

**FINANCIAL INSTITUTION ELDER AND DEPENDENT ADULT
FINANCIAL ABUSE REPORTING REQUIREMENT**
For Wells Fargo Bank, Palo Alto, CA
November 28, 2006

Dave Tate, CPA, Esq.

Contents:

1. Overview. Pages 1-2.
2. Primary applicable statutes. Pages 3-5.
3. Indicators of financial abuse. Pages 6-8.
4. What do you do about it? Page 9.
5. Hypothetical situations. Pages 10-13.
6. Attachment: SOC 341 (revised 6/04).

OVERVIEW

After a long wait, beginning January 2007, SB 1018, The Financial Abuse Reporting Act, becomes effective, making employees of banks, savings associations and credit unions mandatory reporters of suspected financial abuse. See Cal. Welfare & Institutions Code §15630.1(d)-(i). Financial institutions should have appropriate training and report processes in place.

The Act basically provides that an employee or officer of a financial institution is a mandated reporter (first immediately by phone, followed by a written report) of elder and dependent adult financial abuse if that reporting person has direct contact with the elder or dependent adult, or that reporting person reviews or approves the elder or dependent adult's financial documents, records, or transactions, in connection with providing financial services with respect to the elder or dependent adult, and that employee or officer, within the scope of his or her employment or professional practice, has observed or has knowledge of an incident, that is directly related to the transaction or matter that is within the scope of employment or professional practice, that reasonably appears to be financial abuse; or, in the case of an employee or officer who does not have direct contact with the elder or dependent adult, the employee or officer reasonably suspects financial abuse, based solely upon the information before him or her at the time of reviewing or approving the document, record, or transaction. An elder adult is age 65 or older. A dependent adult is an adult less than age 65 who is nevertheless dependent—within the scope of this article I will not elaborate upon the definition of the term "dependent adult."

The Act provides that suspected financial abuse occurs when a person who is a mandated reporter observes or has knowledge of behavior or unusual circumstances or transactions, or a pattern of behavior or unusual circumstances or transactions, that would lead an individual with like training or experience, based on the same facts, to form a reasonable belief that an elder or dependent adult is the victim of financial abuse as defined in Cal. Welfare & Institutions Code §15610.30. The Act further provides that

an allegation by the elder or dependent adult, or any other person, that financial abuse has occurred, is not sufficient by itself to trigger the reporting requirement if both of the following conditions are met: (1) the mandated reporter (who, the Act provides, has no duty of investigation) is aware of no other corroborating or independent evidence of the alleged financial abuse, and (2) in the exercise of his or her professional judgment, the mandated reporter reasonably believes that financial abuse of an elder or dependent adult did not occur. Thus, if someone complains of or alleges financial abuse, an issue might arise as to whether evidence might exist that would or should lead the mandated reporter to reasonably believe that the elder or dependent adult is the victim of financial abuse. The wording of the statute arguably puts the burden on the mandated reporter if he or she concludes that abuse has not occurred.

Pursuant to Cal. Welfare & Institutions Code §15610.30, the financial abuse of an elder or dependent adult occurs when a person or entity assists in or takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult, to a wrongful use, or with intent to defraud, or both, or in bad faith. A person or entity acts in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative. A person or entity should have known of a right if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right to the property.

The Act further provides that county adult protective services agencies (APS) shall provide instructional materials regarding abuse and neglect of an elder or dependent adult and the obligations of mandated reporters, at least including an explanation of abuse and neglect of an elder or dependent adult, and information about how to recognize potential abuse and neglect.

Based on documents, the way that people are acting or other peculiar occurrences, an employee or officer of a financial institution could become aware of possible elder or dependent adult financial abuse in any number of situations involving accounts, investments, or other asset interests. The actions, or inactions, of the mandated reporter will be judged by hindsight. As an initial step, issues will arise, and processes should be implemented to guide employees and officers in the recognition and reporting of suspected financial elder abuse. Perhaps a more difficult question might be what to do about a proposed transaction if abuse is suspected? For example, in a case where the financial institution arguably has a reporting requirement, does the financial institution refuse or prohibit the proposed transaction, if possible, and, if so, for how long? The Act generally provides that an employee will not face personal liability exposure for reporting abuse. However, a fine can be levied for failing to report suspected abuse. Although the Act provides that it does not expand or modify any civil liability or remedy that exists, it might be anticipated that civil liability claims might be alleged against a financial institution for allegedly failing to report financial abuse that arguably should have been reported, thereby wrongfully allowing the abuse to occur, even if unintentional.

* * * * *

PRIMARY APPLICABLE STATUTES

California Welfare & Institutions Code §15630.1

15630.1. (a) As used in this section, "mandated reporter of suspected financial abuse of an elder or dependent adult" means all officers and employees of financial institutions.

(b) As used in this section, the term "financial institution" means any of the following:

(1) A depository institution, as defined in Section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. Sec. 1813(c)).

(2) An institution-affiliated party, as defined in Section 3(u) of the Federal Deposit Insurance Act (12 U.S.C. Sec. 1813(u)).

(3) A federal credit union or state credit union, as defined in Section 101 of the Federal Credit Union Act (12 U.S.C. Sec. 1752), including, but not limited to, an institution-affiliated party of a credit union, as defined in Section 206(r) of the Federal Credit Union Act (12 U.S.C. Sec. 1786(r)).

(c) As used in this section, "financial abuse" has the same meaning as in Section 15610.30.

(d) (1) Any mandated reporter of suspected financial abuse of an elder or dependent adult who has direct contact with the elder or dependent adult or who reviews or approves the elder or dependent adult's financial documents, records, or transactions, in connection with providing financial services with respect to an elder or dependent adult, and who, within the scope of his or her employment or professional practice, has observed or has knowledge of an incident, that is directly related to the transaction or matter that is within that scope of employment or professional practice, that reasonably appears to be financial abuse, or who reasonably suspects that abuse, based solely on the information before him or her at the time of reviewing or approving the document, record, or transaction in the case of mandated reporters who do not have direct contact with the elder or dependent adult, shall report the known or suspected instance of financial abuse by telephone immediately, or as soon as practicably possible, and by written report sent within two working days to the local adult protective services agency or the local law enforcement agency.

(2) When two or more mandated reporters jointly have knowledge or reasonably suspect that financial abuse of an elder or a dependent adult for which the report is mandated has occurred, and when there is an agreement among them, the telephone report may be made by a member of the reporting team who is selected by mutual agreement. A single report may be made and signed by the selected member of the reporting team. Any member of the team who has knowledge that the member designated to report has failed to do so shall thereafter make that report.

(3) If the mandated reporter knows that the elder or dependent adult resides in a long-term care facility, as defined in Section 15610.47, the report shall be made to the local ombudsman or local law enforcement agency.

(e) An allegation by the elder or dependent adult, or any other person, that financial abuse has occurred is not sufficient to trigger the reporting requirement under this section if both of the following conditions are met:

(1) The mandated reporter of suspected financial abuse of an elder or dependent adult is aware of no other corroborating or independent evidence of the alleged financial abuse of an elder or dependent adult. The mandated reporter of suspected financial abuse of an elder or dependent adult is not required to investigate any accusations.

(2) In the exercise of his or her professional judgment, the mandated reporter of suspected financial abuse of an elder or dependent adult reasonably believes that financial abuse of an elder or dependent adult did not occur.

(f) Failure to report financial abuse under this section shall be subject to a civil penalty not exceeding one thousand dollars (\$1,000) or if the failure to report is willful, a civil penalty not exceeding five thousand dollars (\$5,000), which shall be paid by the financial institution that is the employer of the mandated reporter to the party bringing the action. Subdivision (h) of Section 15630 shall not apply to violations of this section.

(g) (1) The civil penalty provided for in subdivision (f) shall be recovered only in a civil action brought against the financial institution by the Attorney General, district attorney, or county counsel. No action shall be brought under this section by any person other than the Attorney General, district attorney, or county counsel. Multiple actions for the civil penalty may not be brought for the same violation.

(2) Nothing in the Financial Elder Abuse Reporting Act of 2005 shall be construed to limit, expand, or otherwise modify any civil liability or remedy that may exist under this or any other law.

(h) As used in this section, "suspected financial abuse of an elder or dependent adult" occurs when a person who is required to report under subdivision (a) observes or has knowledge of behavior or unusual circumstances or transactions, or a pattern of behavior or unusual circumstances or transactions, that would lead an individual with like training or experience, based on the same facts, to form a reasonable belief that an elder or dependent adult is the victim of financial abuse as defined in Section 15610.30.

(i) Reports of suspected financial abuse of an elder or dependent adult made by an employee or officer of a financial institution pursuant to this section are covered under subdivision (b) of Section 47 of the Civil Code.

(j) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

California Welfare & Institutions Code §15610.30

15610.30. (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.

(1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.

(2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's

authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).

(c) For purposes of this section, "representative" means a person or entity that is either of the following:

- (1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.
- (2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

California Welfare & Institutions Code §15610.27

15610.27. "Elder" means any person residing in this state, 65 years of age or older.

California Welfare & Institutions Code §15610.23

15610.23. (a) "Dependent adult" means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

* * * * *

INDICATORS OF FINANCIAL ABUSE

The possible indicators of elder and dependent adult financial abuse are numerous. It is not possible to provide an exhaustive list of financial abuse indicators. More important, whether actual abuse is occurring, or whether you should suspect that abuse is occurring, really depends upon the facts and circumstances at that time, and how you interpret those facts and circumstances. While one mandated reporter might suspect abuse in a particular situation, another mandated reporter might view the situation differently. Additionally, a legitimate explanation for the occurrence might exist, or it is possible that the elder or dependent adult simply is making what might be considered to be an unwise decision, but is not necessarily being abused. Thus, from a legal perspective lists purporting to identify financial abuse can be problematic. The list below is intended to be for helpful discussion purposes only, and is not an indication by itself that abuse has occurred, or even that abuse should necessarily be suspected. You should follow your financial institution's guidelines and policies to evaluate your particular situation, and how you should react in that situation.

There are many web pages that contain lists of possible elder and dependent adult financial abuse indicators. The materials published by the California Bankers Association might be of particular relevance. www.calbankers.com/content/governmentandlegalaffairs_elderabusetrainingmaterials.asp. If you are to be held to a particular standard of care as a financial institution, materials used by the California Bankers Association might be viewed as relevant to evidence that standard.

Basically, possible elder or dependent adult financial abuse typically becomes apparent from a financial situation that appears to be unnatural or out of character for that specific customer, or for the typical similar person in society. So, what are some of the indicators that you might be looking for?

Increased or unusual banking activity.

An unusually, or out of the ordinary, large transaction.

The purchase of an unusual item or service.

Money being paid to or for the benefit of someone out of the ordinary. The person could be a stranger to the elder, a caregiver, a housekeeper, a neighbor, a friend, a gardener, or even a family member.

A change in account title or authority.

Someone improperly using his or her authority over the elder's account. Possible a trustee, attorney in fact, co-account holder, or other person.

Unusual credit card transactions or balances.

A change in deed or real property title or ownership.

Unusual ATM activity.

Telemarketing and mail fraud; fake prizes; fake accidents; unnecessary purchases or home improvements; getting a windfall upon the payment of money or by providing information.

Risky, unnecessary or unusual investments, insurance, warranties or annuities.

Unusual people accompanying the elder; new or unusual acquaintances; new “friends,” boyfriends or girlfriends.

The elder not speaking for himself, or herself; or some other person directing the elder, the situation or the proposed transaction..

The elder acting in a secretive or evasive manner; or perhaps in an overly defensive or hostile manner in response to questions or even in response to typical conversations.

The elder being forgetful, disorganized, disoriented, confused, or unaware of his or her surroundings or common events.

The elder acting paranoid or fearful about the bank, or about his or her accounts.

A change in the appearance, actions or demeanor of the elder; social withdrawal; unkempt; or health problems, including what is referred to as self abuse.

The elder being concerned about who will help or assist him or her, or take care of him or her.

Expressions of concern, pressure, worry or fear.

Excessive payment for a product or subscription, or for services; or payment for an unnecessary product or subscription, or for services.

Excessive or unnecessary borrowing by the elder, or someone on his or her behalf.

The elder wanting to avoid conversation.

Unusual or unnatural Will, Trust, Power of Attorney, Deed or mortgage terms or documents; or unusual or unnatural changes in the terms or conditions of those documents; or the unusual or unnatural selection or nomination of the person to exercise authority in or over those documents.

Documents, checks, payments, etc., missing, misplaced or stolen.

The elder being evicted, or loss of utilities.

The elder becoming isolated from others, either because of other people causing that isolation, or because of the elder's lack of interest.

Forged, missing, or strange looking signatures.

Changes in financial institution.

Changes in account, IRA, or insurance beneficiaries.

Unpaid bills.

The sudden appearance, assistance or interest of strangers, friends or relatives.

New people helping the elder around the house, or with the yard; home improvements.

Associating with much younger people.

Reluctance to discuss financial matters.

The elder's increasing tiredness or depression.

The sudden or unexplained transfer of assets.

* * * * *

WHAT DO YOU DO ABOUT IT?

The number one rule is: first, follow your financial institution's guidelines and policies.

The statutes require you to report the "known or suspected instance of financial abuse by telephone immediately, or as soon as practicably possible, and by written report sent within two working days to the local adult protective services agency or the local law enforcement agency."

Your financial institution's guidelines and policies may require that you first report the occurrence to a supervisor, who will assist you with the immediate situation, and possibly also assist you with the manner and wording of the reporting. For written report purposes, you might want to consider using State of California, Health and Human Services Agency, Report of Suspected Dependent Adult/Elder Abuse (current version SOC 341 (revised 6/04)). I have attached a copy of SOC 341 for your consideration. How you handle other issues that might arise depends upon the facts and circumstances of your situation. With respect to the immediate situation, if a transaction is in progress, a decision might need to be made whether to go forward with completing that transaction, and also whether to temporarily freeze that elder's accounts for protective purposes. Looking beyond the immediate situation and the statutory reporting requirement, typically a person who is susceptible to financial abuse may need assistance or protective action with respect to future financial matters—that assistance or protective action is not the responsibility of the financial institution, unless, perhaps, the financial institution decides to become involved in those matters, or arguably unintentionally becomes more involved by other helpful and well-intended, good Samaritan actions. Long-term assistance or protective action might include conservatorship proceedings, actions to recover assets, restraining orders, changes in trustee, changes in attorney in fact, changes in account title, holder or authority, and other actions.

* * * * *

HYPOTHETICAL SITUATIONS

1. Mrs. Wilson is a relatively active 66 year old woman. She lives in Woodside by herself. She has a few friends, but they are not really close friends. She spends most of the time by herself, but she is friendly, and is a happy person. Her husband died 8 years ago. Her three children live in Southern California. Her children talk to her by phone about every four weeks, and see her twice a year on average. Mrs. Wilson has stock and bond investments totaling \$550,000, about \$75,000 in money market accounts, \$6,000 in her checking account, and annual income of \$80,000. Mrs. Wilson loves Corvettes. The car that she drives has always been a Corvette for the past 40 years. She still drives, but just around town. The Corvette that she now drives is looking old and in need of repair.

Mrs. Wilson comes into the bank by herself and wants to make a \$15,000 withdrawal, and to get a car loan for \$25,000. She says that she has been out looking for a new used Corvette, and says that she has found two that she likes that are just perfect. She is going to buy both of them, one for cash and the other with the loan. You ask her about the cars.

“That sounds great Mrs. Wilson, what are the Corvette’s like?”

“Well, they are both really great cars, and in good condition. One is a fire engine red, with a six cylinder, and an automatic transmission. The other one, that I am getting a loan for, is black and it has a really big, fast V-8 engine, with a stick shift.”

“Why do you want both cars?”

“Well, I’m not really getting two cars. I probably won’t drive the black one much—it might be too fast for me.”

Same scenario, except that Mrs. Wilson comes into the bank accompanied by a younger man, about age 35. His appearance is neat. His hair is medium length, and combed. He is wearing fashionable jeans and a collared polo shirt. He sits in a lounge chair and does not accompany Mrs. Wilson to your window. You seem to recall that you have seen her in the bank with the younger man on one or two prior occasions. In a conversational manner, you ask Mrs. Wilson about the person who accompanied her into the bank.

“I see that you came into the bank today with someone that I don’t know. Is that one of your relatives?”

“His name is John. He and his brother, Mark, are really nice. They have been helping me a lot around the yard. About six months ago I put an ad in the paper to get someone to help me with some house and yard repairs.”

2. Mrs. Peters is 82 years old, and she is in good health but she knows that she is getting older, and

she has concerns about how long she will live, and also that she have enough money to pay for her needs. Thus, Mrs. Peters always has been very cautious about money (basically a penny-pincher), and her transactions are almost always relatively small in amount. Mrs. Peters has an adult son and an adult daughter, both of whom she loves. The son and daughter also both appear to care very much for her. Although Mrs. Peters is concerned about money and financial resources, in fact she has over \$800,000 in investments, she owns her home, and she receives ample income from her investments and social security. Mrs. Peters comes into the bank, and requests a \$20,000 withdrawal in the form of a cashier's check, payable to her daughter. You comment that her daughter is lucky that Mrs. Peters cares so much for her.

"That is great Mrs. Peters. I am sure that money will really help your daughter. She is lucky to have you as a mom."

"Yes, but you know, my daughter really is helping to take care of me. I am just glad that I can help by paying some of her bills."

"Does your daughter live in the area?"

"Yes, she has moved in with me. It is hard on her, you know. She has a job selling women's clothing at the department store, and then she also helps me. I sure hope that she can keep helping and staying with me. I don't know what I would do. This is a lot of money, but it is well worth it if it will keep her helping me."

In passing, you comment that Mrs. Peters probably should speak to her tax preparer.

"You know, you also might want to think about talking to your tax preparer to see how you should report the payment."

"You think so? I don't think that I really need to do that. It doesn't have anything to do with him."

Same scenario, except that Mrs. Peters indicates that she is making a \$1,500 withdrawal for her caregiver as a special present, and that the caregiver has helped her for the past three years.

Same scenario except that the caregiver has helped her for 6 months.

Same scenario, except that Mrs. Peters is making a \$500 withdrawal for her gardener.

Same scenario, except that Mrs. Peters is helping a long-time neighbor friend who needs repairs to her/his car, and Mrs. Peters is withdrawing \$2,500 to help the neighbor.

Same scenario, except that the daughter accompanies Mrs. Peters to the bank and to your window. The daughter greets you but mostly remains silent, and Mrs. Peters handles the entire transaction.

Same scenario, except that the daughter initiates the communications, indicating that her mother would like to make a \$20,000 withdrawal.

“Good morning, my mother wants to make a \$20,000 withdrawal. Can you help her with that?”

“Okay, good morning Mrs. Peters. How are you today? That is a lot of money for you. Would you like the money in a cashiers check, and who do you want it payable to?”

The daughter responds, “The check should be made payable to me. My mother is helping me pay for some things.”

Same scenario, except that the daughter comes to the bank herself, without her mother, and wishes to make a withdrawal on behalf of her mother. The daughter also is named on the account as a joint tenant or account holder. The daughter has a financial power of attorney for the mother, and the daughter also is named as the mother’s Successor Trustee.

3. Mr. Johnson is 76 years old, and is in relatively good health, but tends to move about rather slowly. Mr. Johnson lives in an apartment building. He has one son, who lives in Colorado. Mr. Johnson’s wife passed away 15 years ago. Mr. Johnson has a few male friends, but doesn’t really have any hobbies or similar activities that he does with them. Mr. Johnson is financially secure. He appears to pay for most daily living needs in cash, but also does pay his bills by check. Mr. Johnson typically comes to the bank to make a \$200 withdrawal every two-weeks or so, presumably to pay for eating out, entertainment, and other activities. Mr. Johnson almost always makes his withdrawals on either a Monday or Friday. Over the past 6 months Mr. Johnson has gradually increased his withdrawals from the typical \$200, to \$350 or \$450. On a few occasions, Mr. Johnson also has started making smaller \$100 or \$150 withdrawals in the middle of the week. Mr. Johnson comes to your window to make a \$1,500 withdrawal. You are aware or notice that he last made a withdrawal five days ago in the amount of \$300.

You greet Mr. Johnson as you normally would.

“Good morning Mr. Johnson, it is good to see you again.”

During the course of the transaction you comment, “It looks like you are going to be buying something special.”

Mr. Johnson replies in a friendly, very brief manner, “No, not really.”

A few moments pass. Mr. Johnson volunteers, “I have a special friend who lives in my building. She has been helping me with some things for a while.”

Same scenario, except that Mr. Johnson is accompanied to the bank by a younger woman, appearing to be approximately 45 years old, who sits in the lounge and does not accompany Mr. Johnson

to his window. You ask Mr. Johnson if the woman sitting in the lounge is the friend to whom he was referring.

“Gee, that sounds great. I had noticed that you came into the bank with someone. Is that your special friend?”

Mr. Johnson replies, “Yes she is. She has been really helpful and nice to me. She helps me with my laundry, and sometimes she has helped clean my apartment. And, she has brought me some dinners too. Just the other night she even had dinner with me in my apartment.”

Same scenario, except that you also ask how Mr. Johnson’s son is doing. Mr. Johnson replies that his son is doing well, and that he still lives in Colorado. You ask if his son has been out to see him recently. Mr. Johnson replies that his son was last out to see him about 8 months ago, but that he talks to him by phone. You inquire whether Mr. Johnson’s son has met or knows about his female friend.

Mr. Johnson replies, “No, I haven’t yet had the opportunity to tell him about her, but I plan to do that soon.”

The female friend walks over to the window, greets you, gently takes hold of Mr. Johnson’s arm hand in hand, and in her playful female voice nudges him, “Come along, John, lets go have some fun looking for one of those new big flat panel TV’s, like you promised.”

* * * * *