks. However, in states that already have mandatory reporting laws in place, the presence of such a law can be helpful in getting the banking industry to support a reporting project. On the other hand, states that have tried to add mandatory reporting laws before initiating a bank reporting project have usually encountered considerable resistance from the industry.
3. In voluntary reporting states, the absence of mandatory reporting has not been a major obstacle to developing a successful bank reporting project. Although most state bank associations and the banking industry as a whole have opposed mandatory reporting, state bank associations and individual banks have usually been willing, and often enthusiastic, about participating in voluntary bank reporting projects. This suggests that efforts are better directed at securing the cooperation of the banking industry than toward attempting to enact a mandatory reporting law.
4. There are no major legal obstacles to participation in a bank reporting project:
  - a. Banks that participate in reporting have no reason to fear liability under federal law: the Right to Financial Privacy Act applies only to records and information sought by the federal government, and Section 502(e) the

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<sup>153</sup> It may be more than coincidental that the local projects described in this report are in California and New York, two very large states where initiating a state-wide project would likely present a greater challenge than in smaller states such as Oregon and Massachusetts.

Gramm-Leach-Bliley Act contains several exemptions that would cover both mandatory and voluntary reporting.

- b. In some states, minor amendments to either the state bank privacy law and/or the APS statute may be necessary to provide banks with maximum protection from liability. Whether there is potential liability either to the state or to customers for violation of state privacy rules will depend both on the specific privacy provisions in that state and on the scope of the immunity provision in the state's APS statute.