Uniform Special Deposits Act

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

WITH PREFATORY NOTE AND COMMENTS

May 7, 2024

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Uniform Special Deposits Act

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Prefatory Note

The Uniform Law Commission has approved the Uniform Special Deposits Act. Comments that follow each of the sections of the statute are the official comments. They explain in detail the purpose and meaning of the various sections, and the policy considerations on which they are based. This Prefatory Note sets out important background about special deposits, including the reasons for enacting a Uniform Special Deposits Act and some of the overarching considerations affecting the drafting of the Act.

Introduction

The Uniform Special Deposits Act addresses deposits at a bank where the identity of the person entitled to payment is not determined until the occurrence of a contingency identified at the time that the deposit is created. An example of such an account is an escrow account holding funds that will be paid to one of two potential beneficiaries depending on the outcome of a contingency. Although such accounts are commonly used, the legal protections afforded them are uncertain. The fundamental purpose of the Uniform Special Deposits Act is to provide a vehicle that banks and their customers can elect to use providing greater legal certainty that the expectations of users will be respected.

Historically courts have attempted to fashion protections for such accounts through, among other measures, case law referring to special deposits, but the case law in this area is murky and in some ways anachronistic in the context of modern banking. The Uniform Special Deposits Act creates a vehicle that will provide certainty as to what protections will and will not apply to the accounts of those electing to use it. Because its application is elective, persons not electing to be covered by the Uniform Special Deposits Act will continue to be subject to existing law.

Description of the Transactions Covered by the Uniform Special Deposits Act

The Uniform Special Deposits Act addresses concerns that have arisen about "special deposits", concerns that may undermine the use of special deposits as a useful vehicle to hold funds that may be paid in the future to one or more persons depending on the resolution of one or more specified contingencies. The legal uncertainty arises as to the attributes that make a deposit "special", the rights of the parties interested in the special deposit, their respective creditors, and the bank holding the special deposit prior to the resolution of the contingency. These uncertainties are not capable of resolution in bank-customer agreements because the agreed terms cannot lawfully affect third parties who are not parties to such agreements. The Uniform Special Deposits Act addresses the concerns by reducing the legal uncertainties.

An important threshold question is "what makes a deposit special"? The question arises in a context where the law governing deposits generally is not uniform among the states. The Uniform Special Deposits Act does not change that condition; the statutory changes touch only a subcategory of general deposits (those which are considered to be "special") and are limited in

application such that they address exclusively the concerns about the identified legal uncertainties. The approach taken is a minimalist approach, meaning that the Uniform Special Deposits Act offers statutory language only when necessary to address concerns.

The subcategory of general deposits designated as "special" receives that designation in an account agreement between the bank and its customer, referred to as a "depositor" in the Act (and where the deposit involves at least one beneficiary that is not that depositor). The depositor is the bank's customer, either because the depositor is funding the special deposit or because the depositor is the party that established the special deposit (which might be funded by someone else). The Uniform Special Deposits Act requires more than a customer's designation of a special deposit, although that is one indispensable element. In addition, the special deposit must be denominated in money (language that is based on the Uniform Commercial Code's definition of money, as described below), must serve a permissible purpose specified in the account agreement, and must be subject to a contingency that has not yet been determined. Consequently, a general deposit becomes special under the Uniform Special Deposits Act if the deposit is so designated in an account agreement and if the deposit meets the objective elements set forth in sections of the Uniform Special Deposits Act.

The statutory requirement that the special deposit be denominated in a medium of exchange that is currently authorized or adopted by a domestic or foreign government is a key limitation on scope. The Uniform Special Deposits Act would not cover a bank's securities account for a customer, nor would it cover a safe-deposit account (which is a form of custody account) or a loan account. This requirement would also mean that in most cases, cryptocurrency accounts would not be covered. We are aware that at least one country, El Salvador, has adopted Bitcoin as a legally recognized national currency, so it follows that it would be possible for a special deposit account to be denominated in Bitcoin if the parties to the account agreement, including the bank, all agreed.

The Uniform Special Deposits Act also requires that the special deposit be for one or more specifically identified permissible purposes, and the special deposit must serve such permissible purpose from the time the account agreement is executed until the special deposit is terminated either under the account agreement or under Section 13 if the account agreement does not include a termination provision. This key requirement is designed to address possible unintended and adverse consequences of two of the remedial provisions of the Uniform Special Deposits Act. In protecting the special deposit from a premature creditor attack and from inappropriately being swept into the depositor's bankruptcy estate, these protective provisions of the Uniform Special Deposits Act could be abused. For example, if a depositor established a special deposit "with the actual intent to hinder, delay, or defraud a creditor" of the depositor, this purpose would not be permissible. *Cf*. Uniform Voidable Transactions Act, § 4(a)(1). There are also provisions in the Uniform Special Deposits Act designed to protect against the risk of abuse, including, but not limited to, the permissible purpose requirement. We also note that such an impermissible purpose might develop at a later point in the history of the special deposit; a purpose that is permissible at the outset may become impermissible as circumstances change. In such an event, the protections of the Act will be lost at the appropriate time, and any credits to the account after that time will not receive the Act's protections.

There are four specific concerns that have hindered the "special deposit" from performing what is widely seen as a legitimate aid to commerce and business. First, there exists uncertainty about what makes a deposit "special". The existing case law is not helpful in reducing uncertainty, and perhaps even contributes to it, because decisions reference bank practices that are no longer followed. The Act reduces this uncertainty by setting forth several elements for a "special deposit" and by requiring the parties to the account agreement to clearly state their intention to create a special deposit subject to the Act.

Second, there is uncertainty about the bank's debt that arises from holding a special deposit, and to whom and when that debt is due and owing. Is the debt to the depositor or is it to a third person that the Uniform Special Deposits Act calls a beneficiary? Is it due and owing when the deposit is funded or at a later point in time? These uncertainties render the special deposit vulnerable to an attack by creditors of either the depositor or a beneficiary, and this vulnerability has led many to avoid the use of special deposits. A deposit that is tied up in a dispute with a creditor cannot perform its intended purpose. The Uniform Special Deposits Act minimizes the vulnerability by making it clear that a special deposit is a debt owed to the beneficiary after determination of a stated contingency.

Third, in certain situations described further below, the special deposit might be seen inappropriately as an asset of the depositor, and vulnerable to being considered part of the bankruptcy estate in the event of the depositor's bankruptcy. This bankruptcy vulnerability, like the uncertainty about a creditor attack, is remedied by the Uniform Special Deposits Act because the depositor's pecuniary interest in the special deposit is only as a potential beneficiary. The statute makes clear that the special deposit is remote from a depositor's bankruptcy estate unless the depositor has a determined right to all or a part of the special deposit in its capacity as a beneficiary after the determination of a contingency. To be sure, when a special deposit terminates, the depositor may receive all or part of the balance back if the balance is not distributed to a beneficiary, but it will receive that rebate in the capacity of a beneficiary, with escheatment being the only alternative (an alternative that becomes much less likely as a result of the provision).

Finally, a special deposit can be vulnerable to the bank holding the special deposit, which might exercise a right of set off against the special deposit for a mature debt of the depositor or a beneficiary. This vulnerability has led many to eschew the use of a special deposit because of the legal uncertainty created by the prospect of a bank set off. The Uniform Special Deposits Act reduces this uncertainty.

Legitimate and Salutary Types of Special Deposits

The Uniform Special Deposits Act establishes a non-exhaustive "white list" of certain types of deposit accounts that might be appropriately designated as "special" and would perform a permissible purpose. The idea here is to minimize uncertainty about a particular category of special deposit and whether that category would be considered permissible.

The first listed special deposit is to "hold funds in escrow, including for a purchase and sale, lease, buyback, or other transaction". In the deliberative process leading the Uniform Law

Commission to authorize development of the Uniform Special Deposits Act, the Uniform Law Commission Study Committee learned of the rising popularity of escrow accounts at banking organizations. Parties doing purchase-and-sale transactions associated with many different asset classes, ranging from the conveyance of real estate to the sale of a business, often structure their transactions in two stages: there is the contract to sell and there is the closing of the sale. To provide the seller with assurance that a buyer will proceed in good faith from contract to closing, the contract of sale will often include a term providing for the payment of earnest money by the purchaser. This earnest money will be held by a trusted third party between contract and closing, and that trusted third party will often be a bank, especially when the amount of earnest money is material (and there are occasions when the special deposit can be measured in billions of dollars). Of course, one of the fundamental uncertainties about the deposit received by a bank acting to facilitate such a sale transaction is the uncertainty about the future disbursement of the deposited funds (for example, in the sale of the subsidiary, there may be significant "due diligence" about the financial statements of the subsidiary that might adversely affect the buyer's willingness to proceed). When the parties get to closing, will the special deposit be paid to the seller (yes, if the transaction closes) or will the special deposit be returned to the putative buyer (if the transaction does not close)? It is the uncertainty about the bank's ultimate "due to" obligation that causes some of the concerns identified above. There is no doubt, however, that the special deposit is serving a permissible purpose, namely, to provide assurance that the putative purchaser is serious and has the financial capability to proceed in good faith from the first step to the second step.

Consider also another white-listed special deposit – the escrow account with respect to a landlord-tenant relationship. Envision a large commercial building in a major city, where there might be 150 offices and 150 tenants. In each, there will be a lease between the landlord and the tenant, and the landlord will require tenants to pre-pay rent as a "security deposit" (assume that the security deposit equals one month of rent). The security deposits of all the tenants can be held in a commingled special deposit that the landlord establishes with a bank. Again, there will be the familiar uncertainty about the bank's "due to" obligation. Will all or a part of the balance in the special deposit be "due to" the landlord or will it be "due to" the tenant? If, at the expiry of any leasehold, there is no damage to the leased property, and a definitive communication along these lines is made to the bank, the tenant will be the "beneficiary" of the bank's "due to" obligation and presumably the bank will discharge this liability and pay the tenant out of the special deposit. But the parties will not know whether this contingency is satisfied until the end of the leasehold. If there is damage to the leased property, all or part of the deposit could be due to the landlord. Notwithstanding the uncertain identity of the bank's creditor, the special deposit established by the landlord in the hypothetical situation will be for a permissible purpose, to secure the leased property against all but ordinary wear and tear during the leasehold. The special deposit facilitates the execution of an important term within the 150 leases in the building, and significant funds can be held in a regulated bank, where they will be safe and secure. While providing greater certainty and protection for such a special deposit, the Uniform Special Deposits Act does not displace any provisions of state law that may exist regulating such deposits, such as laws governing the payment of interest on such accounts.

The white list includes examples of funds that may be held for other purposes. In highly sophisticated financial systems, including that in the United States, it is customary for employers

to collect funds in the form of pending transaction accounts to be used to meet required payrolls (both salary payments and ERISA payments scheduled to be made to retirement accounts). It is a common practice to collect the funds needed to discharge employer obligations to employees in a special deposit and then to disburse the collected funds to employees in the form of salary, IRA, or 401(k) payments. The Uniform Special Deposits Act would protect such special deposits and facilitate the payout to employee/beneficiaries by freeing these deposits from an attack by employer/creditors and by making such special deposits bankruptcy remote with respect to the employer's bankruptcy and free from a bank's right of set off. Again, in this example, the permissible purpose is to facilitate the discharge of the employer's obligations to its employees.

A collection account to facilitate the settlement of a legal action or arbitral award is another form of white-listed special deposit that "holds funds for distribution to a defined class of persons". In a class action settlement, for example, it would be typical for a settling defendant to collect the funds needed to pay claimants in a special deposit that would, once the deposit is fully funded, be used to pay out those claimants who are to be compensated by the court-approved settlement. The Uniform Special Deposits Act would protect such settlement accounts from the same kind of uncertainties previously identified. The permissible purpose of the special deposit in this instance is the facilitation of compensation to injured class members.

Another white-listed special deposit is to "provide assurance with respect to an obligation created by contract". In modern economic systems, there is financial infrastructure that depends on participants that have the necessary liquidity to settle not only their own obligations but also the obligations of others. One technique to assure this capability to settle the obligations of third parties is for the settling participant to establish a special deposit with a material balance, which will "provide assurance" that the settling participant has the wherewithal to take on its role as a settlement agent. In such situations, the balance of the special deposit might be large and needs to be held by a reliable and creditworthy entity such as a regulated bank. In this example, the special deposit is facilitating the operation of critical financial infrastructure, and the cash balance needs protection from creditors, or the balance cannot have the necessary "assuring" effect. There are specific examples where the functioning of critical infrastructure has been jeopardized by creditor process, and in certain situations creditor process served on the bank holding a special deposit has been used as a weapon to gain an advantage that is seen to be "unfair". With respect to sovereign debt where there has been a default, some "hold out" creditors have jeopardized other bond holders who agreed to a bond restructuring by attaching the special collection account through which restructured bond payments were to be made, on a theory that the debtor (i.e., the sovereign that defaulted) had a property interest in the account used to collect funds for the payout, and the account needed to be "frozen" until that property interest could be adjudicated. The Uniform Special Deposits Act would insulate special deposits of this kind from such creditor attacks, and the permissible purpose is to assist with the functioning of critical infrastructure and to foster the settlement of financial disputes.

The statute's "white list" also protects special deposits that exist to facilitate settlements done across certain private sector payment systems, which often depend upon special deposit accounts that are used for settlement or are used to provide assurance with respect to obligations that arise in the operation of the system or otherwise support the orderly functioning of the system. Even a short delay in the execution of a settlement, where the delay lasts only for as long

as it takes the parties to get to a judge and obtain relief, could pose a systemic risk to the financial system. Without needed protection from the Uniform Special Deposits Act, the risk of a suspended settlement arising from a levy or restraining order is always just a lawsuit away. The Uniform Special Deposits Act would reduce and perhaps even eliminate this risk.

Finally, special deposits could potentially be used to protect accounts that hold cash margin or other cash collateral required by regulators for reasons including customer protection and mitigation of bilateral credit and systemic risk in securities transactions or transactions in regulated derivatives (primarily swaps and futures). Several governmental authorities, including the Commodity Futures Trading Commission and the Securities and Exchange Commission, require that cash margin be held in an account akin to a "special deposit" where the bank holding the account is contractually required to waive its set off rights against obligations of the broker or dealer holding customer assets. *See, e.g.*, 17 C.F.R. §§ 1.20; 22.5; 23.17; 240.15c3–3; 240.18a–4. If these deposits became covered under the Uniform Special Deposits Act, they would receive the kind of protection regulators have required and may even enhance protections currently provided under federal law. The language of the Uniform Special Deposits Act is sufficiently flexible to cover similar future arrangements because the holding of cash margin appears to be a trend in the more sophisticated financial centers. As for the permissible purpose, the purpose would be coincident with the policy that has prompted regulatory action; the special deposit provides confidence in the protection of customer assets and orderly operation of securities and commodities settlement systems.

The key point about the white-listed special deposits is that these deposits are not "special" only because they are so designated in the account agreement. They are special because of the designation and because the deposits perform a unique public function in facilitating important prudential, commercial, or governmental objectives. It is also appropriate to draw attention to the wide diversity of special deposits, and to the beneficial function that they perform.

Nature of the Relationship between the Bank Holding the Special Deposit and the Beneficiary

There is old case law that mistakenly characterizes the relationship formed in a special deposit. The Uniform Special Deposits Act corrects the mistaken characterizations. The old case law provides that when a bank receives a special deposit in the form of cash, the bank holds this deposited cash in "custody" and the bank's obligation to repay the cash is not reflected on the bank's balance sheet. In the survey preceding the drafting of the Uniform Special Deposits Act, the Uniform Law Commission Study Committee learned that this practice contemplated by the old case law is not followed. No bank today that receives cash on deposit from a customer fails to record a debt to the customer on its balance sheet. The Uniform Special Deposits Act makes clear that the bank does not hold funds in a custodial capacity in a special deposit situation. The legal and accounting relationships are in harmony.

Another unhelpful vestige in old case law is a suggestion that the bank taking a special deposit is acting as a kind of fiduciary vis-à-vis the depositor. As discussed below, the drafters are aware of no evidence that this is the current commercial practice. When a bank intends to act as a trustee, the relationship is clearly provided in a trust agreement and not in a deposit contract.

The Uniform Special Deposits Act provides expressly that any relationship between the bank and a depositor or beneficiary arising from the special deposit is a debtor-creditor relationship. Although banks may act as fiduciaries in certain situations, the relationship formed when taking a special deposit is not a fiduciary relationship. The Uniform Special Deposits Act reduces uncertainty on this issue, and if the intention is to change the relationship from debtor-creditor to fiduciary, that change should be documented in a trust agreement rather than an account agreement.

The Uniform Special Deposits Act also makes clear that the determination of the occurrence of the contingency is the trigger event that ripens the generalized "due to" obligation of the bank into a specific obligation to an entitlement holder, a person that the Uniform Special Deposits Act calls a beneficiary. Before the determination of the occurrence of the contingency, the bank has an indebtedness that is due not to any specifically identified legal person. That is, the bank's obligation to pay is not a contingent liability of the bank, it is a debt of the bank like any other deposit. What depends on the resolution of the contingency is the identity of the person entitled to payment. Consequently, there is no attachable property of a specific person until determination of the occurrence of the contingency, which will identify the beneficiary.

The Uniform Special Deposits Act also clarifies when a debt is owed by the bank to a beneficiary, which can arise only after determination of the occurrence of the contingency, and explicitly states how that obligation may be paid. It is at that point when the debt of the bank to the beneficiary can be subject to creditor process served on the bank by a creditor of the beneficiary. However, if creditor process is served before the point when the contingency is determined, then the bank holding the special deposit is not obliged to act on the process. There is no debt due and owing by the bank to such a beneficiary before the determination point, and the Uniform Special Deposits Act provides that any premature service will not accomplish its restraining objective. These provisions of the Uniform Special Deposits Act minimize legal uncertainty with clear and executable rules that will enable the special deposit to serve its salutary function; it leaves the "due to" free of restraint until the beneficiary's payment right becomes fixed.

Enforcement Features of the Uniform Special Deposits Act

The Uniform Special Deposits Act also contains provisions dealing with enforcement, which resolve some uncertainties currently found in the case law. The Uniform Special Deposits Act is enforceable by a beneficiary, and it does not matter whether the beneficiary is a party to the account agreement. In the wide diversity of special deposit arrangements, there will be some account agreements where the beneficiary will be a party and others where the beneficiary will not be a party. For example, if two companies are contracting for the sale of a business, the buyer of the business will sometimes place a down payment of earnest money in a special deposit. The down payment will later be applied against the purchase price when the sale of the business closes. If the sale does not close, the down payment will typically be returned to the purported buyer. In this arrangement, it would be common for the buyer and the seller to be parties to the special deposit agreement with the bank holding the down payment. On the other hand, with respect to a different kind of special deposit – the security deposits that are taken from tenants in a commercial office park – it would not be unusual for the landlord to take security deposits from

tenants and place them in a special deposit at a bank. In this arrangement, the tenant/beneficiaries would not typically be parties to the account agreement, which often will be between the bank and the landlord.

The Uniform Special Deposits Act also makes clear that a depositor can enforce the account agreement that creates the special deposit. The depositor's standing is derived from the depositor being the person who established the special deposit, even if it placed no funds in the special deposit. Again, this would be typical of certain special deposits but not all special deposits, and the drafting committee envisioned tenant security deposits being placed into a special deposit established by a commercial landlord as a case in point.

The measure of damages for breach of the account agreement or the Uniform Special Deposits Act is framed in terms of actual damages proximately caused by a breach of agreement or a statutory violation. This avoids the prospect of consequential damages against a bank holding a special deposit unless the bank expressly agrees to a more expanded measure of damages in the account agreement or provided by other law. The limitation of consequential damages is purposeful. It removes a sanction that might cause banks to avoid offering a special deposits product. Given the salutary functions that special deposits perform, the Uniform Special Deposits Act offers liability protection as an incentive to banks so that they will offer a special deposit product.

Self-Imposed Limitations of the Uniform Special Deposits Act

The Uniform Special Deposits Act contains several self-imposed limitations. The most important limitation has already been referenced – the Uniform Special Deposits Act accepts, as it must, that the law governing general deposits is not uniform among the 50 states. The drafters had no mandate to write a uniform law governing deposits generally. To the contrary, the charge to the Drafting Committee was to address the unique concerns that are inhibiting the development of a special deposits product, and to do nothing more. Subjects including when a deposit is received and when it is paid out are governed by general deposit law, and that general law is left untouched by the Uniform Special Deposits Act. Further, many states have substantive statutory protections dealing with discrete topics arising from certain types of bank deposits, including customer protection measures for security deposits received by landlords. Another example concerns adverse claims against a generic bank deposit. The Uniform Special Deposits Act leaves all that state law untouched, whatever it happens to be. Further, the Uniform Special Deposits Act relies upon existing general deposit law to "fill in the blanks" (e.g., when is a special deposit received) and does not displace the general deposit law except when necessary to accomplish a specific objective. For example, whether a special deposit will bear interest and if so, at what rate, would be determined by other law and by the agreement between the parties.

The Uniform Special Deposits Act also expressly does not address certain other topics that may affect a special deposit. One such topic is the insolvency of the bank holding a special deposit. This is not addressed for two different reasons. First, in the Uniform Law Commission Study Committee deliberations preceding the drafting of the Uniform Special Deposits Act, bank insolvency was not identified as a problem or concern. In the United States, there is a well-developed bank insolvency law and it has worked well for special deposits. Second, because of

widespread federal deposit insurance, bank insolvency law has largely become the product of federal law, and state law including the Uniform Special Deposits Act can perform only a limited role. Consequently, the Uniform Special Deposits Act does not address the insolvency of the bank holding the special deposit and leaves that subject to federal law.

While bank insolvency is a topic that the Uniform Special Deposits Act does not cover, the statute does address an insolvency topic that is a significant concern – the insolvency of a depositor and the possibility that a special deposit might become part of the bankruptcy estate in the event of the depositor's bankruptcy. A specific suggestion was that the special deposit be made bankruptcy remote in the event of a depositor bankruptcy, which could be done by reducing any uncertainty whether a depositor has a property interest in a special deposit. The Uniform Special Deposits Act provides this needed clarity, and the statute makes clear that the depositor *as a depositor* has no property interest in a special deposit, and that its only property interest is *as a potential beneficiary*. Of course, no beneficiary has any entitlement until determination of the occurrence of the contingency. This should avoid the special deposit being unhelpfully drawn into depositor bankruptcy proceedings and renders the special deposit bankruptcy remote.

A final self-limitation of the Uniform Special Deposits Act is that it is applicable only if the parties to the account agreement have opted in, meaning the bank and its customer have elected that the deposit is special and will receive statutory coverage. In the absence of an agreed "opt-in", the statute does not apply. One of the key attributes of a special deposit that was referenced repeatedly in the Uniform Law Commission Study Committee deliberations was the importance of the "opt-in" to distinguish the covered special deposit from other bank deposits. Currently, banks receive demand, time, savings, and trust deposits, and each of these must be distinguished from the deposit that is "special". Given the wide diversity of "special deposits", many practitioners told the Uniform Law Commission Study Committee that the designation needed to be done by the account parties through an "opt-in" provision in the account agreement. The parties to the account agreement, namely the bank and its depositor(s), would best understand the special purpose being served.

Note also that no bank is required to offer a special deposit product, and some banks may decide that this will not be among their offered suite of products, or that they will offer such a product only under some circumstances, such as all the potential beneficiaries being parties to the account agreement. The Uniform Special Deposits Act is drafted to provide for sufficient flexibility that would enable the Uniform Special Deposits Act to minimize legal uncertainty and maximize the salutary commercial benefits of this deposit type.

Choice of Law, Choice of Forum, and Effective Date

It is appropriate to say a few words about choice of law, choice of forum and the effective date of the Uniform Special Deposits Act.

One of the distinguishing features of the Uniform Special Deposits Act is that it is an "opt-in" statute. The parties to the account agreement, namely the bank and its depositor(s), decide upon coverage. To maximize their freedom of choice, the parties can select to be

governed by the laws of a state which has enacted the Uniform Special Deposits Act, notwithstanding whether there is a reasonable relation between a state that has enacted the Uniform Special Deposits Act and the contracting parties, the forum state, the special deposit, or any transaction associated with the special deposit. Given that the selection of the Uniform Special Deposits Act would encompass certain statutory protections for the special deposit, certainty of application with respect to applicable law is especially important. This certainty is provided by maximizing the ability of the parties to the account agreement to select the governing law. For the same policy reason, there is a choice-of-forum provision at Section 3 that facilitates the selection of a forum for the resolution of disputes between the parties.

With respect to the effective date, one of the concerns that is addressed in the Uniform Special Deposits Act relates to special deposits that are already existing at the time the statute is enacted in a particular state. Will the new law apply to a pre-existing special deposit? The answer is that it will apply if the necessary parties to the account agreement make the requisite amendments to the existing agreement. Again, the rationale for this provision is legal certainty.

Uniform Special Deposits Act

Section 1. Title

This [act] may be cited as the Uniform Special Deposits Act.

Section 2. Definitions

In this [act]:

(1) "Account agreement" means an agreement that:

(A) is in a record between a bank and one or more depositors;

(B) may have one or more beneficiaries as additional parties; and

(C) states the intention of the parties to establish a special deposit governed by this [act].

(2) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, [and] trust company[, and a bank as defined in [cite to state statute]]. Each branch or separate office of a bank is a separate bank for the purpose of this [act].

(3) "Beneficiary" means a person that:

(A) is identified as a beneficiary in an account agreement; or

(B) if not identified as a beneficiary in an account agreement, may be entitled to payment from a special deposit:

(i) under the account agreement; or

(ii) on termination of the special deposit.

(4) "Contingency" means an event or circumstance stated in an account agreement that is not certain to occur but must occur before the bank is obligated to pay a beneficiary.

(5) “Creditor process” means attachment, garnishment, levy, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant.

(6) “Depositor” means a person that establishes or funds a special deposit.

(7) “Good faith” means honesty in fact and observance of reasonable commercial standards of fair dealing.

(8) “Knowledge” of a fact means:

(A) with respect to a beneficiary, actual knowledge of the fact; or

(B) with respect to a bank holding a special deposit:

(i) if the bank:

(I) has established a reasonable routine for communicating material information to an individual to whom the bank has assigned responsibility for the special deposit; and

(II) maintains reasonable compliance with the routine, actual knowledge of the fact by that individual; or

(ii) if the bank has not established and maintained reasonable compliance with a routine described in clause (i) or otherwise exercised due diligence, implied knowledge of the fact that would have come to the attention of an individual to whom the bank has assigned responsibility for the special deposit.

(9) “Obligated to pay a beneficiary” means a beneficiary is entitled under the account agreement to receive from the bank a payment when:

(A) a contingency has occurred; and

(B) the bank has knowledge the contingency has occurred.

“Obligation to pay a beneficiary” has a corresponding meaning.

(10) “Permissible purpose” means a governmental, regulatory, commercial, charitable, or testamentary objective of the parties stated in an account agreement. The term includes an objective to:

(A) hold funds:

(i) in escrow, including for a purchase and sale, lease, buyback, or other transaction;

(ii) as a security deposit of a tenant;

(iii) that may be distributed to a person as remuneration, retirement or other benefit, or compensation under a judgment, consent decree, court order, or other decision of a tribunal; or

(iv) for distribution to a defined class of persons after identification of the class members and their interest in the funds;

(B) provide assurance with respect to an obligation created by contract, such as earnest money to ensure a transaction closes;

(C) settle an obligation that arises in the operation of a payment system, securities settlement system, or other financial market infrastructure;

(D) provide assurance with respect to an obligation that arises in the operation of a payment system, securities settlement system, or other financial market infrastructure; or

(E) hold margin, other cash collateral, or funds that support the orderly functioning of financial market infrastructure or the performance of an obligation with respect to the infrastructure.

(11) “Person” means an individual, estate, business or nonprofit entity,

government or governmental subdivision, agency, or instrumentality, or other legal entity. The term includes a protected series, however denominated, of an entity if the protected series is established under law that limits, or limits if conditions specified under law are satisfied, the ability of a creditor of the entity or of any other protected series of the entity to satisfy a claim from assets of the protected series.

(12) "Record" means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(13) "Special deposit" means a deposit that satisfies Section 5.

(14) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes an agency or instrumentality of the state.

Legislative Note: *The bracketed text in paragraph (2) should be included if a state defines "bank" in another statute and intends for the definition to apply to this act.*

A state should enact the definition of "person" in paragraph (11) regardless of whether the state has enacted the Uniform Protected Series Act (2017) or otherwise recognizes a protected series under its law. The Uniform Special Deposits Act does not require the enacting state to recognize a limit on liability of a protected series organized under the law of another jurisdiction or a limit on liability of the entity that established the protected series. The Uniform Special Deposits Act clarifies the status of a protected series as a "person" under the choice-of-law and substantive law rules of the enacting state under the Uniform Special Deposits Act.

Comment

1. **Account Agreement**. A fundamental question pervading the case law and among parties considering the use of this banking product is what distinguishes the special deposit from other types of deposits, such as checking, savings, and time deposits. The Uniform Special Deposits Act resolves this fundamental question with a clear rule that distinguishes the special deposit by a plain statement of intent in the account agreement. The definition makes clear that the parties to the account agreement must recite a clear intention to constitute a special deposit that is covered by the Uniform Special Deposits Act. The parties to the account agreement will

need to mutually agree to designate a deposit as "special" and identify one or more permissible purposes that it serves. If this is not done, the deposit is not a special deposit under the Uniform Special Deposits Act. If it is done, the deposit will be a special deposit if it meets the other requirements that are set forth in Section 5.

No particular talismanic language is required to express the intent to be covered by the Uniform Special Deposits Act. A statement referring to the title of the applicable state legislation or the relevant sections of the state code embodying the Act or a reference to the Uniform Special Deposits Act as enacted in the relevant state would certainly suffice. But other formulations showing the intent to fall under the Uniform Special Deposits Act would also be effective.

An account agreement is between a bank and at least one depositor, a term that is intentionally defined broadly in the Uniform Special Deposits Act. Not all of the depositors must be parties to the account agreement. In addition, a depositor may also be a beneficiary, but persons that may be beneficiaries of a special deposit need not be parties to the account agreement. For example, there may be persons that are initially identifiable as potential or actual beneficiaries as a class but not as individual persons, or individual persons that may not be identifiable at the time the account agreement is executed but will be identifiable before the bank becomes obligated to pay a beneficiary. There may be a special deposit with one beneficiary designated – for example, a seller in a sales contract may view the deposit of earnest money by the purported purchaser as a sign that the purchaser is serious and has the capability of proceeding to closing. The seller will, if the sale closes, be the solitary beneficiary who receives the earnest money and the remainder of the purchase price. But, if the sale does not close, the purchaser/depositor (who made the original deposit) may be treated as a beneficiary and obtain its earnest money back. In this type of arrangement, the seller/depositor would be considered the second potential beneficiary and should be reflected as such in the account agreement.

2. **Bank**. The definition of bank is based on Sections 1-201(b)(4), 4-105(1), and 4A-105 of the Uniform Commercial Code and provides the option to include other state-specific definitions of a bank. The Uniform Special Deposits Act covers special deposits taken by banks; it does not cover deposits taken by other persons who are not banks.

3. **Beneficiary**. The definition of a beneficiary under the Uniform Special Deposits Act is tied to the account agreement, which may identify a beneficiary directly or indirectly in certain circumstances (e.g., the determination of the occurrence of a contingency or termination of the account agreement). A beneficiary does not need to be identified specifically and may be identified as a member of a class (for example, in a class action settlement) or as a type (for example, all tenants in a building). Such identification should become specific with the fruition of the contingency. When the account agreement identifies specifically the beneficiary of a special deposit, the account agreement may provide additional information as to the making of the payment, including perhaps the beneficiary's bank and account number. For example, the account agreement may specify that payment to the beneficiary would be deemed made when paid to a bank that is selected by such beneficiary. The original depositor may have a right to payment, but that right arises only from its capacity as a beneficiary, either because it is specified in the account agreement, or upon termination, which is also addressed in Section 13.

4. **Contingency**. The definition of "contingency" entails a measure of uncertainty with respect to outcome. This is a common feature of the special deposit, where entitlement to payment is dependent upon an uncertain event – the closing of a contract, the expiration of a commercial lease with no damage to the leased property, settlement of a day's payment activities or daily trading activity, or the occurrence of an event that may or may not occur within a specified period of time. The passage of time, without another event or criteria being satisfied or being necessary to happen or occur, does not constitute a contingency.

5. **Creditor Process**. The definition of "creditor process" is based on Section 4A-502 of the Uniform Commercial Code.

6. **Depositor**. The definition of "depositor" is somewhat counterintuitive in that it encompasses a person who establishes a special deposit at a bank but does not necessarily deposit any funds into the established account. This is designed to accommodate special deposits that are established by a bank customer who is not depositing funds into the account but is best positioned to establish a special deposit account to hold funds that will be paid out in the event a particular contingency is determined. A paradigm example of this kind of special deposit is the situation of a commercial landlord who establishes a special deposit to hold funds deposited by tenants to secure individual leaseholds against the risk of property damage. In this situation, the landlord will not place the landlord's own funds in the special deposit; instead, the funds comprising the special deposit will be placed by the tenants. But the landlord will likely "establish" the special deposit, and this can be the most economical means to accomplish the purpose – it is likely more efficient for an individual landlord to establish the special deposit than for the many tenants to do so. In the landlord-tenant example, the landlord would be considered a depositor and would be able to enforce the account agreement, which may be more efficient than requiring the tenants to do so. A purpose of the Uniform Special Deposits Act is to foster efficient, low-cost banking services meeting the needs of a diverse group of commercial actors. By virtue of the individual's status as a depositor, the individual can enforce the account agreement and requirements of the Uniform Special Deposits Act.

As noted in comment 3 to this Section 2 above, a depositor may not always be a beneficiary. A depositor may be a beneficiary to the extent that the determination of the occurrence of a contingency provides such depositor with a right to payment, and only when that interest has been determined and the bank has become obligated to pay the beneficiary. A depositor may also become a beneficiary upon termination, which is addressed in Section 13.

7. **Obligated to Pay a Beneficiary**. A beneficiary's interest in a special deposit is the right to be paid by the bank holding the special deposit, which right will derive from the account agreement but will also require additional criteria to satisfy the elements of the defined term, "obligated to pay a beneficiary". A beneficiary has no other right to payment where the proceeds are sourced from a special deposit, which is a distinguishing feature of a special deposit from a general deposit of a bank. A beneficiary's right to be paid out of the special deposit arises when the bank is obligated to pay a beneficiary. The disposition of the special deposit among beneficiaries will be determined upon the resolution of a contingency. The bank's obligation is dependent on any contingency for payment to that beneficiary in the account agreement having been determined and the bank having knowledge that such contingency has occurred. The

definition makes clear that the terms of the account agreement govern determination of the occurrence of a contingency. The original depositor may have an entitlement to payment, but that right arises only from its capacity as a beneficiary. If a bank will determine the occurrence of a contingency in an account agreement based on the receipt of records, it is anticipated that it will likely do so based on a review of records. It is expected that the bank's determination will be triggered by the receipt of records similar to the receipt of documents that may trigger payment under a letter of credit.

8. **Permissible Purpose**. The Uniform Special Deposits Act requires that an account agreement be created only for one or more permissible purposes and includes a non-exclusive list of examples of special deposits that would be for permissible purposes. Special deposits may be used for a wide variety of permissible purposes, and the inclusion of certain permissible purposes in the statute as examples should not be interpreted to exclude any other purpose, including because such purpose is a different type than the examples included. Even where a potential purpose is included in the "white list" it is expected that in practice variations of the examples will also serve as permissible purposes. For example, a permissible purpose could include a sale or purchase transaction that involves a title company in addition to the seller and purchaser. It is not possible to identify in advance the possible ways that the protections provided by the Uniform Special Deposits Act could be abused and used to facilitate the inappropriate shielding of assets from creditors. It is also not possible to identify all the salutary purposes that are served by special deposits. With that understood, a special deposit established for the purpose of defrauding or evading creditors until funds are disbursed would not be a permissible purpose under the Uniform Special Deposits Act.

By design, the Uniform Special Deposits Act may delay a realization by a creditor until after a determination of the occurrence of a contingency in an account agreement, but that delay is for the purpose of facilitating an underlying public policy and is coincident with the determination of the definitive property interest. A delay for the purpose of facilitating one of the legitimate policy purposes on the "white list" would be for a permissible purpose; it must be "stated" in the account agreement, and because of the provisions of Section 6, comport with the permissible purpose for so long as the deposit is maintained. The requirement that the purpose be stated is intended as a minimal discipline on the contracting parties; it reminds them that the protections of the Uniform Special Deposits Act might not be available if the discretion of the contracting parties is abused, and an example of such abuse would occur when a special deposit is established for the purpose of defrauding or evading creditors.

Section 3. Scope; Choice of Law; Forum

(a) This [act] applies to a special deposit under an account agreement that states the intention of the parties to establish a special deposit governed by this [act], regardless of whether a party to the account agreement or a transaction related to the special deposit, or the special deposit itself, has a reasonable relation to this state.

(b) The parties to an account agreement may choose a forum in this state for settling a dispute arising out of the special deposit, regardless of whether a party to the account agreement or a transaction related to the special deposit, or the special deposit itself, has a reasonable relation to this state.

(c) This [act] does not affect:

(1) a right or obligation relating to a deposit other than a special deposit under this [act]; or

(2) the voidability of a deposit or transfer that is fraudulent or voidable under other law.

Comment

1. **Choice of Law**. The Uniform Special Deposits Act is an "opt-in" statute, meaning that the parties to the account agreement must affirmatively decide to seek its protections. This also means that the parties need to select the law of a state that has adopted the Uniform Special Deposits Act, which could be the state where the parties are situated, or it is possible that the parties are all situated in a state that has not adopted the Uniform Special Deposits Act, in which case the parties will need to select an alternative governing law. The Uniform Special Deposits Act facilitates such a selection, and the chosen governing law does not need to have a reasonable relationship to the parties to the account agreement, the special deposit, or any transaction associated with the special deposit. Although the parties to an account agreement are electing to be governed by the law of a state that has enacted the Uniform Special Deposits Act, it is possible that a court in the forum state will not enforce the parties' intention to be governed by law other than the law of the forum state. The court may apply the law of the forum state with respect to creditors' rights, injunctions, recoupment, and set off. The likelihood of such a result may be reduced if the parties include an exclusive choice-of-forum clause in the account agreement that selects as the exclusive forum a state that has also enacted the Uniform Special Deposits Act.

2. **Choice of Law Implications**. If an account agreement does not choose to be governed by the Uniform Special Deposits Act, then there has been no "opt in", which is required for statutory coverage. This type of deposit (i.e., a deposit where the account agreement does not select coverage by the Uniform Special Deposits Act) will be governed by other law, most probably the law of the jurisdiction in which the bank holding the deposit is located.

3. **Choice of Forum**. The same policy considerations supporting a broad choice-of-law clause support the inclusion of a broad choice-of-forum provision. Given that the statute is an "opt in", it is especially important that banks have confidence in selecting the substantive law

and also in the predictability of the forum to resolve disputes. The choice-of-forum provision is modeled after Section 5-116(e) of the Uniform Commercial Code.

4. **Scope**. Subsection (c)(1) acknowledges that there are other laws that may confer special rights or obligations on certain deposits, including deposits that may be considered "special deposits" under other law, and the Uniform Special Deposits Act is not intended in any way to displace such other law. Subsection (c)(2) works with the permissible purpose requirement and is intended to signal that a special deposit that is fraudulent or voidable under other law would not constitute a special deposit under the Uniform Special Deposits Act. An account agreement creating a special deposit that is fraudulent or voidable under other law is a nullity, and would not be for a permissible purpose.

Section 4. Variation by Agreement or Amendment

(a) The effect of Sections 2 through 6, 8 through 11, and 14 may not be varied by agreement, except as provided in those sections. Subject to subsection (b), the effect of Sections 7, 12, and 13 may be varied by agreement.

(b) A provision in an account agreement or other record that substantially excuses liability or substantially limits remedies for failure to perform an obligation under this [act] is not sufficient to vary the effect of a provision of this [act].

(c) If a beneficiary is a party to an account agreement, the bank and the depositor may amend the agreement without the consent of the beneficiary only if the agreement expressly permits the amendment.

(d) If a beneficiary is not a party to an account agreement and the bank and the depositor know the beneficiary has knowledge of the agreement's terms, the bank and the depositor may amend the agreement without the consent of the beneficiary only if the amendment does not adversely and materially affect a payment right of the beneficiary.

(e) If a beneficiary is not a party to an account agreement and the bank and the depositor do not know whether the beneficiary has knowledge of the agreement's terms, the bank and the depositor may amend the agreement without the consent of the beneficiary only if the

amendment is made in good faith.

Comment

1. **Variation by Agreement**. The account agreement will designate the special deposit and trigger coverage of the Uniform Special Deposits Act if the special deposit satisfies the requirements in Section 5. The Uniform Special Deposits Act embraces freedom of contract, and because the statute is drafted as an "opt in", the drafters believed it important to enable the parties to the account agreement to have flexibility. Consequently, the parties may vary the effect of certain statutory rules. As with other uniform acts, the statute has particular rules that are so fundamental that they may not be varied by agreement, such as the requirement that the special deposit be for a permissible purpose. Because statutory application is itself the product of a decision to "opt in", it is in the parties' control if they do not wish to be covered by the Uniform Special Deposits Act. The sections that are variable by agreement, such as Sections 7 and 13, include default rules that would be applicable if the parties to an account agreement failed to address the topics that these sections cover.

The permitted variation by agreement does not need to be done in the account agreement that establishes the special deposit. It may be done there, but it may also be done in another agreement of the parties and the drafters are mindful that banks will customarily present customers with several agreements covering different bank products. The Uniform Special Deposits Act acknowledges and accommodates this banking practice.

2. **General Exculpation Ineffective**. Subsection (b) renders ineffective a generalized provision excusing all liability, or a provision that effectively limits any effective remedies for a breach. These types of provisions are rare, but they do exist and would interfere with fundamental elements of the Uniform Special Deposits Act.

3. **Beneficiary Protection**. There is a wide range of special deposits and the account agreements establishing such deposits are also diverse. In some, the beneficiary is a party and in others the agreement is exclusively between the depositor and the bank as observed in the Prefatory Note and described in the comments to Section 2. Subsection (c) covers the account agreements where the beneficiary is a party and it recites a familiar rule – the account agreement may not be amended without the beneficiary's consent unless doing so is expressly permitted by an agreement that the beneficiary executed. If multiple beneficiaries are parties to the account agreement, each beneficiary's consent would be required unless the account agreement provides otherwise. Subsection (d) covers account agreements where the beneficiary is not a party but has knowledge of the material terms of the agreement that is being amended (and the definitional section provides that only actual knowledge is sufficient with respect to a beneficiary). In these types of special deposits, the beneficiary may be injured if the account agreement is amended. Subsection (d) renders an amendment ineffective if it should adversely and materially affect the beneficiary's payment rights. This provision is consistent with case law interpreting the right of a third-party beneficiary who had similar knowledge. In the case of a special deposit, the fundamental expectation of a beneficiary who has knowledge of the terms of the account agreement concerning the special deposit relates to the beneficiary's expectation that, depending on resolution of the contingency, it will receive a payment funded with proceeds from the special

deposit. Therefore, Section 4 (d) more precisely protects that expectation than would a general reliance on third-party beneficiary law. Under Section 4 (d), the beneficiary's consent to amend the account agreement is not required (and, again, this assumes the beneficiary is not a party to the original account agreement) unless the amendment would adversely and materially affect a payment right of the beneficiary, and the bank and the depositor have knowledge that the beneficiary knows the terms of the original agreement.

A bank may wish to make provision in the account agreement for a representation and warranty to be made by the depositor at the time the original account agreement is executed, and repeated whenever it is amended, as to whether any beneficiary has knowledge of the account agreement's existence or terms. Further, because a beneficiary with payment expectations might sustain damages in the event of an amendment that adversely and materially affects its payment rights, a bank might require that the depositor reaffirm its representation and warranty "as of" the time of payment, such that the bank has documentary assurance of a condition material to the bank's decision to agree to an amendment – namely, that the beneficiary has no knowledge of the original account agreement or any amendment. If a beneficiary sustains damages from an amendment that adversely and materially affects a beneficiary's payment rights, and the bank has relied on documentary assurance from the depositor that the beneficiary did not have the required knowledge, the bank making payment would have a defense provided in Section 12 (f) of the Act, which exculpates a bank for its reliance on the genuineness of a record when it makes a payment. In this circumstance, the bank would have relied on the written assurance from the depositor that no beneficiary had knowledge of the original account agreement or its amendment, and this record would provide the bank with a liability defense, which is the intention underlying Section 12 (f) of the Act. Of course, if the depositor cannot make the representation and warranty, then the bank might appropriately decline to amend the original account agreement, because of the risk that a beneficiary could sustain damages if the amendment adversely and materially affects a payment right.

Subsection (e) covers the account agreements where the beneficiary is not a party and the bank and depositor do not know if the beneficiary has knowledge of the material terms of the agreement that is being amended, and renders the amendment ineffective if it is not made in good faith by both the bank and depositor. This provision would also cover the scenario where the bank and depositor know that the beneficiary does not have knowledge of the material terms of the agreement that is being amended. This provision is consistent with case law interpreting the right of a third-party beneficiary without the requisite knowledge, but the Uniform Special Deposits Act contains what is regarded as a modern definition of "good faith". The definition includes the "observance of reasonable commercial standards of fair dealing", a component that may not be seen in some of the earlier cases. This component may provide additional protection to a beneficiary as defined in the Uniform Special Deposits Act.

If the depositor does not know whether a beneficiary that is not a party to the account agreement has knowledge of its terms, a bank may wish to make provision in the account agreement for a representation and warranty to be made by the depositor at the time the original account agreement is executed, and repeated whenever it is amended, stating that the depositor does not know whether the beneficiary has knowledge of the account agreement's terms and the depositor is acting in good faith. Similarly as described above, if such a beneficiary is harmed

by an amendment to the account agreement and seeks recovery from the bank, the bank would be protected by Section 12 (f) and may rely on the written assurance from the depositor that the depositor did not know such beneficiary had knowledge of the account agreement's terms and was acting in good faith, and therefore the consent of such beneficiary was not required.

Section 5. Requirements for Special Deposit

A deposit is a special deposit if it is:

(1) a deposit of funds in a bank under an account agreement;

(2) for the benefit of at least two beneficiaries, one or more of which may be a depositor;

(3) denominated in a medium of exchange that is currently authorized or adopted by a domestic or foreign government;

(4) for a permissible purpose stated in the account agreement; and

(5) subject to a contingency.

Comment

Features of Special Deposits. This provision sets forth the required elements for a special deposit. Consequently, a special deposit will be a subcategory of a general deposit in a bank. The objective criteria specified in Section 5 distinguish the special deposit from other general deposits. Subsection (1) contains the first required element – that the deposit be of funds in a bank under an account agreement. "Account agreement" is a defined term in Section 2.

Subsection (2) provides that the account agreement must be for the benefit of at least two beneficiaries, although one or more of those beneficiaries may be a depositor. Thus, in the commercial real estate example that is discussed in the Prefatory Note and in the official comments to Section 2, an agreement between a landlord and the bank holding security deposits of commercial tenants would meet this required element. In some other situations, the account agreement will have as parties the bank, the depositor(s), and the beneficiaries; in this case too, the required element will be satisfied. This requirement serves a salutary purpose, namely, to minimize the possibility of a person establishing a special deposit to shield its assets from creditors and not to serve a proper purpose (by establishing a special deposit naming themselves the only potential beneficiary). It is not the intent of the Uniform Special Deposits Act to enable a depositor to shield assets from creditors; it is to facilitate the use of the special deposit to solve commercial or other problems and to provide clear rules to creditors for how they might properly reach mature debtor entitlements.

Subsection (3) requires that the special deposit be denominated in "a medium of

exchange that is currently authorized or adopted by a domestic or foreign government"; this language is based on the Uniform Commercial Code's definition of "money". This element is intended to include currencies adopted by governments, such as the U.S. dollar or the Euro. It is also an important scope limitation and excludes deposits of securities, digital tokens, cryptocurrency (unless it has been recognized as currency by a domestic or foreign government), commodities and other non-monetary items that may be deposited in a bank. For example, El Salvador has adopted Bitcoin as a legally recognized national currency, so it follows that it would be possible for a special deposit account to be denominated in Bitcoin if the parties to the account agreement, including the bank, all agreed.

Subsection (4) contains another important required element that the deposit be for a permissible purpose, which is defined in Section 2 and further addressed in Section 6. This requirement is intended to provide some constraint to the kinds of general deposits that may be designated as special. Because the Uniform Special Deposits Act affords special protection to the special deposit, it is a required element that the protections apply to a limited subcategory of general deposits, and deposits that are considered fraudulent or voidable under other law would not qualify.

Subsection (5) requires that there be a contingency, another term defined in Section 2, that will trigger the bank's obligation to pay a beneficiary. While this payment obligation is independent of the special deposit itself, the bank holding the special deposit will customarily fund the "due to" beneficiary by debiting the special deposit. The contingency may concern the resolution of conditions, occurrence of events, passage of time (with the occurrence of another contingency), or combinations thereof. The requirement that the special deposit is subject to a contingency is an important feature that distinguishes a special deposit from a general deposit because it prevents each beneficiary from an entitlement to the special deposit until such time as the contingency has occurred.

Section 6. Permissible Purpose

(a) A special deposit must serve at least one permissible purpose stated in the account agreement from the time the special deposit is created in the account agreement until termination of the special deposit.

(b) If, before termination of the special deposit, the bank or a court determines the special deposit no longer satisfies subsection (a), Sections 8 through 11 cease to apply to any funds deposited in the special deposit after the special deposit ceases to satisfy subsection (a).

(c) If, before termination of a special deposit, the bank determines the special deposit no longer satisfies subsection (a), the bank may take action it believes is necessary under the

circumstances, including terminating the special deposit.

Comment

1. **Permissible Purpose Requirement**. Subsection (a) sets forth a fundamental feature of a special deposit. A criterion making a deposit "special" is if the deposit is for one or more permissible purposes designated in the account agreement. A special deposit must be for one or more of these permissible purposes. A permissible purpose stated in the account agreement must exist at the outset and continue for the duration of the special deposit. This is true whether termination is determined under the account agreement or under Section 13 in the absence of a termination provision in the agreement.

2. **Permissible Purposes Over Time**. Subsections (b) and (c) address the consequences to the special deposit if the purpose of the special deposit changes over time. If, during the pendency of a special deposit, no purpose stated in the account agreement remains a permissible purpose, or if the parties use the special deposit for a different purpose than a purpose stated in the account agreement, the protections of the Uniform Special Deposits Act are no longer applicable with respect to any balance of the special deposit that is credited on or after that time. A bank or a court of competent jurisdiction will make the necessary determination, and the date the protections of the Uniform Special Deposits Act fall away will relate back to the time that the purpose ceased to be a permissible purpose. This protects the existing balance of funds deposited in the special deposit prior to such determination but does not extend the Uniform Special Deposits Act's protections when there is no longer a stated permissible purpose. The part of the balance of the special deposit that is no longer protected will be treated as a general deposit, and will be without the protections that Sections 8-11 provide in the event of depositor bankruptcy, creditor process, and/or recoupment and set off. If a permissible purpose becomes impermissible under other law, there may be additional consequences to the existing balance of the funds deposited in the special deposit, which would be governed by other law.

In exercising its discretion, the bank holding the special deposit might decide that it must terminate the entire relationship with the depositor (e.g., because it is exposed to material liability under federal or state anti-money laundering laws). If the parties to an account agreement are concerned about this possibility, they may include more detailed provisions in the account agreement (perhaps referencing an "as of" debit to the special deposit and an offsetting "as of" credit to a new general deposit). Similarly, if the parties to an account agreement anticipate that the permissible purpose may need to change in the future, that can be addressed in the account agreement to avoid inadvertently losing protection of the Uniform Special Deposits Act. These provisions are intended to clarify the application of the protections of the Uniform Special Deposits Act, and are not meant to disturb the general right afforded to banks under other law to decide to close any account.

Section 7. Payment to Beneficiary by Bank

(a) Unless the account agreement provides otherwise, the bank is obligated to pay a beneficiary if there are sufficient actually and finally collected funds in the balance of the special

deposit.

(b) Except as provided in subsection (c), the obligation to pay the beneficiary is excused if the funds available in the special deposit are insufficient to cover such payment.

(c) Unless the account agreement provides otherwise, if the funds available in the special deposit are insufficient to cover an obligation to pay a beneficiary, a beneficiary may elect to be paid the funds that are available or, if there is more than one beneficiary, a pro rata share of the funds available. Payment to the beneficiary making the election under this subsection discharges the bank's obligation to pay a beneficiary and does not constitute an accord and satisfaction with respect to another person obligated to the beneficiary.

(d) Unless the account agreement provides otherwise, the obligation of the bank obligated to pay a beneficiary is immediately due and payable.

(e) The bank may discharge its obligation under this section by:

(1) crediting another transaction account of the beneficiary; or

(2) taking other action that:

(A) is permitted under the account agreement for the bank to obtain a discharge; or

(B) otherwise would constitute a discharge under law.

(f) If the bank obligated to pay a beneficiary has incurred an obligation to discharge the obligation of another person, the obligation of the other person is discharged if action by the bank under subsection (e) would constitute a discharge of the obligation of the other person under law that determines whether an obligation is satisfied.

Comment

"Due to" Obligations. Section 7 implements one of the key features of a special deposit governed by the Uniform Special Deposits Act. The special deposit receives protections in the

Uniform Special Deposits Act but the bank's obligation to pay a beneficiary, and the bank's action to discharge that payable, do not receive such protections. Subsection (a) reflects that the bank's debt to the beneficiary accrues when a bank is obligated to pay a beneficiary. "Obligated to pay a beneficiary" is defined in Section 2 with respect to the contingency being determined and the bank having knowledge of the determination. Subsection (a) also provides for the obvious – the bank holding the special deposit will fund the "due to" to the beneficiary by debiting the special deposit. The "actually and finally collected funds" element of this subsection clarifies that a bank is not obligated to pay a beneficiary if there are not sufficient funds in the special deposit account. Similarly, subsection (b) acknowledges that a bank has no obligation to satisfy a "due to" obligation to a beneficiary if the funds in the special deposit are not sufficient to cover the entitlement to such beneficiary. This statutory language is meant to be consistent with other areas of law, such as Section 4-401(a) of the Uniform Commercial Code and Section 10B(b)(4) of the Federal Reserve Act (12 U.S.C. § 347b), which make clear that a bank is not tacitly committed to provide needed credit. Thus, a bank is not obligated to provide funds in addition to those on deposit in the special deposit to satisfy a "due to" obligation to a beneficiary if the funds in the special deposit are not sufficient. The parties may agree, however, to a different arrangement if they wish. For example, the bank can agree to pay by overdraft or to make a partial payment by including such terms in the account agreement or another agreement between the parties.

Section 7(c) provides a default rule that when funds in a special deposit are insufficient to pay fully a beneficiary entitled to payment, the beneficiary may elect to receive the available funds and that payment of those funds discharges the bank's obligation to pay the beneficiary. The default rule in Section 7(c) may, under Section 4(a) and the express terms of Section 7(c), be varied by agreement. Any person with an interest in a special deposit should be mindful that, if Section 7(c) is not varied by agreement, the underlying obligor (assuming there is one) will not be discharged on any obligation to pay a beneficiary, even though funds that may have been allocated for that purpose and collected in a special deposit, have been paid out in their entirety to one or more beneficiaries. The default rule created by subsection (c) with respect to payments to be made to beneficiaries even if the funds in the special deposit account are insufficient to meet the entire payment amount contemplated is intended as a protection for certain beneficiaries who may not have the necessary bargaining power with respect to the counterparties to an account agreement. This could represent a trap for an unwary obligor, and exposes such an obligor to a risk of additional liability if the provision is not altered by agreement because the underlying obligation remains outstanding even after substantially all the funds in the special deposit are paid out to an electing beneficiary. Other law determines what credit the obligor will receive for the partial payment from the special deposit. In other contexts, the default rule may result in outcomes inconsistent with the wishes of the parties. For example, in payment and clearing system rules, there may be elaborate arrangements made to deal with account shortfalls that would be wholly inconsistent with the default rule in subsection (c). Similarly, the default rule in subsection (c) may not be workable where there are multiple beneficiaries or payments need to be made through payment systems, which rely almost exclusively on straight-through processing. Therefore, parties considering the use of the Uniform Special Deposits Act should pay careful attention to whether it is necessary in the context of their transactions to draft an alternate approach to the default rule in the account agreement. Section 4(a) and Section 7(c) permit such a variation.

Subsection (d) addresses the remaining detail as to when the bank's obligation to the beneficiary is due and payable and provides that this "due to" is immediately due and payable unless the account agreement provides differently. In some cases, a bank could have multiple obligations that arise from an initial obligation to pay a beneficiary.

Subsection (e) addresses the next obvious issue, and that is how the bank discharges its "due to" to the beneficiary. This section provides that a bank obligated to pay a beneficiary might fulfill its payment obligation by crediting another deposit account of the beneficiary with the obligated bank. This identical issue is addressed in Section 4A-405 of the Uniform Commercial Code, which covers the obligation of the beneficiary's bank to pay a beneficiary of a funds transfer. In substance, subsection (e) is drafted to incorporate the substantially similar concepts from Article 4A. The purpose of this subsection is to protect the special deposit itself but not the obligation of the bank to pay the beneficiary or the actual payment to the beneficiary.

Subsection (f) addresses the situation where the bank's obligation to pay a beneficiary will discharge the obligation of another person or persons (for example, in a simple escrow between a buyer and a seller, it would be typical for the bank holding the earnest money in a special deposit to pay it to the seller on closing, thereby helping to discharge the buyer's overall obligation to pay the purchase price), and explains that payment of the bank's obligation to a beneficiary will discharge the other underlying obligation to another person or persons. Subsection (f) is of special importance to financial market infrastructures where an infrastructure payment may discharge the underlying obligations of many participants.

Section 8. Property Interest of Depositor or Beneficiary

(a) Neither a depositor nor a beneficiary has a property interest in a special deposit.

(b) Any property interest with respect to a special deposit is only in the right to receive payment if the bank is obligated to pay a beneficiary and not in the special deposit itself. Any property interest under this subsection is determined under other law.

Comment

1. **No Property Interest in Special Deposit**. Section 8 contains one of the key protective provisions of the Uniform Special Deposits Act that makes the special deposit "bankruptcy remote" from the depositor. Neither a depositor nor a beneficiary has a property interest in a special deposit. Any interest that the depositor has with respect to a special deposit relates to its capacity as a beneficiary and rights that are triggered by the determination of the occurrence of the contingency. If the depositor is not a beneficiary, then it has no rights in the special deposit. Note that a depositor may have rights as a beneficiary if there is a residual in a special deposit after all other beneficiaries have been paid out because of Section 13(b). But in this narrow instance, the depositor's property right is contingent on the bank being obligated to pay the residual balance to the depositor, who is considered a beneficiary for this purpose.

2. **Property Interest in Right to Receive Payment**. Although Section 8(a) makes it clear that a beneficiary has no property interest in the special deposit, under other law a beneficiary may presently have a property interest in the beneficiary's contingent right to receive payment after the bank has become obligated to pay the beneficiary. Under other law, a creditor of the beneficiary may be able to create a lien on that contingent right of the beneficiary that may be enforced against the beneficiary after the bank has become obligated to pay the beneficiary. However, under Section 9 such a lien is not enforceable against the bank until it has actually become obligated to pay the beneficiary and then only as provided in Section 9(b).

Section 9. When Creditor Process Enforceable Against Bank

(a) Subject to subsection (b), creditor process with respect to a special deposit is not enforceable against the bank holding the special deposit.

(b) Creditor process is enforceable against the bank holding a special deposit with respect to an amount the bank is obligated to pay a beneficiary or a depositor if the process:

(1) is served on the bank;

(2) provides sufficient information to permit the bank to identify the depositor or the beneficiary from the bank's books and records; and

(3) gives the bank a reasonable opportunity to act on the process.

(c) Creditor process served on a bank before it is enforceable against the bank under subsection (b) does not create a right of the creditor against the bank or a duty of the bank to the creditor. Other law determines whether creditor process creates a lien enforceable against the beneficiary on a contingent interest of a beneficiary, including a depositor as a beneficiary, even if not enforceable against the bank.

Comment

1. **Protection from Creditor Process**. Section 9 is another key protective provision of the Uniform Special Deposits Act. This protects the special deposit from creditor process that might cause the bank holding the special deposit to "freeze" all or part of the special deposit, which would disable the special deposit from performing its permissible purpose. Creditor process is only enforceable on a bank if the requirements in subsection (b) are met, and then the process restrains only the bank's obligation to pay a beneficiary. "Obligated to pay a beneficiary" is defined in Section 2, and requires that a contingency has already occurred, and

that the bank has knowledge of that fact and as a result, a beneficiary is entitled to payment. Creditor process cannot be effective against the special deposit itself, or any funds in the special deposit that have not already been determined under the account agreement to be subject to an obligation to pay a specific beneficiary. Again, the special deposit is protected from creditor process so that the special deposit might foster the policy objectives of the special deposit. Protecting the special deposit from premature creditor process is a fundamental protection of the Uniform Special Deposits Act. The term depositor is included in 9(b) for the elimination of any doubt, but it should be noted that the only time a depositor would have any rights would be in its capacity as a beneficiary.

2. **Examples**. Example 1: Creditor obtains a judgment against beneficiary, which is a beneficiary of a special deposit held by bank. After bank becomes obligated to pay beneficiary (after a contingency has occurred and the bank has knowledge), creditor serves a writ of garnishment on bank. The writ is enforceable if the writ provides sufficient information to permit bank to identify, from bank's books and records, beneficiary's interest in the special deposit and affords bank a reasonable amount of time to act on the process before paying.

Example 2: Creditor obtains a judgment against beneficiary, which is a beneficiary of a special deposit held by bank. Creditor serves a writ of garnishment on bank before bank becomes obligated to pay beneficiary (i.e., before determination of the contingency). The premature garnishment is not enforceable against bank either at the time it is served or later, after determination of the contingency, when the bank becomes obligated to pay beneficiary (additional process would need to be served after determination of the contingency). Whether a beneficiary has a property interest in bank's contingent obligation to pay all or any portion of the special deposit to beneficiary, and whether service of the writ of garnishment creates a present lien on such a property interest enforceable against the beneficiary, rather than the bank holding the special deposit, is determined by other law.

Where a special deposit is intended to serve a payment or clearing system account with multiple beneficiaries, a creditor's writ of garnishment on the bank can only be enforceable against a determined payment right of a beneficiary, and not against the special deposit itself.

Section 10. Injunction or Similar Relief

A court may enjoin, or grant similar relief that would have the effect of enjoining, a bank from paying a depositor or beneficiary only if payment would constitute a material fraud or facilitate a material fraud with respect to a special deposit.

Comment

Protection from Injunctions. Section 9, above, protects the special deposit from creditor process. Typically, creditor process is a remedy that is addressed to a property interest of some kind. The same or a similar result can be obtained by seeking a temporary restraining order or preliminary injunction against a bank holding a special deposit. This section avoids that result,

and creates a safeguard for situations of fraud that might occur that is modeled after Section 5-109(b) of the Uniform Commercial Code, which addresses fraud with respect to the issuer of a letter of credit.

Section 11. Recoupment or Set Off

(a) Except as provided in subsection (b) or (c), a bank may not exercise a right of recoupment or set off against a special deposit.

(b) An account agreement may authorize the bank to debit the special deposit:

(1) when the bank becomes obligated to pay a beneficiary, in an amount that does not exceed the amount necessary to discharge the obligation;

(2) for a fee assessed by the bank that relates to an overdraft in the special deposit account;

(3) for costs incurred by the bank that relate directly to the special deposit; or

(4) to reverse an earlier credit posted by the bank to the balance of the special deposit account, if the reversal occurs under an event or circumstance warranted under other law of this state governing mistake and restitution.

(c) The bank holding a special deposit may exercise a right of recoupment or set off against an obligation to pay a beneficiary, even if the bank funds payment from the special deposit.

Comment

Limited Exceptions to No Set Off. The special deposit receives protections under the Uniform Special Deposits Act, including protection from the bank's right of recoupment or set off. This general rule is codified in (a). There are some significant exceptions. First, it is important to clarify that the prohibition of set off and recoupment would not prohibit a bank funding its obligation to pay a beneficiary with a debit to the special deposit. This is fundamental and it is inherent in the special deposit that it exists to fund future payments to beneficiaries. Subsection (b)(1) makes this clear.

Note, too, that the funding of the "payable" to a beneficiary shows that there is now an independent obligation of the bank to a beneficiary separate and distinct from the special deposit,

where, before the determination of the contingency, the payment recipient was not yet determined. This obligation to pay a beneficiary is not protected by the Uniform Special Deposits Act and is within the reach of either the bank creditor or a third-party creditor.

Subsections (b)(2)-(4) address other common operational issues with respect to a current account. Subsection (b)(2) addresses the current account when the balance is negative, meaning that the account owes the bank an amount sufficient to bring the balance to zero, together with interest on the deficit balance. Typically, the bank will also assess some kind of fee for the overdraft, and the fee will often be added to the deficit balance. The subsection permits this.

Subsection (b)(3) permits the bank to debit the special deposit for "costs" that "relate directly to the special deposit". One example would be costs associated with the bank's defense of a creditor attack on the special deposit, including the bank's attorneys' fees. The costs might also be borne by a third party like a securities custodian, who might also need to hire counsel to defend securities held in custody and might be indemnified by the bank for performing this function on behalf of the bank as a custodian. It is also useful to consider a "cost" that would not be recoverable here. Let us suppose that the Depositor has defaulted under a separate credit agreement between the bank holding the special deposit and the Depositor, and that the bank has declared a default and accelerated the amount due under the credit agreement. This amount could not be set off against the balance of the special deposit, because the credit agreement is not directly related to the special deposit. However, if there is an amount due to the depositor as a beneficiary, it might be subject to a set off under Subsection (c). This result is consistent with the application of setoff principles in the context of the structure of the Act. Under the Act, the depositor has no ownership interest in the special deposit other than a possible payment right as a beneficiary, in the event that a contingency is determined triggering such a payment right, at which point the necessary mutuality of obligation could exist. Note that the scope of what is considered a "cost" not only includes amounts paid to third parties by the bank related to the special deposit, but also losses suffered by the bank as a result of its performance of the account agreement governing the special deposit, such as unpaid fees under the account agreement.

Subsection (b)(4) enables the bank holding the special deposit to debit the special deposit to reverse an earlier credit. There are occasions when mistakes are made in handling a funds transfer. See, e.g., Citibank, N.A. v. Brigade Capital Management, 49 F.4th 42 (2d Cir. 2022) (involving a mistake that affected $900 million in funds transfers). This provision enables the bank to correct a mistaken transfer that increases the balance of a special deposit. Subsection (b)(4) could address both an event or circumstance prescribed under the state's laws governing mistake or restitution, or may simply be a mistaken credit by the bank due to a clerical or other error.

Subsection (c) exists for a different purpose and that is to make clear that, upon accrual of the bank's obligation to pay the beneficiary, that independent obligation is subject to the bank's right of recoupment or set off (if the beneficiary has a mature undischarged debt to the bank, that debt can be set off against the obligation of the bank to pay the beneficiary, again assuming that it is immediately due and payable, which is the default rule). This is not an obligation that arises from the special deposit itself, but rather from the contingency being determined, which triggers the independent obligation of the bank to pay the beneficiary.

Section 12. Duties and Liability of Bank

(a) A bank does not have a fiduciary duty to any person with respect to a special deposit.

(b) When the bank holding a special deposit becomes obligated to pay a beneficiary, a debtor-creditor relationship arises between the bank and beneficiary.

(c) The bank holding a special deposit has a duty to a beneficiary to comply with the account agreement and this [act].

(d) If the bank holding a special deposit does not comply with the account agreement or this [act], the bank is liable to a depositor or beneficiary only for damages proximately caused by the noncompliance. Except as provided by other law of this state, the bank is not liable for consequential, special, or punitive damages.

(e) The bank holding a special deposit may rely on records presented in compliance with the account agreement to determine whether the bank is obligated to pay a beneficiary.

(f) If the account agreement requires payment on presentation of a record, the bank shall determine within a reasonable time whether the record is sufficient to require payment. If the agreement requires action by the bank on presentation of a record, the bank is not liable for relying in good faith on the genuineness of the record if the record appears on its face to be genuine.

(g) Unless the account agreement provides otherwise, the bank is not required to determine whether a permissible purpose stated in the agreement continues to exist.

Comment

1. **Relationship between Bank and Beneficiary**. A special deposit is a form of deposit which, like all bank deposits, establishes a debtor-creditor relationship between the bank and its customer. Some existing case law addressing "special deposits" suggesting that the bank holding the funds deposited holds it in "custody" and the relationship is in the nature of a bailment is rejected in the Uniform Special Deposits Act. In modern commercial practice, no financial institution takes funds from a customer and holds funds in custody. This bailment concept is

anachronistic and not feasible in modern banking practice. It is also sometimes observed that a special deposit is a "poor man's trust", where the special deposit creates a trust relationship between the bank, as trustee, and the persons entitled to be paid, the trust "beneficiaries". This conception is rejected by the Uniform Special Deposits Act as well. If the parties want to create a trust, they should create a trust and not use a special deposit. The Uniform Special Deposits Act also makes clear that it does not create a fiduciary relationship between the bank and any person. Any argument that a bank is acting as a fiduciary would likely come from a beneficiary, but there could be other scenarios.

2. **Duties and Breach**. Importantly, the Uniform Special Deposits Act makes clear that the ultimate obligation of a bank holding a covered special deposit will be due to a beneficiary once the occurrence of a contingency is determined. If a duty expressed in either the account agreement or the Uniform Special Deposits Act is breached by the bank, the bank may be liable to the beneficiary for damages (not including consequential, special, or punitive damages), and is not liable to any other person, including a depositor. The duty runs only to a beneficiary (which could include a depositor) as a person that the bank is obligated to pay from the special deposit. However, the depositor or beneficiary may enforce the account agreement against the bank holding the special deposit. The depositor could be the person who established the special deposit and might be the best-positioned person to enforce the account agreement. In the landlord-tenant example, the landlord that establishes the special deposit may be better positioned to enforce the account agreement against the bank than the individual tenants that have deposited funds.

3. **Reliance on Documents**. The Uniform Special Deposits Act embraces current commercial practice where the bank holding the special deposit will rely upon a record, if it, rather than a third party, is to determine the contingency. This determination function, because it is so consequential, will usually be memorialized in careful detail in the account agreement. Although the parties may rely on the presentation of records, a special deposit is not a letter of credit under Article 5 of the Uniform Commercial Code, and it would be prudent for the account agreement to so state. On other occasions, a bank might rely upon an authenticated payment order, perhaps as specified in Section 4A-202 of the Uniform Commercial Code. If so, the payment order and its acceptance or rejection will be governed by Article 4A, which is incorporated through Section 14, *infra*.

4. **Permissible Purpose**. Notwithstanding the requirement in Section 6 that a permissible purpose exist for the duration of the special deposit, a bank does not have a duty under the Uniform Special Deposits Act to make such a determination, but it may be required under other law to make such a determination (for example, to determine under federal or state anti-money laundering law if a special deposit violates prohibitions against money laundering), or it may be required to act because another person has made such a determination under other law, including a court of competent jurisdiction.

Section 13. Term and Termination

(a) Unless otherwise provided in the account agreement, a special deposit terminates five

years after the date the special deposit was first funded.

(b) Unless otherwise provided in the account agreement, if the bank cannot identify or locate a beneficiary entitled to payment when the special deposit is terminated, and a balance remains in the special deposit, the bank shall pay the balance to the depositor or depositors as a beneficiary or beneficiaries.

(c) A bank that pays the remaining balance as provided under subsection (b) has no further obligation with respect to the special deposit.

Comment

1. **Applicability of Termination Provision**. The account agreement would normally be expected to provide, and should provide, a termination provision. The terms of Section 13(a) provide a default rule if the account agreement is silent about termination. The default rule would end the special deposit five years after the special deposit was first funded. A special deposit is first funded when a transfer of funds into the special deposit produces its first positive balance.

2. **Right of Remission**. Subsection (b) deals with the situation where, notwithstanding a diligent effort to locate all of the beneficiaries, the bank holding the special deposit is unable to do so. In this situation, whoever deposited funds into the special deposit will be considered a beneficiary and the funds will be repaid to such depositor as a beneficiary. The provision avoids a forfeiture of the remaining balance to the state, which is the probable result of the escheatment law of most states. The drafters assume that the deposited funds will be apportioned among depositors, appropriately taking into account the amount of their deposits into the account, prior payments from the account, and earnings on the account.

Section 14. Principles of Law and Equity

[Cite to state's Uniform Commercial Code], consumer protection law, law governing deposits generally, law related to escheat and abandoned or unclaimed property, and the principles of law and equity, including law related to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, and bankruptcy, supplement this [act] except to the extent inconsistent with this [act].

Comment

1. **Applicability of Supplemental Principles of Law**. This Section 14 is based on the

language from Section 1-103 of the Uniform Commercial Code, with the express addition of the Uniform Commercial Code, consumer protection law, law governing deposits generally, and law related to escheat and abandoned property. Certain provisions from the Uniform Commercial Code, specifically Articles 1, 3, 4, 4A, 5, and 9, are likely to supplement this Uniform Special Deposits Act for certain special deposits. As noted in the official comment to Section 1-103, this language "states the basic relationship of the Uniform Commercial Code to supplemental bodies of law". Further, as noted in earlier comments, the special deposit is a subcategory of the general deposit, and it is appropriate to supplement provisions of the Uniform Special Deposits Act with general deposit law if that law does not conflict with any provision of the Act. When consumers are affected, as in residential leases, it may be important to consider consumer protection measures implemented by a state to protect consumers. It is not the intent of the drafters to displace any applicable consumer protection law. The Uniform Special Deposits Act was drafted in accordance with a minimalist philosophy, meaning that the drafters understood it would be supplemented by other law, and the principal sources of such law are listed in Section 14. Implicit in this drafting approach is the importance of contract law, as many features of the special deposit arrangement will be determined by the parties in the account agreement. Questions including when a deposit is received by a bank, who can make a deposit into a bank account, and how adverse claims are treated will all be governed by the general law of deposits in a state. It is understood that Section 14 will import that law to fill in coverage gaps.

2. **Other Deposits**. Section 3(c), *supra*, limits the effect of the Uniform Special Deposits Act on other deposits taken by the bank.

Section 15. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Section 16. Transitional Provision

This [act] applies to:

(1) a special deposit made under an account agreement executed on or after [the effective date of this [act]]; and

(2) a deposit made under an agreement executed before [the effective date of this [act]], if:

(A) all parties entitled to amend the agreement agree to make the deposit a special deposit governed by this [act]; and

(B) the special deposit referenced in the amended agreement satisfies

Section 5.

Comment

Existing Special Deposits. A number of commentators observed that parties to existing special deposits might wish to be covered by the Uniform Special Deposits Act when it is enacted. Section 16 provides that this can be accommodated through a simple amendment to the account agreement. However, it is also important that the special deposit meet all the criteria set out for special deposits in Section 5. Further, the amended agreement must set forth its permissible purpose, which is another requirement of Section 5. While it is easy to apply the Uniform Special Deposits Act to what might be called a "legacy special deposit", some analysis will nevertheless be necessary.

[Section 17. Severability]

[If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state stating a general rule of severability.*

Section 18. Effective Date

This [act] takes effect . . .