



# Deposit and Security Account Control Agreements Under the UCC Negotiating and Drafting Agreements to Perfect Security Interests

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**Wednesday, September 9, 2009**

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**ADDITIONAL REPORT  
OF  
THE JOINT TASK FORCE ON DEPOSIT ACCOUNT CONTROL AGREEMENTS**

August 11, 2008

This is an additional report of the Joint Task Force on Deposit Account Control Agreements established by the Business Law Section of the American Bar Association.<sup>1</sup> This report supplements the initial report of the Task Force (the “Initial Report”) set forth at 61 The Business Lawyer 745 (2006). The Initial Report discussed the background and reasons for the creation of the task force, summarized the process by which the task force carries out its work and discussed the form of Deposit Account Control Agreement produced by the task force. That form was contained as an attachment to the Initial Report and consisted of the Deposit Account Control Agreement itself (the “DACA”), together with the General Terms incorporated by reference in the DACA. This report assumes that the reader already has some familiarity with the Initial Report, the DACA and the General Terms.<sup>2</sup>

This report describes various inserts to the DACA, contained in this report as attachments, that can be used with the DACA in order to modify the DACA to conform to the type of transaction contemplated by the parties. It explains how the inserts may be used with the DACA and then discusses the substance of each insert. This report then provides a discussion of the future work of the task force.

**I. USE OF THE INSERTS**

The DACA contains a Part A incorporating the General Terms and a Part B setting forth Specific Terms. As explained in the Initial Report,<sup>3</sup> the parties may supplement or modify the General Terms by inserting additional provisions (“inserts”) in the Specific Terms. Each insert is contemplated to be placed in section 10 of the Specific Terms, thereby incorporating the insert within the DACA.

The Initial Report anticipated that inserts may be desirable in certain deposit account control agreement transactions. The DACA itself was designed for a common paradigm deposit account control arrangement involving a demand deposit account. It assumes that the parties intend for the debtor to have access to the funds in the deposit account unless and until the secured party instructs the depository bank otherwise. It does not in itself provide, for example, for a standing order for a cash sweep of the funds in the deposit account to the secured party at

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<sup>1</sup> This report has not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>2</sup> The Initial Report, the DACA, the General Terms, and the inserts to the DACA discussed in this report are available on the Joint Task Force’s web site at <http://www.abanet.org/dch/committee.cfm?com=CL710060>.

<sup>3</sup> Joint Task Force on Deposit Account Control Agreements of the A.B.A. Section of Business Law, *Initial Report of the Joint Task Force on Deposit Control Agreements*, 61 BUS. LAW. 745, 778 (2006) (hereinafter the *Initial Report*).

the outset of the credit transaction or the use of a postal lock box linked to the deposit account.<sup>4</sup> These transactions, among others, need to be accommodated by inserts.

Since the issuance of the Initial Report, the task force has continued to meet<sup>5</sup> and has designed inserts to accommodate transactions other than the paradigm transaction originally contemplated by the DACA. These transactions consist of those involving a standing disposition instruction (commonly known as a funds “sweep”), lock box arrangements, a security interest in a time deposit or other deposit account not payable on demand, the blocking of the debtor’s access to the deposit account without a standing disposition instruction, a deposit account from which funds are automatically swept into an omnibus investment account, and first and second lien arrangements over the same deposit account.

Each of these inserts is discussed below. Each insert contains footnotes and, in one case, a prefatory note to assist the parties in selecting the proper insert for their transaction and in guiding them through possible choices contained in the insert where the task force recognized the different solutions may be present in the market place. The footnotes and the prefatory note should also be consulted when using the insert, but the footnotes and, if applicable, the prefatory note should be deleted when an insert is incorporated into the DACA.<sup>6</sup>

The parties may wish to use more than one insert in a single DACA. For example, a common transaction would be for the parties to use both the Standing Disposition Instruction Insert and the Lock Box Insert if they contemplate that checks and other items payable to the debtor would be received in a lock box, the proceeds of the items would be deposited in a deposit account and the resulting available funds would be swept to the secured party on a periodic basis, generally without the debtor ever having access to either the items or the funds. When using more than one insert, the parties are advised to add a subsection number to each insert incorporated into section 10 of part B of the DACA to distinguish the provisions of that insert from those of another insert. For example, if both the Standing Disposition Instruction Insert and the Lock Box Insert are to be used in the DACA, the parties might designate the provisions of the Standing Disposition Instruction Insert as section 10.1 and those of the Lock Box Insert as section 10.2.

## **II. OVERVIEW OF THE INSERTS**

The following discussion is an overview of the inserts. The overview is a brief summary only. The applicable insert’s footnotes and any prefatory note should be consulted for further explanation.

### **A. STANDING DISPOSITION INSTRUCTION**

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<sup>4</sup> *See id.* at 751.

<sup>5</sup> The current co-chairs of the task force are R. Marshall Grodner, Marvin D. Heileson, Oliver Ireland, John D. Pickering and Edwin E. Smith. Roberta Torian was a task force co-chair for the development of the DACA but was succeeded in 2006 by Oliver Ireland.

<sup>6</sup> The footnoted inserts, in Adobe format, and inserts without the footnotes, in Word format, are available for downloading and use by the public on the Joint Task Force’s web site at <http://www.abanet.org/dch/committee.cfm?com=CL710060>.

The Standing Disposition Instruction Insert is designed for a transaction in which the debtor does not at any time during the transaction have access to the funds in the deposit account. Instead, the funds are sent by funds transfer on a daily or other periodic basis to a deposit account designated by the secured party, commonly referred to as a “sweep account.”

The deposit account designated by the secured party may be at the depository bank party to the DACA or at another financial institution. The term “funds transfer,” as used in the insert, is sufficiently broad to encompass either possibility.<sup>7</sup> The funds transfer instructions contained in the insert should comply with normal banking procedures for payment orders.

The use of the insert in the DACA will, in and of itself, constitute a Disposition Instruction.<sup>8</sup> Accordingly, as the insert contemplates, the Outside Time<sup>9</sup> becomes the Agreement Date,<sup>10</sup> and all references in the DACA to the Initial Instruction<sup>11</sup> and the Exhibit<sup>12</sup> are deleted. The effect of these changes is that the debtor will not have access to the deposit account when the DACA becomes effective. It is assumed that any documentation required to be provided to the depository bank by § 4(a)(ii) of the General Terms<sup>13</sup> will be provided by the Agreement Date.

## B. LOCK BOX

The Lock Box Insert is designed for a transaction in which checks and other items<sup>14</sup> are sent to a post office box or similar address over which the depository bank or its agent has access. The place where the items are sent is commonly referred to as a “lock box.” The bank or its agent picks up the items from the lock box and deposits the items in the deposit account that is subject to the DACA. The insert may be easily used with the Standing Disposition Instruction Insert if the parties contemplate that the funds in the deposit account made available by the deposited items will be sent by funds transfer to the secured party on a periodic basis.

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<sup>7</sup> See U.C.C. § 4A-104(a) (2003) (defining “funds transfer”). The term includes a so-called “book transfer” of funds in a deposit account at a depository bank to another deposit account at the same depository bank even though the funds are not sent through a wire transfer system. See U.C.C. § 4A-104 official cmt. 1, case #1. The DACA uses terms as they are defined in the Uniform Commercial Code. Joint Task Force on Deposit Account Control Agreements of the A.B.A. Section of Business Law, General Terms of the Deposit Control Agreement §1(a) (Feb. 13, 2006) (available on the Joint Task Force’s website at <http://www.abanet.org/dch/committee.cfm?com=CL710060>) [hereinafter “General Terms”]. References in this report to the Uniform Commercial Code are to the 2003 Official Text as promulgated by the American Law Institute and the Uniform Law Commission.

<sup>8</sup> See General Terms §1 (defining “Disposition Instruction”); see also *Initial Report* at 758 (explaining “Disposition Instruction”).

<sup>9</sup> See General Terms §1 (defining “Outside Time”); see also *Initial Report* at 756-758 (explaining “Outside Time”).

<sup>10</sup> See General Terms §1 (defining “Agreement Date”).

<sup>11</sup> See *id.* (defining “Initial Instruction”); see also *Initial Report* at 754-759 (explaining “Initial Instruction”).

<sup>12</sup> See General Terms §1 (defining “Exhibit”); see also *Initial Report* at 755-756 (explaining “Exhibit”). The Exhibit is the form of the Initial Instruction attached to the DACA. See Joint Task Force website, <http://www.abanet.org/dch/committee.cfm?com=CL710060>.

<sup>13</sup> Section 4(a)(ii) of the General Terms provides that the depository bank need not comply with a Disposition Instruction unless the depository bank has received evidence reasonably required by it as to the authority of the person giving a Disposition Instruction to act for the secured party. See *Initial Report* at 758-759, 761.

<sup>14</sup> See U.C.C. § 4-104(a)(9) (defining “item”).

The insert accommodates transactions in which items are deposited to a single postal lock box for the debtor or to a master lock box for the debtor and other customers of the depository bank.

The depository bank's duties in respect of the lock box are usually those set forth in a lock box agreement between the debtor and the depository bank.<sup>15</sup> The lock box agreement, for example, will set forth how often the depository bank picks up items from the lock box and processes them for deposit to the deposit account. The insert assumes that the terms of the lock box agreement are satisfactory to the secured party, but it also makes suggestions in the footnotes as to how the insert might modify the lock box agreement if the period for pick up and processing set forth in the lock box agreement is not acceptable to the secured party. Depository banks participating in the task force have indicated that, while some changes reflecting standard options available to the debtor, such as those relating to pick up and processing times, may be acceptable, other changes to their standard lock box agreements are unlikely to be considered.

The insert provides that, while generally the depository bank should not take instructions from the debtor that would divert items from being picked up by the depository bank and processed for deposit to the deposit account, the depository bank may take instructions from the debtor for routine check processing matters, such as the handling of full payment checks,<sup>16</sup> not sufficient funds checks<sup>17</sup> and the like, unless otherwise instructed by the secured party following the Outside Time. If the Standing Disposition Instruction Insert is used with the insert, the Outside Time is the Agreement Date.

The insert also addresses how checks and other items are handled if the DACA should terminate.<sup>18</sup> An optional paragraph is provided under which, during a post-termination period, items are forwarded by the depository bank to the secured party. As noted in the insert, a number of banks are not willing to agree to this provision or will do so only for securitization transactions.

### C. NON-DEMAND DEPOSIT ACCOUNT

The Non-Demand Deposit Account Insert is designed for a transaction in which the deposit account neither is a demand account nor has a specific maturity date. For example, the deposit account may be an interest-earning account (sometimes referred to as a "money market deposit account") which permits only a limited number of withdrawals each month. After the withdrawal limit is reached, no further withdrawals may be made during the month without incurring a "penalty" charge. The insert is necessary in these cases solely because the General Terms were drafted by reference to a paradigm deposit account control arrangement involving a demand deposit account in contrast to a deposit not payable on demand. The insert clarifies that

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<sup>15</sup> Under the Lock Box Insert, the lock box agreement is considered to be a "Deposit-related Agreement" as defined in §1 of the General Terms.

<sup>16</sup> See U.C.C. § 3-311.

<sup>17</sup> See U.C.C. § 4-402(c) (explaining time of determination of insufficiency of account); U.C.C. § 4-402 official cmt. 4 (clarifying the need for a second determination).

<sup>18</sup> See General Terms §9 (setting forth DACA termination provisions); see also *Initial Report* at 772-773 (explaining DACA termination provisions).

the deposit account is not a pure demand deposit account, but the balance of the terms of the DACA will often apply.

If the deposit account is an interest-earning account with a specific maturity date (commonly referred to as a “certificate of deposit”), the Time Deposit Insert, discussed below, should be used instead.<sup>19</sup>

#### D. INITIAL BLOCK WITHOUT A STANDING DISPOSITION INSTRUCTION

The Initial Block Without a Standing Disposition Instruction Insert is designed for a transaction in which the debtor’s access to the deposit account is blocked, but the funds in the deposit account are not intended, at least initially, to be swept to the secured party. The deposit account may be a demand account or another deposit account, such as money market deposit account, without a specific maturity date.<sup>20</sup> Depository banks participating in the task force have emphasized that this type of account is an uncomplicated way of establishing an interest-earning “cash collateral” account – far superior in ease of implementation than the accounts referred to in the Time Deposit Insert or the Deposit Account Automatic Sweep Investment Insert discussed below. It is also far simpler and more straightforward in respect of the security interest perfection and priority analysis than the Deposit Account Automatic Sweep Investment Insert discussed below.<sup>21</sup>

Because the deposit account is blocked upon execution of the DACA, there is no need for an Initial Instruction. However, if there is a subsequent Disposition Instruction, the Disposition Instruction will be subject to the requirements of §4(a)(ii) of the General Terms.

If the deposit account is an interest-bearing account, interest will continue to accrue in the deposit account. If the secured party desires to direct the disposition of the interest on a periodic basis to the debtor or otherwise, Section 4(a)(ii)(E) of the General Terms should be consulted.

If the deposit account has a specific maturity date, the Time Deposit Insert should be used instead.<sup>22</sup> If the funds in the deposit account are to be swept periodically to the secured party, the Standing Disposition Instruction Insert should be used instead.<sup>23</sup>

#### E. TIME DEPOSIT

The Time Deposit Insert is designed for a transaction in which the deposit account is an interest-earning deposit with a specific maturity date. The most common example is a so-called “certificate of deposit” that is not certificated or, if certificated, the certificate does not constitute an instrument under Article 9.<sup>24</sup> The account is often referred to colloquially as a certificate of

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<sup>19</sup> See *infra* Section II.E.

<sup>20</sup> If the account is a deposit account other than a demand deposit account, the Non-Demand Deposit Account Insert should be used in conjunction with the Initial Block without a Standing Disposition Instruction Insert. See *supra* Section II.C.

<sup>21</sup> See *infra* Section II.F.

<sup>22</sup> See *infra* Section II.E.

<sup>23</sup> See *supra* Section II.A.

<sup>24</sup> See U.C.C. §§ 9-102(a)(29) (defining “deposit account”) and 9-102(a)(47) (defining “instrument”).

deposit or “CD.” Most current certificated “certificates of deposit” do not have certificates that constitute an instrument under Article 9 since they are typically not negotiable instruments or, as otherwise required to qualify as an “instrument” under Article 9, are not “of a type that in the ordinary course of business is transferred by delivery with any necessary indorsement or assignment.”<sup>25</sup>

The insert clarifies that the deposit account is not a deposit account payable on demand and that the debtor’s access to the deposit account is blocked at the outset. Accordingly, there is no need to use the Non-Demand Deposit Account Insert or the Initial Block without Standing Disposition Instruction Insert with the Time Deposit Insert.

The insert also deals with the two principal structural complications associated with using “certificates of deposit” as collateral – early withdrawal charges and how to handle “roll-overs.” The latter complication arises since most pledged certificates of deposit will likely mature more than once during the duration of the secured transaction.

If there are any charges for early withdrawal as a result of the depository bank’s receipt of a Disposition Instruction, those charges are charges that the depository bank may make to the deposit account free of the depository bank’s subordination under §5(a) of the General Terms.<sup>26</sup>

As to “roll-overs,” the insert establishes as a “default rule” that at maturity any interest accrued will be added to the deposit account and that the deposit account will be automatically renewed for the same period as the prior period. If renewal for that period is not available, the insert provides for the parties to follow the relevant Deposit-related Agreement to establish the period or, if there is no such provision to determine the period in the Deposit-related Agreement, the period established by the depository bank in accordance with its customary practice.

However, this is only the default rule. The insert permits (a) the secured party to give a Disposition Instruction prior to renewal, (b) the deposit account automatically to renew for a different period as specified in the insert or (c) accrued interest to be remitted to the debtor absent a contrary Disposition Instruction from the secured party. If a different period is selected for the renewal, the parties should choose a standard renewal period, such as thirty, sixty or ninety days. Otherwise, if the period is unavailable, the default rule will apply, and the time deposit will be renewed for the same period as the prior period.

#### F. DEPOSIT ACCOUNT AUTOMATIC SWEEP INVESTMENT

The Deposit Account Automatic Sweep Investment Insert contains a lengthy prefatory note that explains the purpose of the insert. In brief, the insert is designed for a deposit account that is linked to a cash management product in which funds in the deposit account are swept into an investment arrangement, typically on an overnight basis, in order to earn a greater amount of interest. If done on an overnight basis, the next morning, the funds, together with any accrued interest, are returned to the deposit account. The investment arrangement is usually structured to create an omnibus account in which the debtor and other customers of the depository bank

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<sup>25</sup> U.C.C. § 9-102(a)(47).

<sup>26</sup> See *Initial Report* at 765-766 (explaining depository bank’s subordination and right of charge back).

participate. The prefatory note further explains the sweep investment structure in more detail and cautions that (a) the investment arrangement may not be offered by a particular depository bank, (b) if offered, it may be offered only to certain customers, (c) it may not be suitable for some customers and (d) if offered to the particular debtor, the actual structure of the investment may vary. The prefatory note should be reviewed with care before the insert is used.

The insert is intended to assure the secured party that if, consistent with the debtor's cash management agreement, funds are swept from the deposit account to the investment arrangement on an overnight or other periodic basis and before the funds are returned to the deposit account, the secured party's security interest in the funds will remain perfected by control.

In many instances, the insert will not be needed. For example, if the debtor is seeking a greater rate of return on cash funds, the use of a "money market deposit account" as the deposit account subject to the DACA might be more appropriate for the debtor.<sup>27</sup> A money-market deposit account would also be less complicated to implement with the DACA since it would only require the use of the Non-Demand Deposit Account Insert. But, even if the deposit account is linked to an omnibus account investment arrangement, the Deposit Account Automatic Sweep Investment Insert may still not be required in all instances for the secured party's security interest in the funds swept to the investment arrangement to remain perfected with the requisite priority.

Whether or not the insert is used, the secured party will have a proceeds interest in the debtor's interest in the investment arrangement. The exchange of the debtor's interest in funds in the deposit account for an interest in the investment arrangement would result in the debtor's interest in the investment arrangement being proceeds of the deposit account.<sup>28</sup> That the depository bank maintains a record of the debtor's interest in the investment arrangement would suggest that the proceeds, i.e., the debtor's interest in the investment arrangement, constitute *identifiable* proceeds for purposes of enabling the secured party's security interest in the proceeds to attach.<sup>29</sup>

Whether or not the insert is used, the security party's proceeds security interest, having attached, will be automatically perfected for a period of 20 days following attachment.<sup>30</sup> The automatic perfection will lapse after 20 days unless one of the requirements for the continuation of perfection is met under UCC § 9-315(d).<sup>31</sup> A lapse of the 20-day automatic perfection period, however, is usually not a concern if the investment period for the sweep of the funds from the

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<sup>27</sup> See *supra* Sections II.C and II.D.

<sup>28</sup> See U.C.C. § 9-102(a)(64) (defining "proceeds"). Cf. U.C.C. § 9-332 official cmt. 2, ex. 2 (illustrating a case in which a secured party's security interest in a deposit account as original collateral may attach as proceeds to the debtor's interest in a deposit account to which funds from the first deposit account are transferred).

<sup>29</sup> See U.C.C. §§ 9-203(f) (stating enforceability of security interest in proceeds) and 9-315(a)(2) (stating secured party's rights in identifiable proceeds).

<sup>30</sup> U.C.C. §§ 9-315(c)-(d).

<sup>31</sup> Perfection of the security interest would extend beyond the 20-day automatic period if the debtor's interest in the investment arrangement were considered to be a deposit account and, in such a case, the secured party's proceeds interest would be in identifiable cash proceeds entitled to extended perfection under U.C.C. § 9-315(d)(2). See U.C.C. § 9-322 official cmt. 8, ex. 9. Cash proceeds includes a deposit account. See UCC § 9-102(a)(9) (defining "cash proceeds").

deposit account and the return of the funds to the deposit account is merely an overnight period or is otherwise within the 20-day automatic perfection period.<sup>32</sup>

Given that the secured party will be entitled to a proceeds security interest in the debtor's interest in the investment arrangement, that the proceeds security interest will attach and that the proceeds security interest will continue perfected during the likely investment period of 20 days or less, the only remaining area of possible concern for the secured party in not using the insert is the priority of the secured party's proceeds security interest. Even if the secured party did not use the insert, the secured party will maintain its control or equivalent priority for the proceeds security interest in one of two instances.

The first instance is one in which the debtor's interest in the investment arrangement were itself an interest in a deposit account or were otherwise considered to be cash proceeds. In that case, the secured party would maintain its control priority under UCC § 9-322(c). Section 9-332(c) contains a special set of priority rules designed to address, if a security interest in original collateral has priority under a non-temporal priority rule contained in Article 9, when a security interest in proceeds of the original collateral is entitled to the same non-temporal priority. The section applies expressly to the proceeds of a security interest in a deposit account as original collateral perfected by control. It gives control priority to a perfected security interest in proceeds of the deposit account if the proceeds are itself a deposit account or are cash proceeds.<sup>33</sup>

The second instance is one in which the debtor's interest in the investment arrangement is investment property or another type of collateral in which a security interest may be perfected by filing. If the secured party filed an effective financing statement covering the proceeds collateral as original collateral, the secured party may be entitled to priority for its proceeds security interest under the normal "first-to-file-or-perfect" priority rule of UCC § 9-322(a)(1). It would be quite common for the secured party's security interest in the collateral perfected by filing to have achieved that priority if the security interest were part of a larger financing secured by a security interest in all of the debtor's existing and after-acquired assets and if the secured party had already assured itself of filing priority under UCC § 9-322(a)(1) as a condition to closing that larger financing.

The secured party would not be able to rely upon UCC § 9-314(c) to maintain its control priority. While UCC § 9-314(c) is an attractive provision to address the concerns of the secured party in losing its control interest on funds swept from the deposit account, the section applies by its terms only to investment property as original collateral. In this case, however, the original

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<sup>32</sup> If perfection of the security interest beyond the 20-day automatic period were of concern, perfection of the security interest beyond the 20-day period would continue so long as the debtor's interest in the investment arrangement were considered to be a deposit account or were otherwise cash proceeds. In that case, the secured party's proceeds interest would be in identifiable cash proceeds entitled to extended perfection under U.C.C. § 9-315(d)(2). *See* U.C.C. § 9-322 official cmt. 8, ex. 9.

<sup>33</sup> If the debtor's interest in the investment arrangement were considered another type of collateral, e.g., investment property, U.C.C. § 9-322(c) would not be applicable. *See* U.C.C. § 9-322(c)(2)(B). U.C.C. § 9-322(c)(2)(B) requires that the proceeds must either be cash proceeds or proceeds of the same type as the original collateral. *See* U.C.C. § 9-322 official cmt. 8, ex. 10.

collateral would not be investment property, such as a securities account or security entitlements, but rather would be a deposit account.<sup>34</sup>

Instead of the secured party having to perform the due diligence necessary to rely upon the above analysis to assure itself that the perfection and priority of its security interest in the funds swept from the deposit account has been maintained, the insert seeks to provide greater certainty to the secured party without the necessity of the secured party performing that due diligence. The insert also permits the secured party to maintain the priority of its proceeds security interest in an interest of the debtor in an investment arrangement for which the above analysis may not be applicable, e.g., where the debtor's interest in the investment arrangement is investment property and the secured party cannot rely upon a filed financing statement to achieve priority for its proceeds security interest in that interest.

The insert accomplishes these objectives by expressly providing for the secured party's perfection by control of its security interest in the debtor's interest in the investment arrangement represented by the funds swept into the investment arrangement. Because the types of sweep products may vary, control is achieved under the insert, depending upon the structure of the investment arrangement, by one of five methods. Each of these methods is included in the insert in order to cover all of the types of sweep products mentioned.

(1) *Investment arrangement which is a deposit account maintained by the depositary bank*

The investment arrangement may be a deposit account maintained by the depositary bank. In that case, the secured party's perfection by control is achieved by control language in the insert complying with UCC § 9-104(a)(2).

(2) *Investment arrangement which is a deposit account for which the depositary bank is the customer*

The investment arrangement may be a deposit account at another bank for which the depositary bank party to the DACA is the customer of that bank.<sup>35</sup> This situation would typically arise when the investment arrangement is a deposit account maintained at an affiliate of the depositary bank party to the DACA or at a third party bank. In that case, the secured party's perfection by control is achieved by (a) the depositary bank party to the DACA having control under UCC § 9-104(a)(3) as the customer of the affiliate or a third party acting as a depositary bank, and (b) the depositary bank party to the DACA, acting as customer, acknowledging, analogous to the acknowledgment contemplated by UCC § 8-106(d)(3), that the depositary bank has control of the debtor's interest in the deposit account on behalf of the secured party.<sup>36</sup>

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<sup>34</sup> This is not to suggest that a policy argument may not be made, if the issue were ever litigated, that U.C.C. § 9-314(c) should be applied to a deposit account by analogy. It is only to suggest that the protections contained in U.C.C. § 9-314(c) itself do not extend to collateral that is a deposit account. See U.C.C. § 9-314(c).

<sup>35</sup> See U.C.C. § 4-104(a)(5) (defining "customer" with respect to deposit account).

<sup>36</sup> It might be argued that it is not possible for a secured party to perfect its security interest in a deposit account by control if the depositary bank's customer merely acknowledges that it has control of the deposit account on behalf of the secured party. Compare U.C.C. § 9-104(a) (lacking any such acknowledgement provision) with U.C.C. § 6-106(d)(3) (providing expressly for control if there is acknowledgement). U.C.C. § 8-106(d)(3) expressly provides,

(3) *Investment arrangement which is a securities account maintained by the depositary bank in its capacity as securities intermediary*

The investment arrangement may be a securities account<sup>37</sup> maintained by the depositary bank in its capacity as a securities intermediary.<sup>38</sup> In that case, the secured party's perfection by control is achieved by control language in the insert complying with UCC § 8-106(d)(2).<sup>39</sup>

(4) *Investment arrangement which is a securities account for which the depositary bank is the entitlement holder*

The investment arrangement may be a securities account for which the depositary bank is the entitlement holder.<sup>40</sup> This situation would typically arise when the investment arrangement is a securities account maintained at an affiliate of the depositary bank or at a third party acting as a securities intermediary. In that case, the secured party's perfection by control is achieved by the depositary bank (a) having control under UCC § 8-106(d)(1), and (b) acknowledging under UCC § 8-106(d)(3) that the depositary bank has control of the debtor's interest in the securities account on behalf of the secured party.

(5) *Bank as registered owner of securities*

It is also possible that the depositary bank may operate the investment program as one in which the depositary bank purchases securities, such as interests in money market funds, outright from the issuers with the funds from the debtor's deposit account and with funds from other customers. In that case, the securities would be directly held by the depositary bank as either certificated or uncertificated securities.<sup>41</sup> The insert provides that the secured party's perfection by control is achieved by (a) the depositary bank's status as the registered owner of the debtor's interests in the securities under UCC § 8-106(b)(2), if the securities are certificated, or 8-106(c)(1), if the securities are uncertificated, or (b) the depositary bank acknowledging in the case of uncertificated securities, analogous to the acknowledgment contemplated by UCC § 8-106(d)(3), that the depositary bank has control of the debtor's interest in the securities on behalf of the secured party and, in the case of certificated securities, acknowledging that it holds

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with respect to a security entitlement, for a secured party to have control of the security entitlement if a person in control of a security entitlement acknowledges that it has control on behalf of the secured party. U.C.C. § 8-106(d)(3). However, the mere absence of a similar provision in U.C.C. § 9-104(a) does not displace the application of normal agency principles under U.C.C. § 1-103(b). *See* U.C.C. § 1-103(b). Under normal agency principles, if the customer of the depositary bank is not the debtor or a person under the control of or otherwise closely associated with the debtor, the customer may act as agent for the secured party in order to perfect the secured party's security interest in the deposit account by control. *See* U.C.C. § 9-313 official cmt. 3.

<sup>37</sup> *See* U.C.C. § 8-501(a) (defining "securities account").

<sup>38</sup> *See* U.C.C. § 8-102(a)(14) (defining "securities intermediary").

<sup>39</sup> The control provisions of U.C.C. § 8-106 for investment property are methods for achieving control for purposes of Article 9. *See* U.C.C. § 9-106.

<sup>40</sup> *See* U.C.C. § 8-102(a)(7) (defining "entitlement holder").

<sup>41</sup> *See* U.C.C. § 8-102(a) (defining "security," "certificated security" and "uncertificated security"). A security is directly held by a person if it is not held by a securities intermediary in a securities account for that person or in another manner so as to give rise to the person having a security entitlement in the security. *See* U.C.C. § 8-501(d); U.C.C. § 8-501 official cmt. 4.

possession of the debtor's interest in the certificated securities on behalf of the secured party under UCC § 9-313(c).

Additionally, it is theoretically possible that the depositary bank may operate the investment program as one in which the depositary bank purchases instruments outright with the funds from the debtor's deposit account and with funds from other customers. In that case, the insert provides that perfection is by the depositary bank's possession of the debtor's interests in the instruments on behalf of the secured party under UCC § 9-313(c).

Notwithstanding the secured party's perfection of its security interest by control or possession, the secured party's right to instruct the depositary bank or, with respect to investment property, give entitlement orders<sup>42</sup> is necessarily limited. The limitation is inherent in the automated nature of the investment sweep product. The secured party may give instructions or originate entitlement orders to the depositary bank only to continue the automated process of the sweep investment product by which funds, together with any accrued interest, are deposited back to the deposit account at the end of the overnight or other investment period. These instructions are, in fact, given within the insert.

Although the secured party may not direct the depositary bank to divert the funds from the deposit account, the secured party may terminate the debtor's further use of the investment sweep program, assuming that the funds are credited to the deposit account, and the secured party has given an Initial Instruction if applicable.<sup>43</sup>

The insert does not address issues that could arise in certain cross-border contexts. This includes situations where, for example, (a) any securities or instruments held directly by the depositary bank are issued by a foreign issuer, or (b) financial assets or funds in respect of the investment arrangement are held by the depositary bank, any affiliate of the depositary bank, or an affiliated securities intermediary or depositary bank through a foreign office or branch. In these instances, it may be necessary for the secured party to obtain advice from legal counsel in the foreign jurisdiction as to whether, under the substantive law of the foreign jurisdiction, the secured party's security interest in the debtor's interest in the investment arrangement is perfected and has the desired priority, or whether the conflict-of-laws rules of the foreign jurisdiction would result in the application by a court in the foreign jurisdiction of the substantive law of a Uniform Commercial Code jurisdiction on issues relating to perfection and priority of the security interest.

## G. FIRST AND SECOND LIENS

The task force has developed two inserts to deal with so-called "second lien" secured financing arrangements. These are financings in which there are two secured parties with a security interest in common collateral and an intercreditor agreement entered into by the two secured parties. In the intercreditor agreement, one secured party (the "second lien secured

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<sup>42</sup> See U.C.C. § 8-102(a)(8) (defining "entitlement order").

<sup>43</sup> An Initial Instruction would not be applicable if the insert were being used together with the Initial Block Without Standing Disposition Instruction Insert. See *supra* Section II.D.

party”) agrees that its security interest (the “second lien”) is junior to the security interest (the “first lien”) of the other secured party (the “first lien secured party”).<sup>44</sup>

Often the common collateral consists of a deposit account maintained by a third party depositary bank for the debtor as the depositary bank’s customer. Each secured party is desirous of having a security interest in the deposit account as original collateral perfected by control through the use of a DACA. Under the intercreditor agreement, however, as between the two secured parties, only the first lien secured party may enforce the security interest so long as the obligations secured by the first lien remain outstanding or there remains a commitment to extend credit consisting of obligations that would be secured by the first lien.

The task force considered whether to devise a special DACA to deal with the second lien financing market. The task force discussed whether a DACA could be devised to which the debtor, the depositary bank, and both secured parties could be parties. However, after consideration and observation of documentation in the market place involving second lien financings, the task force determined that the better approach, and the approach more likely to receive market acceptance, was for each secured party to have its own DACA with the debtor and the depositary bank, with minimal intercreditor provisions built into each DACA as an insert.

Accordingly, the task force has promulgated a “Second Lien Separate Control Agreement Insert” and a “First Lien Separate Control Agreement Insert.” In both inserts the depositary bank agrees that it will not comply with an Initial Instruction or a Disposition Instruction from the second lien secured party until the DACA of the first lien secured party has been terminated.

The task force determined that the second lien secured party would still have perfected its security interest by control through the use of a DACA with Second Lien Separate Control Agreement Insert at the outset even though the right of the second lien secured party to give an Initial Instruction or a Disposition Instruction is conditioned upon a later termination of the DACA of the first lien secured party. The second lien secured party will have control because the depositary bank will still have agreed, as required for perfection by control under UCC § 9-104(c)(2), that the depositary bank will follow instructions originated by second lien secured party *without further consent of the debtor*.<sup>45</sup>

Given that control for the second lien secured party will have been achieved under the DACA with the Second Lien Separate Control Agreement Insert, the task force did not think it necessary to include in the DACA provisions to appoint the first lien secured party as agent for the second lien secured party under the intercreditor agreement for the second lien secured party’s security interest in the deposit account to be perfected by control. Whether such an

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<sup>44</sup> The First Lien Separate Control Agreement Insert and the Second Lien Separate Control Agreement Insert do not contain provisions relating to the intercreditor relationship between the first lien secured party and the second lien secured party. The Commercial Finance Committee of the American Bar Association’s Business Law Section has established a Model Intercreditor Agreement Task Force to deal with the intercreditor relationship. That task force’s web site address is <http://www.abanet.org/dch/committee.cfm?com=CL190029>.

<sup>45</sup> See *Initial Report* at 764 n. 66.

agency relationship is desirable in the intercreditor agreement for other reasons is not addressed in the insert.<sup>46</sup>

Each insert contemplates that the second lien secured party, in the case of the First Lien Separate Control Agreement Insert, and the first lien secured party, in the case of the Second Lien Separate Control Agreement Insert, would be identified in the insert as acting in its capacity as second- or first lien secured party, respectively. The separate identification of the capacity in which each secured party acts is necessary in the event that the same financial institution or other entity serves as both the first- and second lien secured party.

There is a particular issue that the first lien secured party and the second lien secured party should not address in the inserts but may wish to address in the intercreditor agreement. Once the DACA of the first lien secured party terminates, the first lien secured party may have some trailing liabilities for reimbursement to the depository bank under §6(b) of the General Terms or for the first lien secured party's indemnity under §6(e) of the General Terms.<sup>47</sup> To be sure, the first lien secured party's reimbursement obligations under §6(b) are limited to the total amount transferred from the deposit account as a result of Disposition Instructions originated by the first lien secured party or, under §9(b) of the General Terms, arising upon termination of the DACA. The reimbursement obligations would not be the responsibility of the second lien secured party under the second lien secured party's DACA. Whether the first lien secured party may look to the second lien secured party or to the collateral securing the second lien obligations, to the extent still or previously consisting of common collateral, for payment of the first lien secured party's reimbursement or indemnification obligations under the first lien secured party's DACA is a matter left to be addressed, if at all, in the intercreditor agreement.

### **III. FUTURE WORK OF THE TASK FORCE**

Two projects remain for the task force. The first project is to develop a DACA, with the assistance of the Business Law Section's Commercial Finance Committee's Subcommittee on Securitizations and Derivatives, specifically designed for securitizations. This project is substantially completed and will be the subject of a separate report.<sup>48</sup>

The second project is to develop an agreement relating to security interests in health-care receivables.<sup>49</sup> Under applicable federal law relating to Medicare and Medicaid receivables, with certain exceptions, the secured party may not have a right to collect health-care receivables directly from the account debtor and may not be able to have a control agreement with the

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<sup>46</sup> If the first lien secured party and the second lien secured party desire to permit the second lien secured party to originate an Initial Instruction or a Disposition Instruction before the termination of the DACA of the first lien secured party, the two secured parties may do so by waiving the requirement of termination of their respective DACAs without further consent of the debtor. *See* General Terms § 14(a).

<sup>47</sup> *See Initial Report* at 766-769 (explaining depository bank's right to reimbursement and indemnification from secured party).

<sup>48</sup> Eric Marcus is serving as the reporter for that project.

<sup>49</sup> *See generally*, "Not So Perfect: The Disconnect Between Medicare and the Uniform Commercial Code Regarding Health-Care-Insurance Receivables", 9 North Carolina Banking Institute 373 (2005) (discussing relation of Medicare and Medicaid scheme to proceeds of health-care receivables deposited in deposit account).

depository bank for a deposit account to which the proceeds of the receivables are credited.<sup>50</sup> The task force is developing a form of agreement among the debtor, the secured party and the depository bank which, while not being a control agreement, will provide certain safeguards to protect the secured party against diversion of proceeds by the debtor.<sup>51</sup> The project, when completed, will be the subject of a separate report.

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<sup>50</sup> *See, e.g.*, 42 U.S.C. § 1395g(c).

<sup>51</sup> Leslie Polt is serving as the reporter for this project.

STANDING DISPOSITION INSTRUCTION INSERT

(funds transfer by simple cash sweep from the Agreement Date)

(for optional use to be inserted in Section 10 of Part B of the Deposit Account Control Agreement)

version 1 dated September 18, 2006

available from the American Bar Association's Business Law Section at  
<http://www.abanet.org/dch/committee.cfm?com=CL710060><sup>52</sup>

10. [ ]<sup>53</sup>                      Standing Disposition Instruction.

(a) On each Business Day [next following the end of each \_\_\_ period<sup>54</sup>], and without further consent of the Debtor, the Bank will initiate a funds transfer<sup>55</sup> in accordance with the following instructions or in accordance with such other instructions as the Secured Party may from time to time communicate to the Bank:

[Bank Name: \_\_\_\_\_

Bank Address: \_\_\_\_\_

Bank ABA Routing # : \_\_\_\_\_

Account Number: \_\_\_\_\_

Account Name: \_\_\_\_\_

Reference Data: \_\_\_\_\_

\_\_\_\_\_ ]<sup>56</sup>

<sup>52</sup> This document is a model form produced by the Joint Task Force on Deposit Account Control Agreements of the Business Law Section of the American Bar Association. The provisions of the form have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>53</sup> Insert number to distinguish this insert from other inserts and then remove brackets.

<sup>54</sup> If a transfer is to be made less frequently than on each Business Day, (i) insert the agreed weekly, bi-weekly or other period at the end of which the transfer is to be made and (ii) remove the brackets.

<sup>55</sup> "Funds transfer" is defined in UCC § 4A-104(a). The term includes not only a wire transfer but also, if the originator's bank and the beneficiary's bank are the same, a book transfer. See Official Comment 1, Case #1, to UCC § 4A-104.

<sup>56</sup> The funds transfer instructions should comply with normal banking procedures for payment orders. Typically, the instructions must include at a minimum the name of the beneficiary's bank, the ABA routing number, the account number at the beneficiary's bank and the beneficiary's account name. Other identifying information, such as the

(b) This subsection constitutes a Disposition Instruction originated by the Secured Party.<sup>57</sup> The Bank will not comply with the Debtor's Disposition Instructions. All references in the General Terms to the Outside Time shall instead be to the Agreement Date. This Agreement is amended to delete the Exhibit and all references to the Initial Instruction and the Exhibit.

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beneficiary bank's address and reference data, must be included in the payment order if the information is included in paragraph (a) of this subsection.

<sup>57</sup> Like any Disposition Instruction, the Disposition Instruction in this subsection is subject to § 4(a)(ii) of the General Terms. The subsection assumes that any documentation to be provided to the Bank as contemplated by § 4(a)(ii) has been provided on or before the Agreement Date.

LOCK BOX INSERT

(for optional use to be inserted in Section 10 of Part B of the Deposit Account Control Agreement)

version 1 dated January 25, 2007

available from the American Bar Association's Business Law Section at <http://www.abanet.org/dch/committee.cfm?com=CL710060><sup>58</sup>

10. [ ]<sup>59</sup>                      Lock Box Arrangements.

(a) In this subsection, the following terms have the following meanings:

“*Lock Box*” means the lock box arrangement associated with the Deposit Account, or, if there is more than one lock box arrangement, the lock box arrangements, individually and collectively, associated with the Deposit Account and for which in each case the Bank or its agent has the rights of access and direction, as identified below:

Bank's Identifying Number <sup>60</sup>	Associated Deposit Account

“*Lock Box Agreement*” means the agreement between the Bank and the Debtor governing the Lock Box and the services to be provided by the Bank to the Debtor in connection therewith.

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<sup>58</sup> This document is a model form produced by the Joint Task Force on Deposit Account Control Agreements of the Business Law Section of the American Bar Association. The provisions of the form have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>59</sup> Insert number to distinguish this insert from other inserts and then remove brackets.

<sup>60</sup> The Bank's identifying number may be a postal box number or, especially in the case of a master postal box to receive items and correspondence of more than one customer, an internal number used by the Bank to identify the Debtor's items and correspondence received by the Bank in the postal box.

In addition, all references in this subsection to checks and other items and correspondence received by the Bank for the Lock Box refer to checks and other items and correspondence received by the Bank for the Debtor's account.<sup>61</sup>

(b) The Bank will pick up and thereafter process the checks and other items and correspondence received by the Bank for the Lock Box, including depositing only to the associated Deposit Account as specified above the checks and other items of payment, all in accordance with the Lock Box Agreement.<sup>62</sup>

(c) The Bank will not comply with any instructions from the Debtor regarding the checks or other items received by the Bank for the Lock Box. However, the Bank may, if so provided under the Lock Box Agreement, comply with the Debtor's instructions as to dealing with routine check processing matters, such as the handling of full payment checks, not sufficient funds checks and the like, unless, for items and correspondence to be sent to the Debtor, the Outside Time has occurred, the Secured Party has instructed the Bank to send the items and correspondence to the Secured Party and the Bank has had a reasonable period of time to act thereon.

(d) All references in this Agreement to the Deposit-related Agreements include the Lock Box Agreement. A reference to the Deposit Account in the definition of "*Order or Process*" and in Sections 4(a)(iii), 5(b)(ii), 8 and 9(a) of the General Terms includes a reference to the Lock Box. [Sections 9(b) and (c) of the General Terms apply to the checks and other items received by the Bank for the Lock Box, and not at the time already deposited to the Deposit Account, as of the date of any termination of this Agreement by the Bank pursuant to Section 9(a)(ii)(C) of the General Terms as if the items were funds in the Deposit Account.]<sup>63</sup>

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<sup>61</sup> This sentence is relevant if the Lock Box is a master postal box to receive items and correspondence of more than one customer.

<sup>62</sup> If the timeliness of pick up or processing of the items is an important factor in the Secured Party's credit decision, the Secured Party should review the Lock Box Agreement to verify that the timeliness of pick up and processing is acceptable. If it is not, the Secured Party may require, as a condition to the granting of financing accommodations, that the Lock Box Agreement be amended to accelerate the timeliness of pickup or processing. The Bank may or may not be willing to agree to such an amendment. In some cases, the Bank may be willing for the DACA itself to override the timeliness of pick up or processing in the Lock Box Agreement. In that case a substitute paragraph (b) may be considered as follows:

(b) The Bank will pick up [not less frequently than once each Business Day] and thereafter process [within one Business Day] the checks and other items and correspondence received by the Bank for the Lock Box, including depositing only to the associated Deposit Account as specified above the checks and other items of payment, but otherwise in accordance with the Lock Box Agreement.

If the Secured Party finds the timeliness of pick up or processing of items in the Lock Box Agreement to be acceptable but is concerned about the Debtor later amending the Lock Box Agreement to extend the time for the Bank's pick up or processing, the Secured Party should consider prohibiting such an amendment in its loan and security documentation with the Debtor.

<sup>63</sup> A number of depository banks are not willing to agree to the bracketed language or will do so only for securitization transactions. Those that are willing to do so are so willing only if the Bank terminates the Deposit

[(e) Upon the termination of this Agreement by the Bank, the Bank will follow the procedures set forth in this paragraph (e) for a period of [30-60] days following the termination of this Agreement or for such shorter period of time as the Secured Party specifies in instructions to the Bank (the “*Post-Termination Period*”). During the Post-Termination Period, the Bank will forward to the Secured Party all checks and other items or correspondence received by the Bank for the Lock Box, including checks and other items received by the Bank for the Lock Box as of the termination of this Agreement by the Bank and not at the time already deposited to the Deposit Account. The Secured Party will pay to the Bank any fees customarily charged by the Bank, and will reimburse the Bank for any out of pocket costs or expenses incurred by the Bank, in maintaining the Lock Box and forwarding the checks and other items and correspondence during the Post-Termination Period. The Bank reserves the right to condition its maintenance of the Lock Box and forwarding of the checks and other items and correspondence on the Secured Party making such payments and reimbursements to the Bank in advance. Notwithstanding the termination of this Agreement, Section 4 of the General Terms will apply with respect to the Bank’s acts and omissions under this paragraph (e).]<sup>64</sup>

[(e)][(f)]<sup>65</sup> Any checks or other items or correspondence forwarded to the Secured Party by the Bank pursuant to this Agreement will be forwarded in the form received, without the Bank supplying any indorsements for the checks or other items. [All correspondence forwarded to the Secured Party by the Bank pursuant to paragraph (e) will be forwarded unopened inclusive of any items contained in the correspondence.]<sup>66</sup>

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Account Control Agreement on thirty days’ prior notice under Section 9(a)(ii)(C) of the General Terms. However, the bracketed language may be deleted if the next bracketed paragraph is included in the insert.

<sup>64</sup> A number of lock box banks are not willing to agree to this provision as a general matter or will do so only for securitization transactions. Depending upon the willingness of the lock box bank, paragraph (e) may be included or not included in the insert. In the case of a securitization transaction, the Post-Termination Period is often 60-90 days.

<sup>65</sup> If paragraph (e) is included in the insert, this paragraph should be lettered paragraph (f). If paragraph (e) is not included in the insert, this paragraph should be lettered paragraph (e).

<sup>66</sup> If paragraph (e) is not included in the insert, the bracketed language should be deleted.

NON-DEMAND DEPOSIT ACCOUNT INSERT

(for optional use to be inserted in Section 10 of Part B of the Deposit Account  
Control Agreement)

version 1 dated August 6, 2007

available from the American Bar Association's Business Law Section at  
<http://www.abanet.org/dch/committee.cfm?com=CL710060><sup>67</sup>

10.  <sup>68</sup> Non-Demand Deposit Account<sup>69</sup>

(i) The words "demand deposit accounts" in the first sentence of the first paragraph in the "Background" section of the Specific Terms are deleted and replaced with "deposit accounts".

(ii) Section 7(ii) of the General Terms is deleted and replaced with the following: "(ii) maintains, in the ordinary course of the Bank's business, the Deposit Account as a time, savings, passbook, or similar account not payable on demand, and".

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<sup>67</sup> This document is a model form produced by the Joint Task Force on Deposit Account Control Agreements of the Business Law Section of the American Bar Association. The provisions of the form have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>68</sup> Insert number to distinguish this insert from other inserts and then remove brackets.

<sup>69</sup> This insert is for use for deposit accounts other than demand deposit accounts, including savings accounts. If the non-demand deposit account is a time deposit or other deposit account with a specific maturity date, such as a certificate of deposit that is not an instrument, the Time Deposit Insert should be used instead.

INITIAL BLOCK WITHOUT A STANDING DISPOSITION INSTRUCTION  
INSERT

(for optional use to be inserted in Section 10 of Part B of the Deposit Account  
Control Agreement)

version 1 dated August 6, 2007

available from the American Bar Association's Business Law Section at  
<http://www.abanet.org/dch/committee.cfm?com=CL710060><sup>70</sup>

10. <sup>71</sup>                      Initial Block<sup>72</sup>

The Bank will not comply with the Debtor's Disposition Instructions. All references in the General Terms to the Outside Time shall instead be to the Agreement Date. This Agreement is amended to delete the Exhibit and all references to the Initial Instruction and the Exhibit.<sup>73</sup>

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<sup>70</sup> This document is a model form produced by the Joint Task Force on Deposit Account Control Agreements of the Business Law Section of the American Bar Association. The provisions of the form have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>71</sup> Insert number to distinguish this insert from other inserts and then remove brackets.

<sup>72</sup> This insert will work with any deposit account in which the Secured Party desires to block the Debtor's access to the deposit account upon execution of the DACA, but in which there is to be no sweep to another account. The Deposit Account may include savings accounts or deposit accounts paying interest at money market rates. When dealing with deposit accounts with a specific maturity date, however, including certificates of deposits that are not instruments, the Time Deposit Insert, with its provisions specific to time deposits, should be used. Furthermore, if the Secured Party desires to combine the blocking of the Deposit Account with a sweep to another account, the Secured Party should use the Standing Disposition Instruction Insert instead. This insert is for use for all deposit accounts, other than time deposits or deposit accounts where there is an associated sweep to another account. In particular, accounts encompassed by this insert include deposit accounts that require notification to the depository bank before withdrawal or deposit accounts with limited withdrawal rights that pay interest. Specifically, such an account may be a deposit account that pays interest at determinable rates, such as money market rates, or that allows only a limited number of withdrawals during a set period of time without penalty.

<sup>73</sup> Since under this insert the Deposit Account is blocked upon execution of the DACA, there is no need for an Initial Instruction. Furthermore, if the Deposit Account is interest-bearing, interest will continue to be earned in the Deposit Account in accordance with the Deposit-related Agreements unless there is a subsequent Disposition Instruction from the Secured Party. If there is a subsequent Disposition Instruction, this Disposition Instruction is subject to § 4(a)(ii) of the General Terms. In this case, this insert assumes that any documentation to be provided to the Bank as contemplated by § 4(a)(ii) has been provided before the Agreement Date or will be provided shortly thereafter. Furthermore, it may be advisable to include, in Section 10 of Part B of the DACA, the address to which a Disposition Instruction is to be sent.

## TIME DEPOSIT INSERT

(for optional use to be inserted in Section 10 of Part B of the Deposit Account Control Agreement)

version 1 dated August 6, 2007

available from the American Bar Association's Business Law Section at  
<http://www.abanet.org/dch/committee.cfm?com=CL710060><sup>74</sup>

10.  <sup>75</sup> Time Deposit

(a) Initial Block

The Bank will not comply with the Debtor's Disposition Instructions. All references in the General Terms to the Outside Time shall instead be to the Agreement Date. This Agreement is amended to delete the Exhibit and all references to the Initial Instruction and the Exhibit.<sup>76</sup>

(b) Non-Demand Deposit Account

(i) The words "demand deposit accounts" in the first sentence of the first paragraph in the "Background" section of the Specific Terms are deleted and replaced with "deposit accounts".

(ii) Section 7(ii) of the General Terms is deleted and replaced with the following: "(ii) maintains, in the ordinary course of the Bank's business, the Deposit Account as a time, savings, passbook, or similar account not payable on demand, and".

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<sup>74</sup> This document is a model form produced by the Joint Task Force on Deposit Account Control Agreements of the Business Law Section of the American Bar Association. The provisions of the form have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>75</sup> Insert number to distinguish this insert from other inserts and then remove brackets. This insert is designed for use with interest bearing deposit accounts that have a specific maturity date. The most common of these types of deposit accounts are certificates of deposit that are not represented by an instrument, commonly called "certificates of deposit" or "CDs". Moreover, for ease of use, this Insert includes both the contents of the Initial Block without a Standing Disposition Instruction Insert and the Non-Demand Deposit Account Insert together with provisions specifically for time deposits. Therefore, the Initial Block without a Standing Disposition Instruction Insert and the Non-Demand Deposit Account Insert should not be used with this insert.

<sup>76</sup> Since under this insert the Deposit Account is blocked upon execution of the DACA, there is no need for an Initial Instruction. Furthermore, if the Deposit Account is interest-bearing, interest will continue to be earned in the Deposit Account in accordance with the Deposit-related Agreements unless there is a subsequent Disposition Instruction from the Secured Party. If there is a subsequent Disposition Instruction, this Disposition Instruction is subject to § 4(a)(ii) of the General Terms. In this case, this insert assumes that any documentation to be provided to the Bank as contemplated by § 4(a)(ii) has been provided before the Agreement Date or will be provided shortly thereafter. Furthermore, it may be advisable to include, in Section 10 of Part B of the DACA, the address to which a Disposition Instruction is to be sent.

(c) Other Matters

(i) Any early withdrawal penalties as provided in the relevant Deposit-related Agreement resulting from withdrawal of funds from the Deposit Account prior to its maturity date shall be included as a charge permitted by Section 5(b) of the General Terms.

[(ii) This clause (ii) is subject to clause (iii) or (iv) of this paragraph (c). The Bank agrees that, absent any contrary Disposition Instruction originated by the Secured Party and received by the Bank within the time period provided in the relevant Deposit-related Agreement, or if not so provided, a reasonable time for the Bank to act thereon prior to the maturity date of the Deposit Account, the Deposit Account, together with all interest earned thereon, will automatically renew<sup>77</sup> and be reinvested for the same period of time as was most recently applicable to the then maturing Deposit Account. If that period is unavailable, then the Deposit Account, together with all interest earned thereon, will automatically renew for such period as provided in the relevant Deposit-related Agreement, and if not so provided, then for such period of time as is in accordance with the Bank's customary practice.]

(iii)  If this box is checked and the following line is filled in, then the Deposit Account, together with all interest earned thereon, shall automatically renew and be reinvested for a \_\_\_\_\_ period, notwithstanding clause (ii) of this paragraph (c).<sup>78</sup>

(iv)  If this box is checked, the Secured Party directs that the disposition of the interest earned on the Deposit Account (but not the principal) as of any maturity date shall be made as directed by the Debtor, absent another Disposition Instruction from the Secured Party.<sup>79</sup>

(v) If, upon maturity, the renewal of the Deposit Account results in the creation of a new account, the term "Deposit Account" shall thereafter include the new account.<sup>80</sup>

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<sup>77</sup> The term "renewal" is commonly used when the time deposit matures, interest is paid or rolled over, and the principal, and possibly interest, is placed in a new time deposit. Some banks operationally, however, may actually create a new account on this "renewal." The term renew is meant to cover this situation, as well. See the text accompanying Note 7, *infra*.

<sup>78</sup> If this box is checked or the second line is not filled in, then the default rule in clause (ii) of paragraph (c) will apply, and the Deposit Account will automatically renew and be reinvested for the period provided in clause (ii) of paragraph (c). It is important to note that the parties should pick a standard time period that is generally available, such as 30, 60 or 90 days.

<sup>79</sup> If this box is checked, then this insert will constitute a Disposition Instruction. Like any Disposition Instruction, this Disposition Instruction is subject to § 4(a)(ii) of the General Terms. In this case, this insert assumes that any documentation to be provided to the Bank as contemplated by § 4(a)(ii) has been provided before the Agreement Date or will be provided shortly thereafter.

<sup>80</sup> See Note 4, *supra*.

## DEPOSIT ACCOUNT AUTOMATIC SWEEP INVESTMENT INSERT

(for optional use; to be inserted in Section 10 of Part B of the Deposit Account Control Agreement)

version 1 dated October 5, 2007

available from the American Bar Association's Business Law Section at <http://www.abanet.org/dch/committee.cfm?com=CL710060><sup>81</sup>

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### PREFATORY NOTE<sup>82</sup>

This Insert is intended to provide for the perfection of the Secured Party's security interest by possession or control of the Debtor's interest in a cash management product of the Bank, referred to in this Insert as a "Sweep Investment". The Sweep Investment is linked by the Bank to the Deposit Account. This Insert is not intended to create any other rights or obligations that are not necessary to provide for the Secured Party's perfection of its security interest by possession or control of the Debtor's interest in the Sweep Investment.

The key operational factor that distinguishes a Sweep Investment is that the investment process does *not* involve a separate securities account, deposit account or other account of the Debtor as such. Rather, a Sweep Investment usually involves the Bank commingling funds of the Debtor from its Deposit Account with funds of other depositary banking customers of the Bank who have made similar investment elections. The commingled funds are deposited into large accounts (often "house accounts" of the Bank itself) that are used by the Bank to make a single, very large, aggregate investment with the applicable issuer or securities intermediary or, potentially, even with the Bank itself. This aggregate investment usually would be recorded on the books of the investing party as an investment by the Bank (in contrast to an investment by the Debtor). Depending on the nature of the Sweep Investment and various other operational aspects, the Bank could be viewed as any of the following: (i) a holder of directly-held instruments (*e.g.*, if the investment were in commercial paper), (ii) a customer of another depositary bank

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<sup>81</sup> This document is a model form produced by the Joint Task Force on Deposit Account Control Agreements of the Business Law Section of the American Bar Association. The provisions of the form have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>82</sup> This Prefatory Note to this insert, together with the footnotes, should be deleted if this insert is added to Section 10 of Part B of the Deposit Account Control Agreement.

(e.g., if the investment were in interest-bearing bank deposits of another bank), or (iii) an entitlement holder of a securities account (if the investment were in securities or other financial assets held through a separate securities intermediary). In addition, the Bank itself could be acting as a depository bank (if the investment were in the Bank's own interest-bearing deposits), or a securities intermediary (e.g., if the investment were in money market mutual funds held by the Bank). Sweep Investments are usually made pursuant to an agreement between the Debtor and the Bank, referred to in this Insert as a "Sweep Agreement."

This Insert is drafted as a comprehensive document intended to provide for the Secured Party's perfection of its security interest in the Debtor's interest in the Sweep Investment by possession, in the case of instruments not constituting investment property, or otherwise by control, irrespective of whichever of the foregoing characterizations "fit" the particular Sweep Investment. This Insert also recognizes, as it must, that the automated nature of a Sweep Investment effectively limits the operational ability of the Bank to follow entitlement orders or instructions while the Debtor's funds are in a Sweep Investment, except to the extent provided in this Insert. A Secured Party should not expect the Bank to provide any rights to a Secured Party or for the Bank to assume any obligations relating to a Sweep Investment other than those provided for in this Insert. In particular, the Secured Party should not expect the Bank to agree to follow any entitlement order or instruction as to the Debtor's funds contained in a Sweep Investment, other than as set forth in this Insert.

The Secured Party can also perfect its security interest in the Debtor's interest in the Sweep Agreement by filing a Uniform Commercial Code financing statement to the extent that a security interest in the Debtor's interest may be perfected by filing. Indeed, the Secured Party may already have made such a filing in connection with the security interest granted under the financing transaction.

A Sweep Investment may or may not be available from the Bank or, if available, may or not be offered by the Bank to the Debtor. A Bank may have certain eligibility criteria that a customer must meet in order to be considered by the Bank as a Sweep Investment candidate. A Sweep Investment may not be suitable for a particular customer or group of customers of the Bank, including the Debtor. Generally, a Bank will offer a Sweep Investment to the Debtor only in the Bank's discretion. For reasons such as these, if the Debtor and the Secured Party are seeking to earn a return on the funds in the Deposit Account – especially if the Deposit Account is dedicated "cash collateral" securing a particular obligation of the Debtor - the Bank may have various other products, such as a money market deposit account, that offer an acceptable interest rate, are considerably simpler to implement as a secured transaction, and, accordingly, would not require use of this Insert.

The use of a Sweep Investment, when available and offered by the Bank to the Debtor, typically involves an investment decision by the Debtor - *at the Debtor's risk* - as part of the Debtor's treasury function. The investment decision is not a decision of the Secured Party, whose interest is merely to obtain a security interest perfected by possession or control of the Debtor's interest in the Sweep Investment and to have available to the Secured Party practical remedies to enforce its security interest.

This Insert is not intended to apply to investments made with funds that are withdrawn from the Deposit Account at the instruction of the Debtor and credited to a separate securities account or deposit account maintained directly by the Debtor with a securities intermediary or a depository bank and governed by a typical securities account agreement or deposit account agreement. If the Secured Party seeks to obtain a security interest perfected by control in such a Debtor-directly-maintained securities account or deposit account, the Secured Party should seek to enter into a separate securities account control agreement with the securities intermediary or, as the case may be, a deposit account control agreement with the depository bank. The securities intermediary or the depository bank may be the Bank, an affiliate of the Bank, or a third party.

Generally, it is very inadvisable to combine control provisions dealing with a separate securities account in the Deposit Account Control Agreement, even if the securities intermediary is the Bank or an affiliate of the Bank. Among other possible reasons, this is because personnel responsible for the securities account most likely are in different internal lines of business or operational platforms in the Bank than those personnel with whom the Secured Party or the Debtor will deal for purposes of the Deposit Account Control Agreement.

The structure of this Insert is as follows. Paragraph (a) contains definitions and rules of interpretation specific to this Insert, supplementing the definitions and rules of interpretation in the General Terms. Paragraph (b) sets forth the core undertakings of the Bank necessary for the Secured Party's security interest in the Debtor's interest in the Sweep Investment to be perfected by possession or control. Paragraphs (c) and (e) deal with the requirement that funds operationally withdrawn by the Bank from the Sweep Investment for credit to the Debtor must be transferred and deposited by the Bank only to the Deposit Account. Paragraphs (d) and (f) address the circumstances under which funds will no longer be withdrawn by the Bank from the Deposit Account and credited to the Sweep Investment.

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(a) In this subsection, the following terms have the following meanings:

“*Sweep Agreement*” means a Deposit-related Agreement governing a Sweep Investment.

“*Sweep Investment*” means a cash management product offered by the Bank to certain classes or groups of its customers, including the Debtor, by which the Bank automatically (i) withdraws all or a portion of the funds in the Deposit Account on a daily or other periodic basis, (ii) invests the withdrawn funds for the benefit or account of the Debtor in securities directly held by the Bank,<sup>84</sup> in instruments directly held by the Bank,<sup>85</sup> in a securities account for which the Bank is either the entitlement holder<sup>86</sup> or the securities intermediary<sup>87</sup>, or in a deposit account for which the Bank is either the depository bank’s customer<sup>88</sup> or the depository bank<sup>89</sup>, (iii) at the end of the investment period, re-deposits to the Deposit Account funds that were withdrawn by the Bank from the Deposit Account and invested in the Sweep Investment, less any loss of funds suffered by the investment and the amount of any Sweep Investment Fees, and (iv) credits to the Deposit Account the amount of any dividend or other return on the investment or interest, if any, earned on the funds in the investment during the specific investment period, all in accordance with the Sweep Agreement governing the Sweep Investment.

“*Sweep Investment Fees*” means any fees or other charges assessed in accordance with the Sweep Agreement against the Debtor’s interest in the Sweep Investment.

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<sup>83</sup> Insert number to distinguish this insert from other inserts and then remove brackets.

<sup>84</sup> The Bank would be the registered owner of directly-held securities if it purchased shares, for example, in a money-market or other mutual fund, and the Bank were identified as the registered owner in the records of the mutual fund (including the records of a transfer agent that maintains the records of interests in the mutual fund).

<sup>85</sup> The Bank would be the holder of directly-held instruments if, for example, it purchased instruments in the form of commercial paper and became the holder of the commercial paper.

<sup>86</sup> The Bank would be the entitlement holder if the funds in the Deposit Account were withdrawn and invested by the Bank for the Debtor in a securities account maintained by a securities intermediary that is an affiliate of the Bank or is an unaffiliated bank, broker or other securities intermediary, and the Bank itself were the entitlement holder on the securities account.

<sup>87</sup> The Bank would be the securities intermediary if the funds in the Deposit Account were withdrawn by the Bank and invested for the Debtor in a securities account maintained by the Bank as securities intermediary for one or more customers or a class or group of customers participating in the investment program.

<sup>88</sup> The Bank would be the depository bank’s customer if the funds in the Deposit Account were withdrawn by the Bank and invested for the Debtor in a deposit account maintained by a depository bank that is an affiliate of the Bank or is an unaffiliated bank and the Bank itself were the customer on the deposit account.

<sup>89</sup> The Bank would be the depository bank if the Bank were to withdraw funds from the Deposit Account and invest the withdrawn funds for the benefit of the Debtor in an income-producing deposit account maintained by the Bank as depository bank for one or more customers or a class or group of customers participating in the investment program.

(b) If the Bank is the:

(i) registered owner of securities, or the holder of instruments, of which the Sweep Investment is a component, then the Bank acknowledges that it has registered ownership of the Debtor's interest in the securities, or holds the Debtor's interest in the instruments, in each case for the benefit and on behalf of the Secured Party;

(ii) entitlement holder of a securities account, or the customer on a deposit account, of which the Sweep Investment is a component, then the Bank acknowledges that it has control of the Debtor's interest in the Bank's security entitlements in the securities account, or that the Bank has control of the Debtor's interest in the Bank's rights as customer in the funds in the deposit account, in each case for the benefit and on behalf of the Secured Party;

(iii) securities intermediary maintaining a securities account of which the Sweep Investment is a component, then the Bank will comply, without further consent of the Debtor, with entitlement orders originated by the Secured Party as to the Debtor's interest in the security entitlements in the securities account; and

(iv) depository bank maintaining a deposit account of which the Sweep Investment is a component, then the Bank will comply, without further consent of the Debtor, with instructions originated by the Secured Party as to the disposition of the Debtor's interest in the funds in the deposit account.<sup>90</sup>

(c) The Secured Party hereby originates an entitlement order or instruction directing the Bank to continue, at the end of each investment period of the Sweep Investment, to re-deposit in the Deposit Account funds that were withdrawn by the Bank from the Deposit Account and invested in the Sweep Investment, less any loss of funds suffered by the investment and the amount of any Sweep Investment Fees, together with the amount of the dividend or other return on investment or interest, if any, earned thereon during the investment period, all

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<sup>90</sup> To the extent that any securities or instruments directly-held by the Bank are issued by a foreign issuer, or financial assets or funds in respect of the Sweep Investment are held by the Bank, any affiliate of the Bank or an affiliated securities intermediary or depository bank through a foreign office or branch, it may be necessary for the Secured Party to obtain advice from legal counsel in the foreign jurisdiction as to whether under the substantive law of the foreign jurisdiction the Secured Party's security interest in the Debtor's interest in the Sweep Investment is perfected and has the desired priority, or whether the conflict-of-laws rules of the foreign jurisdiction would result in the application by a court in the foreign jurisdiction of the substantive law of a Uniform Commercial Code jurisdiction on issues relating to perfection and priority of the security interest.

in accordance with the Sweep Agreement.<sup>91</sup> This entitlement order or instruction may not be amended without the consent of the Bank.

(d) The Bank may continue the Debtor's participation in the Sweep Investment in accordance with the Sweep Agreement until the Secured Party shall have instructed the Bank to terminate the Debtor's use of the Sweep Investment<sup>92</sup> [following the Bank's acting or being required by the terms of this Agreement to act on the Initial Instruction]<sup>93</sup>. However, unless the Bank otherwise shall be instructed by the Secured Party [following the Bank's acting or being required by the terms of this Agreement to act on the Initial Instruction]<sup>94</sup>, the Debtor may at any time terminate the Sweep Agreement and its participation in the Sweep Investment, or the Debtor may replace the Sweep Investment with a different Sweep Investment in which the Debtor participates in accordance with the terms of another Sweep Agreement. The provisions of this subsection shall apply to any replacement Sweep Investment and its Sweep Agreement.

(e) The Secured Party acknowledges that, because of the automated operations of the Sweep Investment, while funds that were withdrawn from the Deposit Account by the Bank are invested in the investment component of the Sweep Investment, the Bank will not be operationally capable of implementing any Disposition Instruction originated by the Secured Party relating to the invested funds, or any other entitlement order or instruction not contained in paragraph (c), until the invested funds, less any loss of funds suffered by the investment and the amount of any Sweep Investment Fees, shall have been re-deposited to the Deposit Account in accordance with the Sweep Agreement.

(f) This subsection does not (i) affect any right of the Bank to terminate the Sweep Investment in accordance with the Sweep Agreement, (ii) impose any duty on the Bank that is not expressly provided in this subsection or in the Sweep

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<sup>91</sup> If the loan or security agreement between the Debtor and the Secured Party permits the Secured Party to give entitlement orders as to securities accounts and instructions as to deposit accounts only following a default by the Debtor, the Debtor's execution of the Deposit Account Control Agreement containing this insert is a consent by the Debtor for the entitlement order or instruction contained in paragraph (c) to be given by the Secured Party regardless of the existence of a default by the Debtor.

<sup>92</sup> Many, if not most, Sweep Investments described generally in this insert are programmed by the Bank's computer software and systems so that the Debtor's funds in the Deposit Account are automatically "swept" by the Bank from the Deposit Account to the investment component of the Sweep Investment, and funds are automatically returned by the Bank from the investment component of the Sweep Investment to the Deposit Account in accordance with the provisions of the Sweep Agreement and the operations of the Bank's systems. The Secured Party would typically not have the ability to countermand the programmed and automatic operation of the Sweep Investment except to instruct the Bank to cease all further Sweep Investment withdrawals from the Deposit Account that were not already automatically undertaken by the Bank.

<sup>93</sup> The bracketed language should be deleted if this insert is being used together with the Initial Block without a Standing Disposition Instruction Insert. The latter insert eliminates the need for an Initial Instruction.

<sup>94</sup> The bracketed language should be deleted if this insert is being used together with the Initial Block without a Standing Disposition Instruction Insert. The latter insert eliminates the need for an Initial Instruction.

Agreement, or (iii) provide to the Secured Party any right not available to the Debtor under the Sweep Agreement.<sup>95</sup>

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<sup>95</sup> Many Sweep Investments are neither insured by the Federal Deposit Insurance Corporation nor guaranteed by The United States of America or any of its agencies.

FIRST LIEN SEPARATE CONTROL AGREEMENT INSERT

(for optional use to be inserted in Section 10 of the Deposit Account Control Agreement)

version 1 dated January 23, 2008

available from the American Bar Association's Business Law Section at  
<http://www.abanet.org/dch/committee.cfm?com=CL710060><sup>96</sup>

10. [ ](a)<sup>97</sup> Arrangements for Separate Second Lien Control Agreement:

[Second Lien Entity], in its capacity as second lien secured party (the "Second Lien Secured Party"), the Debtor, and the Bank are parties to that certain Deposit Account Control Agreement [dated as of ] (as it may be amended, restated, modified or supplemented from time to time, the "Second Lien Control Agreement").

(b) Replace General Terms paragraph 7(iii) to the end of paragraph 7 with the following:

(iii) has not entered into any currently effective agreement with any person under which the Bank may be obligated to comply with Disposition Instructions originated by a person other than the Debtor or Secured Party except for the Second Lien Control Agreement. The Bank will not enter into any agreement with any person under which the Bank may be obligated to comply with Disposition Instructions originated by a person other than the Debtor or the Secured Party except for the Second Lien Control Agreement.

(c) The Bank will not honor an Initial Instruction or a Disposition Instruction from the Second Lien Secured Party until this Agreement is terminated.

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<sup>96</sup> This document is a model form produced by the Joint Task Force on Deposit Account Control Agreements of the Business Law Section of the American Bar Association. The provisions of the form have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>97</sup> Insert number to distinguish this insert from other inserts and then remove brackets.

## SECOND LIEN SEPARATE CONTROL AGREEMENT INSERT

(for optional use to be inserted in Section 10 of the Deposit Account Control Agreement)

version 1 dated January 23, 2008

available from the American Bar Association's Business Law Section at <http://www.abanet.org/dch/committee.cfm?com=CL710060><sup>98</sup>

10. [ ]<sup>99</sup> Arrangements for Separate First Lien Control Agreement:

- (a) [First Lien Entity], in its capacity as first lien secured party (the "First Lien Secured Party"), the Debtor, and the Bank are parties to that certain Deposit Account Control Agreement [dated as of ] (as it may be amended, restated, modified or supplemented from time to time, the "First Lien Control Agreement").
- (b) At the end of General Terms paragraph 3(ii), insert the following:  
, provided, however, that notwithstanding any other provision of this Agreement, the Bank shall not comply with an Initial Instruction or a Disposition Instruction until the First Lien Control Agreement shall have been terminated.<sup>100</sup>
- (c) At the end of General Terms paragraph 4 insert the following:  
The Bank will not be liable to any other party for failing to follow the Initial Instruction or Disposition Instruction prior to the termination of the First Lien Control Agreement.
- (d) Replace General Terms paragraph 7(iii) to the end of paragraph 7 with the following:  
(iii) has not entered into any currently effective agreement with any person under which the Bank may be obligated to comply with Disposition Instructions originated by a person other than the

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<sup>99</sup> Insert number to distinguish this insert from other inserts and then remove brackets.

<sup>100</sup> The Second Lien Secured Party still has control even though the right to give instruction is conditioned on the termination of the First Lien Control Agreement. If the Second Lien Secured Party is to receive any funds from the Deposit Account while the First Lien Control Agreement is in effect, the First Lien Secured Party must issue a Disposition Instruction for such payment to the Second Lien Secured Party (which can be provided for under the intercreditor agreement).

Debtor or Secured Party, except for the First Lien Control Agreement. The Bank will not enter into any agreement with any person under which the Bank may be obligated to comply with Disposition Instructions originated by a person other than the Debtor or the Secured Party, except for the First Lien Control Agreement.

- (e) Insert in General Terms paragraph 9(b) directly after “If the Bank terminates this Agreement pursuant to Clause (A) of Section 9(a)(ii)” the following:

prior to the termination of the First Lien Control Agreement, the funds in the Deposit Account will be disbursed according to the Disposition Instructions (as defined in the First Lien Control Agreement) of the First Lien Secured Party. If the Bank terminates this Agreement pursuant to clause (A) of Section 9(a)(ii) after the termination of the First Lien Control Agreement

- (f) Prior to the termination of the First Lien Control Agreement, there will be no amendment of this subsection without the consent of the First Lien Secured Party.

GENERAL TERMS FOR DEPOSIT ACCOUNT CONTROL AGREEMENT  
(For Securitization Transactions)

version 1 dated June 19, 2008

available from the American Bar Association's Business Law Section at  
<http://www.abanet.org/dch/committee.cfm?com=CL710060><sup>1</sup>

1. Definitions and Rules of Interpretation. In this Agreement (a) terms defined in the UCC and not otherwise defined in this Agreement have the same meanings in this Agreement as in the UCC, (b) the rules of interpretation in Article 1 of the UCC apply to the interpretation of this Agreement and (c) the term "or" is not exclusive. Unless otherwise stated, section references are to sections of these General Terms. In addition, the following terms in this Agreement have the following meanings or interpretations:

This "*Agreement*" means the Deposit Account Control Agreement dated the Agreement Date among the Secured Party, the Debtor, the Servicer<sup>2</sup> and the Bank. The Deposit Account Control Agreement includes these General Terms (incorporated by reference), the Specific Terms and the Exhibit read and construed together as a single agreement.

"*Agreement Date*" means the date set forth at the beginning of this Agreement as the date as of which this Agreement was executed and delivered by the parties.

An "*address*" includes the person or persons or department of the Bank on an "attention" line.

"*Bank*" means the organization signing this Agreement as the Bank.

"*Business Day*" means:

(i) for communications to the Bank, a day other than a day (A) that is not a "business day" as defined in Federal Reserve Board Regulation CC, 12 CFR Part 229, (B) on which the office, branch or department of the Bank specified as the Bank's address in the Exhibit is closed, or (C) on which commercial banks are closed in the city or cities set forth in the Specific Terms; and

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<sup>1</sup> This document is a model form produced by the Joint Task Force on Deposit Account Control Agreements of the Business Law Section of the American Bar Association. The provisions of the form have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>2</sup> In most securitizations, a Servicer is appointed by the Debtor and by the investors (or by an agent or trustee on behalf of the investors) to administer and collect the securitized receivables. Such appointment is typically made in the securitization documentation, and this Agreement assumes that such an appointment has been made. Accordingly, such appointment is not part of this Agreement. See the second sentence of the Background to this Agreement, which describes that the Servicer has been appointed to perform certain administrative duties with respect to the Deposit Account. Often the Servicer is the originator of the securitized receivables or an affiliate of the originator. However, the Servicer may also be a third party.

(ii) for communications to any other party, a day, other than a Saturday or Sunday, on which the other party is open for business at the location to which the communication is sent.

“*Claim*” means a claim, loss, cost or expense, and includes out-of-pocket or allocable internal legal fees and expenses incurred in bringing or defending a claim.

A “*communication*” includes the Initial Instruction, a Disposition Instruction or a notice.

“*Debtor*” means the person signing this Agreement as the Debtor.

“*Deposit Account*” has the meaning set forth in the “Background” of this Agreement. The Deposit Account is identified in Section 1 of the Specific Terms.

“*Deposit-related Agreements*” means, collectively, the deposit account agreement and any other agreements between the Bank and the Debtor governing the Deposit Account and any cash management or similar services provided by the Bank to the Debtor in connection with the Deposit Account.

“*Disposition Instruction*” means an instruction to the Bank directing the disposition of the funds in the Deposit Account.

“*Exhibit*” means the Exhibit referred to in Part C of and attached to this Agreement as the form to be used as the Initial Instruction.

“*Initial Instruction*” means the first instruction to the Bank originated by the Secured Party directing that the Bank no longer comply with the Servicer’s Disposition Instructions. The Initial Instruction may also contain a Disposition Instruction originated by the Secured Party.

“*Order or Process*” means an order, judgment, decree or injunction, or a garnishment, restraining notice or other legal process, directing, or prohibiting or otherwise restricting, the disposition of the funds in the Deposit Account.

“*Outside Time*” means, unless an earlier Outside Time is stated in the Specific Terms, the opening of business on the second Business Day after the Business Day on which the Initial Instruction in substantially the form of the Exhibit is actually received at the address for the Bank specified in the Exhibit. If the Initial Instruction is actually received at that address after 12:00 noon, local time, at that address, then in determining the Outside Time, the Initial Instruction will be considered to have been actually received on the following Business Day.

“*Secured Party*” means the person signing this Agreement as the Secured Party, whether the person is acting in a representative capacity or otherwise.

“*Servicer*” means the person signing this Agreement as the Servicer.

“*Specific Terms*” means the terms contained in Part B of this Agreement.

“UCC” means the Uniform Commercial Code of the jurisdiction whose law governs this Agreement or, if relevant to any matter other than the meaning of a defined term, the Uniform Commercial Code of the jurisdiction whose law applies to the matter under the choice of law rules of the jurisdiction whose law governs this Agreement.

A “writing” means a tangible writing, including a facsimile and, if the Specific Terms permit, an electronic record; “written” refers to a communication in the form of a writing.

2. The Servicer’s and the Debtor’s Dealings with the Deposit Account.

(a) Except as provided in Section 2(b), the Bank may comply with the Servicer’s Disposition Instructions in accordance with the Deposit-related Agreements. The Bank will not comply at any time with any Disposition Instructions originated by the Debtor.

(b) The Bank will not comply with the Servicer’s Disposition Instructions after the Outside Time. In its discretion the Bank may cease complying with the Servicer’s Disposition Instructions at an earlier time as permitted by Section 4(a)(iv).

3. The Secured Party’s Right to Give Instructions as to the Deposit Account. The Bank will comply with the Initial Instruction, and with any Disposition Instructions originated by the Secured Party, in each case (i) without the further consent of the Debtor or the Servicer, and (ii) even if following the instruction results in the dishonoring by the Bank of items presented for payment from the Deposit Account or the Bank otherwise not complying with the Servicer’s Disposition Instructions. The Initial Instruction may not be rescinded or otherwise modified without the Bank’s consent.

4. Exculpation of the Bank.

(a) Notwithstanding the Bank’s agreements in Sections 2 and 3, the Bank will not be liable to any other party for:

(i) either failing to follow an Initial Instruction that (A) is not in the form of the Exhibit, (B) does not specify the address to which the Initial Instruction was to have been sent, (C) is not otherwise completed, or (D) does not have attached to it a copy of this Agreement as fully executed or, as a result of any such defect in the Initial Instruction, continuing to comply with the Servicer’s Disposition Instructions;

(ii) failing to follow a Disposition Instruction originated by the Secured Party (A) before the Outside Time, (B) that requires the disposition of the funds in the Deposit Account by a method not available to the Debtor under the Deposit-related Agreements, (C) that the Bank determines would result in the Bank’s failing to comply with a statute, rule or regulation, or an Order or Process, binding upon the Bank, (D) that requires the disposition of funds that are not immediately available in the Deposit Account, (E) that, unless otherwise set forth in the Specific Terms, directs the disposition of less than all the funds in the Deposit Account or directs that the funds be sent to more than one recipient, or (F) for which the Bank has not received evidence reasonably required by the Bank as to the authority of the person giving the Disposition Instruction to act for the Secured Party;

(iii) complying with the Servicer's Disposition Instructions, or otherwise completing a transaction involving the Deposit Account, that the Bank or an affiliate had started to process before the Outside Time; or

(iv) after the Bank becomes aware that the Secured Party has sent the Initial Instruction, but before the Outside Time, complying with the Initial Instruction or a Disposition Instruction originated by the Secured Party, notwithstanding any fact or circumstance and even if the Initial Instruction (A) has not been actually received at the address specified in the Exhibit, (B) fails to have attached to it a copy of this Agreement as fully executed, or (C) is not completed or otherwise fails to be in the form of Initial Instruction set forth on the Exhibit.

(b) The Bank will not be liable to any other party for:

(i) wrongful dishonor of any item as a result of the Bank following the Initial Instruction or any Disposition Instruction originated by the Secured Party,

(ii) failing to comply or delaying in complying with the Initial Instruction, any Disposition Instruction or any provision of this Agreement due to a computer malfunction, interruption of communication facilities, labor difficulties, act of God, war, terrorist attack, or other cause, in each case beyond the Bank's reasonable control,

(iii) any other Claim, except to the extent directly caused by the Bank's gross negligence or willful misconduct, or

(iv) any indirect, special, consequential or punitive damages.

(c) The Bank will have no fiduciary duties under this Agreement to any other party, whether as trustee, agent, bailee or otherwise. The Bank will have no duties to the Secured Party except as expressly set forth in this Agreement. The Bank will have no duty to inquire into or determine the existence or enforceability of the Debtor's obligations to the Secured Party or whether, under any separate agreement between the Debtor and the Secured Party, the Debtor's obligations to the Secured Party are in default, the Servicer may originate a Disposition Instruction or the Secured Party may originate the Initial Instruction or any Disposition Instruction.

##### 5. The Bank's Recourse to the Deposit Account.

(a) Except for amounts referred to in Section 5(b), the Bank (i) subordinates any security interest, lien or other encumbrance against the Deposit Account to the Secured Party's security interest and (ii) will not exercise any right of recoupment, setoff or debit against the Deposit Account. This subordination will not apply to any security interest that the Bank has in an item under UCC Article 4 as a collecting bank.

(b) Notwithstanding Section 5(a), and regardless of any agreement of the Debtor to compensate the Bank by means of balances in the Deposit Account, the Bank may charge the Deposit Account, to the extent permitted by any of the Deposit-related Agreements or applicable law, for:

(i) the face amount of a check, draft, money order, instrument, wire transfer of funds, automated clearing house entry, credit from a merchant card transaction, other electronic transfer of funds or other item (A) deposited in or credited to the Deposit Account, whether before or after the Agreement Date, and returned unpaid or otherwise uncollected or subject to an adjustment entry, whether for insufficient funds or for any other reason and without regard to the timeliness of the return or adjustment or the occurrence or timeliness of any other person's notice of nonpayment or adjustment, (B) subject to a claim against the Bank for breach of transfer, presentment, encoding, retention or other warranty under Federal Reserve Regulations or Operating Circulars, clearing house rules, the UCC or other applicable law, or (C) for a merchant card transaction, against which a contractual demand for chargeback has been made;

(ii) normal service charges or fees payable to the Bank in connection with the Deposit Account or any related services;

(iii) any adjustments or corrections of any posting or encoding errors; and

(iv) reimbursements for out-of-pocket or allocable internal legal fees and expenses in connection with the administration or enforcement of this Agreement by the Bank<sup>3</sup>.

## 6. Indemnification and Reimbursement.

(a) The Debtor and the Servicer<sup>4</sup> jointly and severally indemnify the Bank against all Claims incurred, sustained or payable by the Bank arising out of this Agreement except to the extent directly caused by the Bank's gross negligence or willful misconduct.

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<sup>3</sup> It is anticipated that the Bank will have a separate agreement with the Debtor or the Servicer providing for reimbursement of the expenses of negotiating this Agreement and that such expenses will be separately paid upon the execution by the Bank of this Agreement and will not be chargeable to the Deposit Account. Some banks may require the payment of such expenses as a condition to their execution of this Agreement. In some securitizations (particularly if the Bank also acts as trustee for the securitization investors), reimbursement of the Bank's administration and enforcement expenses (in its capacity as depository bank) is specifically provided for at an appropriate level of priority in the waterfall contained in the indenture or other securitization agreement, and in such case, clause (iv) should be deleted in its entirety. If the Bank's expenses are included in the waterfall, but the Bank is not a party to the securitization agreement which contains the waterfall, the Bank is advised to confirm that the securitization agreement contains third party beneficiary or other provisions sufficient to protect the Bank's interest. See also the related discussion in footnote 5 below.

<sup>4</sup> Because the Debtor will typically be a bankruptcy-remote, special purpose entity, the Bank will likely wish to obtain indemnification from another party which it deems to be of acceptable credit standing. The Servicer may be the appropriate party to fulfill this function. In many securitizations, the Servicer is an affiliate of the Debtor and is also the originator of the receivables, and in its capacity as originator, it may have been the Bank's customer with respect to the Deposit Account prior to the effectiveness of the securitization. In such cases, the Servicer will likely be willing to provide this indemnity, and the Bank may already be comfortable with the creditworthiness of the Servicer as a joint indemnitor. However, in some types of securitizations (e.g. CMBS), the Servicer may not be an affiliate of the Debtor, in which case it may not be willing to provide a joint indemnity.

(b)<sup>5</sup> The Secured Party agrees to reimburse the Bank for any charge against the Deposit Account under Section 5(b) for which there were insufficient funds in the Deposit Account to satisfy the charge. Such reimbursement will be limited to the aggregate amount transferred from the Deposit Account as a result of the Bank's acting upon Disposition Instructions originated by the Secured Party or pursuant to Section 9(b). Any demand by the Bank for reimbursement must be made within the number of days after the termination of this Agreement set forth in the Specific Terms. The Bank may not make a Claim for reimbursement under this subsection unless the Debtor or the Servicer fails to satisfy the Claim within 15 days after the Bank makes a demand on both the Debtor and the Servicer under Section 6(a) (provided, however, that (i) no such demand is required on the Debtor if the Bank is enjoined, stayed or prohibited by operation of law from making such demand on the Debtor and (ii) no such demand is required on the Servicer if the Bank is enjoined, stayed or prohibited by operation of law from making such demand on the Servicer).

(c) The Secured Party's reimbursement obligations under Section 6(b) will not apply to (i) a charge for reimbursement of or indemnification for any out-of-pocket or allocable internal legal fees and expenses incurred by the Bank in connection with any claim or defense by the Bank against the Secured Party relating to this Agreement or (ii) the amount of any loss incurred by the Bank to the extent directly caused by the Bank's gross negligence or willful misconduct. If the Bank satisfies any Claim against the Debtor referred to in the foregoing clause (i) by charging the Deposit Account, the amount of the Secured Party's maximum liability for reimbursement obligations under Section 6(b) will be reduced by the amount of the Claim so satisfied.

(d) If the Secured Party fails to reimburse the Bank for any amount under Section 6(b), the Secured Party will pay the Bank's out-of-pocket or allocable internal legal fees and expenses in collecting from the Secured Party the amount payable.

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<sup>5</sup> In certain transactions, the Secured Party will not agree to reimbursement obligations, and Section 6(b) through 6(e) will have to be deleted (such deletion would be effectuated in Section 10 of the Specific Terms). For example, in transactions where the Secured Party is a trustee or agent acting for numerous investors, the Secured Party may not have a contractual right to reimbursement from the investors or it may be impractical to enforce reimbursement rights.

The Task Force does not believe that a standard market practice currently exists for handling this issue, and in such situations, the Bank must make a credit decision as to the adequacy of the joint indemnity of the Debtor and the Servicer, combined with the Bank's ability to charge the Deposit Account pursuant to Section 5(b) as future collections are received. If the Bank determines that such rights are not sufficiently protective, an acceptable alternative may be to provide for direct payment of the Bank's indemnity claim from collections on the securitized receivables at an appropriate level in the waterfall provision contained in the indenture or other applicable securitization agreement. However, if the Bank is not a party to the indenture or other applicable agreement, the Bank should be granted third party beneficiary rights, including an express right to enforce these payment rights and the ability to protect itself against adverse amendments. See also the related discussion in footnote 3 above (regarding third party beneficiary rights) and in the last paragraph of Section III.C.19 of the Initial Report (regarding indemnification by an indenture trustee). Yet another alternative may be for the Secured Party to grant the Bank a right of reimbursement that is limited solely to funds subsequently distributed to the Secured Party under the waterfall. This would avoid putting the Secured Party in a position where it must seek reimbursement from numerous investors, but the funds available for reimbursement would presumably be subject to a cap and the arrangement would have to be approved by any rating agencies rating the transaction.

(e) The Secured Party indemnifies the Bank against all other Claims incurred, sustained or payable by the Bank arising from the Bank following an Initial Instruction or a Disposition Instruction originated by the Secured Party, or from the Bank's remittance of funds pursuant to Section 9(b), except to the extent directly caused by the Bank's gross negligence or willful misconduct.

7. Representations and Warranties; Agreements with Other Persons. The Bank represents and warrants to the Secured Party that (i) the Bank is an organization engaged in the business of banking, (ii) the Bank maintains the Deposit Account as a demand deposit account or accounts in the ordinary course of the Bank's business and the Debtor is the Bank's customer with respect to the Deposit Account<sup>6</sup>, and (iii) the Bank has not entered into any currently effective agreement with any person under which the Bank may be obligated to comply with Disposition Instructions originated by a person other than the Servicer or the Secured Party. The Bank will not enter into any agreement with any person under which the Bank may be obligated to comply with Disposition Instructions originated by a person other than the Servicer or the Secured Party.

8. Deposit Account Information. If the Secured Party so requests<sup>7</sup>, the Bank will provide to the Secured Party, whether by Internet access or otherwise, a copy of each periodic account statement relating to the Deposit Account ordinarily furnished by the Bank to the Debtor. The Bank's liability for failing to provide the account statement will not exceed the Bank's cost of providing the statement. The Debtor authorizes the Bank to provide to the Secured Party and the Servicer, whether by Internet access or otherwise, any information concerning the Deposit Account that the Bank may agree to provide to the Secured Party or the Servicer at such party's request.

9. Termination; Closure of the Deposit Account.

(a) None of the Debtor, the Servicer or the Bank will close the Deposit Account prior to termination of this Agreement. This Agreement may not be terminated by the Debtor except by a notice to the Bank given jointly by the Debtor and the other parties hereto (other than the Bank). This Agreement may be terminated (i) by the Secured Party at any time by notice to the other parties and (ii) by the Bank (A) immediately upon notice to the other parties if the Bank becomes obligated to terminate this Agreement or to close the Deposit Account under any statute, rule or regulation, or any Order or Process, binding upon the Bank, (B) upon five Business Days' notice to the other parties if any other party is in material breach of any of

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<sup>6</sup> In many securitizations, bank accounts (including the Deposit Account) maintained by the originator of the receivables and utilized for the receipt of collections are transferred to the Debtor, because the Debtor becomes the owner of such receivables and collections pursuant to the securitization. Such transfer will be implemented pursuant to separate agreements among the originator, the Debtor and the Bank, and such agreements will result in the Debtor becoming the Bank's customer. Because the Secured Party is not a party to such agreements, but the effectiveness of such agreements is an important factor in the Secured Party's credit decision, the Secured Party will wish to obtain the Bank's representation contained in this clause (ii).

<sup>7</sup> The Bank should confirm, prior to entering into this Agreement, that it has the operational ability to send account statements to more than one person.

the Deposit-related Agreements or this Agreement<sup>8</sup>, and (C) otherwise upon 30 days' notice to the other parties.

(b) If the Bank terminates this Agreement pursuant to Section 9(a)(ii), the Bank will remit any funds in the Deposit Account on the date of termination (i) at the direction of the Secured Party if the direction is received by the Bank prior to the date of termination of this Agreement or (ii) if no such direction is received by the Bank prior to such date, by check mailed to the address of the Secured Party for receiving communications under this Agreement. Any obligation of the Bank to remit any funds to or at the direction of the Secured Party under this subsection is subject to clauses (B) through (F) of Section 4(a)(ii).

(c) The termination of this Agreement will not affect any rights created or obligations incurred under this Agreement before the termination. Sections 4 and 6 will survive the termination of this Agreement for actions taken or omitted before the termination. Sections 9(b) and 14(c) will survive the termination of this Agreement, and Section 5 will survive the termination of this Agreement solely for any funds to be remitted to or at the direction of the Secured Party pursuant to Section 9(b).

#### 10. Communications.

(a) All communications under this Agreement must be in writing and must be delivered by hand or overnight courier service, mailed by certified or registered mail, or sent by facsimile to the party addressee. If the Specific Terms permit a writing to include an electronic record, a communication, other than the Initial Instruction, may be sent by email.

(b) For a communication under this Agreement to be effective, it must be received (i) for the Initial Instruction, at the Bank's address specified on the Exhibit and (ii) in all other cases, at the party's address indicated below the party's signature to this Agreement, in each case subject to any change in address provided in Section 10(c). Receipt of the Initial Instruction does not occur until it is received by the person or persons or department specified on the "attention" line on the Exhibit. If more than one person is specified, receipt occurs when the Initial Instruction is received by one of the persons.

(c) The Bank may communicate to the Secured Party changes in the address for the Initial Instruction, and any party may communicate to the other parties changes in its address for communications under this Agreement.

#### 11. Successors and Transferees.

(a) This Agreement will inure to the benefit of, and be binding upon, the parties and their respective successors and other transferees permitted under this Section. Except as

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<sup>8</sup> The short time period in clause (ii)(B) is likely to be of concern to the Secured Party, because five Business Days is not sufficient time to enter into a new DACA and to notify obligors to pay to a new deposit account or lockbox. As a result, this provision could result in the loss of a significant portion of collections due to the investors in the securitization. The Task Force does not believe that a standard market practice currently exists for handling this issue in securitization transactions. Several alternatives are discussed in footnote 11 of Section 10 of the Specific Terms.

provided in this Section, a voluntary transfer of a party's rights or duties under this Agreement without the written consent of the other parties will be void.<sup>9</sup>

(b) The Bank may transfer its rights and duties under this Agreement to a transferee to which, by contract or operation of law, the Bank transfers substantially all of its rights and duties under the Deposit-related Agreements.

(c) The Secured Party may transfer its rights and duties under this Agreement to (i) a transferee to which, by contract or operation of law, the Secured Party transfers substantially all of its rights and duties under the financing or other arrangements between the Secured Party and the Debtor for which the Deposit Account acts as collateral security or (ii) if the Secured Party is acting as a trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest is created or provided for, a transferee that is a successor trustee, indenture trustee, agent, collateral agent, or other representative.

(d) The rights and duties of the Servicer under this Agreement may be transferred to (i) a transferee to which, by contract or operation of law, the Servicer transfers substantially all of its rights and duties as servicer under the financing or other arrangements between the Secured Party and the Debtor for which the Deposit Account acts as collateral security or (ii) a transferee appointed by the Secured Party pursuant to the terms of such financing or other arrangements.<sup>10</sup>

(e) No transfer under this Section will be binding upon a non-transferring party until the transferring party or the transferee notifies the non-transferring parties of the transfer in a writing signed by the transferee that identifies the transferee, gives the transferee's address for communications under this Agreement, and states that the transferee is a successor of the transferor or other transferee permitted under this Section and is entitled to the benefit of the transferring party's rights and has assumed all of the transferring party's duties under this Agreement.

(f) A non-transferring party need not request proof of any transfer or that the transferee is a successor of the transferor or other transferee permitted by this Section. If requested by a non-transferring party, however, the transferring party or the transferee will provide reasonable proof thereof. If the Bank or the Secured Party, as a non-transferring party, requests such proof, then the effectiveness of the notification of transfer as to the non-transferring party will be suspended until the proof is provided.

(g) When a transfer becomes binding on the non-transferring parties, the transferring party will not be entitled to exercise any rights, and will be relieved of its obligations, accruing under this Agreement from and after that time. Those rights may be exercised and those obligations will be incurred by the transferee.

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<sup>9</sup> Note that if the Bank objects to a successor Secured Party or successor Servicer permitted by Section 11(c) or (d), the Bank may terminate this Agreement at any time upon 30 days' notice pursuant to Section 9(a).

<sup>10</sup> With regard to the reference to "voluntary transfer" in the second sentence of Section 11(a), the Task Force considers that a transfer of the Servicer's rights and duties pursuant to clause (ii) of Section 11(d) is "voluntary" (even though the transfer may occur solely at the direction of the Secured Party following the occurrence of a servicer termination event), because it is done pursuant to a contract entered into by the Servicer and the Secured Party (as distinguished from an "involuntary transfer" resulting from enforcement of a judicial lien).

(h) The provisions of subsections (e) and (f) requiring notification for a transfer to be binding on the non-transferring parties and suspending the effectiveness of the notification of transfer until reasonable proof of the transfer has been provided do not apply to the Bank as the transferring party if the transfer is by operation of law and by operation of the law (i) the transferee succeeds to all or substantially all of the rights and becomes generally bound by all of the duties of the Bank, including the Bank's duties under this Agreement, and (ii) the Bank ceases to exist.

12. Entire Agreement; Relation to Other Agreements.

(a) This Agreement constitutes the entire agreement of the parties, and supersedes all previous and contemporaneous negotiations, understandings and agreements, with respect to its subject matter, all of which have become merged and finally integrated into this Agreement.

(b) If a term in the Specific Terms conflicts with a term of this Agreement not in the Specific Terms, the term in the Specific Terms controls.

(c) If this Agreement conflicts with any of the Deposit-related Agreements, this Agreement will control. However, this Agreement will not (i) derogate from any Claim or defense that the Bank may have against the Debtor under any of the Deposit-related Agreements or (ii) create any third party beneficiary rights under any of the Deposit-related Agreements in favor of the Secured Party.

(d) This Agreement does not amend or otherwise modify any of the agreements between the Debtor or the Servicer and the Secured Party or provide any rights for the Debtor or the Servicer to originate a Disposition Instruction in contravention of any agreement between the Debtor or the Servicer and the Secured Party.

13. Governing Law, Depository Bank's Jurisdiction and Waiver of Jury Trial.

(a) Except as otherwise required by Article 9 of the UCC, this Agreement will be governed by the law of that jurisdiction set forth in the Specific Terms without giving effect to any choice of law rule that would require the application of the law of another jurisdiction.

(b) If the Specific Terms are completed expressly to designate the Bank's jurisdiction for purposes of part 3 of Article 9 of the UCC, then the Deposit-related Agreements are amended to provide that for those purposes that jurisdiction is the Bank's jurisdiction so designated.

**(c) To the extent permitted by applicable law, each party waives all rights to trial by jury in any action, claim or proceeding (including any counterclaim) of any type arising out of or directly or indirectly relating to this Agreement.**

14. Miscellaneous.

(a) No amendment to this Agreement will be binding on any party unless it is in writing and signed by all of the parties. Any provision of this Agreement benefiting a party may be waived only by a writing signed by that party.

(b) If a provision of this Agreement is held invalid or unenforceable in any respect, the validity or enforceability of the remaining provisions will not in any way be affected, it being understood that the invalidity or unenforceability of an affected provision in a particular jurisdiction will not in and of itself affect the validity or enforceability of the provision in any other jurisdiction.

(c) The Bank (solely in its capacity as (i) a party to this Agreement and as the depository bank with respect to the Deposit Account and the Deposit-related Agreements and (ii) following the termination of this Agreement, as the depository bank with respect to the Deposit Account and the Deposit-related Agreements, to the extent of rights, duties and obligations which arose under this Agreement) agrees that it shall not institute against, or join any other person in instituting against, the Debtor any bankruptcy, reorganization, arrangement, insolvency or liquidation proceeding, or any other similar proceeding under any federal or state bankruptcy or similar law, for one year and a day after the later of (i) the termination of any funding or purchase commitment by the Secured Party (or any other persons for whom the Secured Party is acting in a representative capacity) to the Debtor and (ii) payment in full of all obligations of the Debtor to the Secured Party (or any other persons for whom the Secured Party is acting in a representative capacity)<sup>11</sup>. The foregoing shall not limit the rights of the Bank to file any claim in, or otherwise take any action with respect to, any such proceeding instituted against the Debtor by a person other than the Bank.

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<sup>11</sup> Although Section 14(c) survives termination of this Agreement (see Section 9(c)), this Section 14(c) does not restrict the Bank from filing a bankruptcy petition against the Debtor in connection with (i) claims arising out of contractual arrangements with the Debtor other than this Agreement and the Deposit-related Agreements or (ii) claims it may have against the Debtor arising out of the Deposit Account or any Deposit-related Agreement following the termination of this Agreement (provided that such claims do not arise out of the Bank's rights, duties or obligations under this Agreement). The restrictions of this Section 14(c) are limited to the filing of a bankruptcy petition against the Debtor and do not affect the Bank's right to commence any other legal proceeding against the Debtor or to commence any legal action (including a bankruptcy proceeding) against the Servicer.

# Initial Report of the Joint Task Force on Deposit Account Control Agreements

*By the Joint Task Force on Deposit Account Control Agreements, ABA Section of  
Business Law\**

February 13, 2006

This is the initial report of the Joint Task Force on Deposit Account Control Agreements established by the Business Law Section of the American Bar Association.<sup>1</sup> This report sets forth the background and reasons for the creation of the task force and a summary of the process by which the task force carried out its work. It next discusses the form of Deposit Account Control Agreement produced by the task force and set forth as Attachment A to this report, including the General Terms for Deposit Account Control Agreements set forth as Attachment B. This report then provides a discussion of the future work of the task force before making concluding remarks.

## I. BACKGROUND AND REASONS FOR THE CREATION OF THE TASK FORCE

The 1998 revisions to Article 9 of the Uniform Commercial Code (“Article 9”), now in effect in every state in the United States and the District of Columbia, brought within the scope of Article 9 for the first time, as part of Article 9’s Official Text, security interests in deposit accounts as original collateral.<sup>2</sup> Although secu-

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\* R. Marshall Grodner, Co-chair; Marvin D. Heileson, Co-chair; John D. Pickering, Co-Chair; Edwin E. Smith, Co-chair and Reporter; and Roberta Griffin Torian, Co-chair.

1. This report has not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

2. See U.C.C. § 9-109(a)(1) (2003). Unless otherwise indicated, all references to the Uniform Commercial Code are to the 2003 Official Text as promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and all references to Article 9 or another Article of the Uniform Commercial Code are to Article 9 or the other Article as appearing in the 2003 Official Text. The term “deposit account” is defined in U.C.C. § 9-102(a)(29). Former Article 9 of the Uniform Commercial Code, as reflected in the 1995 and earlier Official Texts, excluded from its scope security interests in deposit accounts as original collateral. See former U.C.C. § 9-104(l) (1995). A few states, such as California, Hawaii, Illinois and Louisiana, enacted non-uniform amendments to include deposit accounts within the scope of the former Article 9 of those states prior to their enactments of the revisions to Article 9 contained in the 1998 Official Text. See CAL. COM. CODE § 9302(1)(g) (1998); HAW. REV. STAT. ANN. § 490:9-302(1)(h) (1998); 810 ILL. COMP. STAT. ANN. 5/9-302(1)(i) (1998); LA. REV. STAT. ANN. § 10:9-305(4) (1998). Other states left the law of security interests in deposit accounts to the common law of those states. Generally under the common law in

rity interests in deposit accounts as original collateral in consumer transactions remain excluded from Article 9,<sup>3</sup> security interests in deposit accounts as original collateral in other transactions are today being granted using the provisions of Article 9 as setting forth the rules governing the attachment, perfection, priority and enforcement of the security interests.<sup>4</sup>

The provisions relating to “control” of deposit accounts as original collateral are an important component of these legal rules. A security interest in a deposit account as original collateral must be perfected by control.<sup>5</sup> Moreover, a security interest in a deposit account perfected by control is superior to a security interest in a deposit account perfected by a method other than control, such as a security interest in a deposit account claimed merely as identifiable cash proceeds of other Article 9 collateral in which a secured party had a perfected security interest.<sup>6</sup> Furthermore, when a security interest is perfected by control, the mechanics for enforcement need not involve judicial process. The secured party may merely exercise its control rights to receive, if applicable, and in any event to apply the funds in the deposit account to the secured obligations.<sup>7</sup>

Control of a deposit account under Article 9 is achieved in one of three ways. Two are very straight forward. Under one method, if the secured party is the depository bank, the secured party automatically has control.<sup>8</sup> Under a second method, if the secured party is the depository bank’s customer with respect to the deposit account, the secured party has control.<sup>9</sup>

There is also a third method for a secured party to achieve control. Under that method, the debtor, the secured party and the depository bank must have “agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing the disposition of the funds in the deposit account

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order for the secured party to obtain a perfected security interest in a deposit account, the debtor needed to assign the deposit account to the secured party as a chose in action, the secured party had to notify the depository bank of the assignment, and the secured party needed to obtain exclusive dominion and control over the deposit account. See *Miller v. Wells Fargo Bank International Corp.*, 540 F.2d 548, 557–58 (2d Cir. 1976); *Duncan Box & Lumber Co. v. Applied Energies, Inc.*, 270 S.E.2d 140, 145–46 (W. Va. 1980).

3. See U.C.C. § 9-109(d)(13); see also Official Comment 16 to U.C.C. § 9-109.

4. See Ingrid Michelson Hillinger, David Line Batty and Richard K. Brown, *Deposit Accounts under the New World Order*, 6 N.C. BANKING INST. 1 (2002) (providing a detailed discussion of the treatment of deposit accounts under Article 9); Ben Carpenter, *Security Interests in Deposit Accounts and Certificates of Deposit Under Revised UCC Article 9*, 55 CONSUMER FIN. L.Q. REP. 133 (2001) (outlining mechanics of how to obtain control of deposit account in order to perfect a security interest in that deposit account as original collateral); G. Ray Warner, *Deposit Accounts as Collateral Under Revised Article 9*, 19 AM. BANKR. INST. J. 18 (July–Aug. 2000) (briefly describing procedure of attachment, perfection, and priority of security interest in deposit account as original collateral); Bruce A. Markell, *From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9*, 74 CHI.-KENT L. REV. 963 (1999) (discussing history behind and structure of Article 9 as it pertains to deposit accounts).

5. U.C.C. § 9-312(b)(1).

6. U.C.C. § 9-327(1).

7. U.C.C. § 9-607(a)(5).

8. U.C.C. § 9-104(a)(1).

9. U.C.C. § 9-104(a)(3).

without further consent of the debtor.”<sup>10</sup> Accordingly, when the secured party is not the depositary bank and it is not desirable or practical for the secured party to become the bank’s customer with respect to the deposit account, the secured party must, to have control over the deposit account, obtain a tri-partite agreement in a signed writing or other authenticated record that the depositary bank will follow the secured party’s instructions directing the disposition of the funds in the deposit account without the debtor’s further consent.<sup>11</sup> This tri-partite agreement is commonly referred to as a “deposit account control agreement.”<sup>12</sup>

The method for a secured party to achieve control by entering into a control agreement with the debtor and the depositary bank has in some cases become problematic in practice. Secured parties and depositary banks have developed their own forms of control agreements that largely focus on their own needs and concerns. On the one hand, secured parties generally seek in control agreements not only to achieve control for purposes of perfection but also to obtain assurance of the priority of the security interest, as well as ongoing monitoring, enforcement and other rights, all without undue exposure to themselves. On the other hand, depositary banks view the control agreement structure largely as an administrative accommodation to their customers that exposes them to potential liability to a third party that they would not otherwise have. As a result, depositary banks desire that the control agreement provide them with appropriate exculpatory and indemnification protections against liability for operational and other risks.

The result has been a classic “battle of the forms,” with each secured party and depositary bank insisting on using its own form. Financing transactions sometimes are delayed while deposit account control agreements are negotiated. Alternatively, the negotiations continue post-closing with debtors facing impending events of default in their loan documents with secured parties unless the deposit account control agreements are finalized and executed by certain dates set forth in the post-closing arrangements. Depositary banks suffer as well. In-house lawyers at major financial institutions acting as depositary banks often have the task of negotiating numerous control agreements under the pressures of closings or impending post-closing customer defaults. Generally, practitioners and clients complain of delays, costs and the use of resources that could be better employed elsewhere.<sup>13</sup>

With this background, the Business Law Section of the American Bar Association organized an ad hoc task force to attempt to develop a standard form of deposit account control agreement that could gain wide acceptance in the industry

10. U.C.C. § 9-104(a)(2).

11. See Official Comment 3 to U.C.C. § 9-104.

12. Some practitioners refer to the tripartite agreement as a “blocked account” agreement. This reference is actually a misnomer if the debtor retains the right to direct the disposition of the funds in the deposit account unless and until the secured party instructs the depositary bank otherwise. See U.C.C. § 9-104(b). While the debtor retains that right, the deposit account is not technically “blocked.”

13. See Alan M. Christenfeld and Shephard W. Melzer, *Deposit Account Control Agreements*, 229 N.Y.L.J. 5 (June 5, 2003) (discussing the practical issues facing a secured party in negotiating a control agreement).

and which could be implemented with no or minimal negotiation.<sup>14</sup> The task force is jointly sponsored by four Committees of the Business Law Section, each appointing one or more co-chairs of the task force: the Banking Law Committee (Marvin D. Heileson and John D. Pickering, Co-chairs); the Commercial Financial Services Committee (Robert Marshall Grodner, Co-chair), the Consumer Financial Services Committee (Roberta Griffin Torian, Co-chair) and the Uniform Commercial Code Committee (Edwin E. Smith, Co-chair).

Edwin E. Smith serves as the task force reporter. The members of the task force consist of representatives of various secured parties, depository institutions, professional organizations and trade groups. The names of the members of the task force and their affiliations are set forth at the end of the copy of this report on the task force website, the address of which is indicated on the first page of Attachment A.

## II. PROCESS

The task force met initially at the 2004 Spring Meeting of the Business Law Section in Seattle, Washington. At the initial meeting, the task force focused on a list of issues relating to deposit account control agreements that had been drafted by the Co-chairs and that was circulated to and commented on by members of the task force in advance. At the meeting it was determined that the task force would divide into subgroups with each subgroup being responsible for addressing the various issues on the list assigned to it, with specific contract language to be suggested.

Following the submission of the suggested language by each subgroup in the fall of 2004, the Co-chairs created a working draft deposit account control agreement designed for a demand deposit account without lock box provisions<sup>15</sup> or a related securities account.<sup>16</sup> The rationale for focusing upon the demand deposit

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14. A similar project was undertaken in connection with the 1994 revisions to U.C.C. Articles 8 and 9 promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Under those revisions it became possible for a secured party to perfect a security interest in a securities account by "control" analogous to the method of obtaining control over a deposit account. See U.C.C. §§ 8-106, 9-106 and 9-314. Following the promulgation of those revisions, the Investment Securities Subcommittee of the Uniform Commercial Code Committee of the American Bar Association's Business Law Section developed several now widely-used forms of securities account control agreements. See Howard Darmstadter, Sandra M. Rocks and Steven O. Weise, *A Model "Account Control Agreement" under the New Article 8 of the Uniform Commercial Code*, 53 BUS. LAW. 139 (1997), and Sandra M. Rocks and Robert A. Wittie, *Getting Control of Control Agreements*, 31 UCC L.J. 318 (1999).

15. Under a lock box arrangement, the depository bank's customer instructs its account debtors and other obligated persons to make payments to a postal lock box to which the depository bank has exclusive access. The depository bank, as part of the lock box service, collects checks and other items from the lock box on a regular basis, typically daily, and deposits the items in the deposit account on behalf of the customer.

16. The deposit account may be linked to a securities account (see U.C.C. § 8-501(a)) to which the funds in the deposit account are swept on a regular basis, typically at the end of each business day. The funds in the securities account are usually invested in securities (see U.C.C. § 8-102(a)(15)) or other financial assets (see U.C.C. § 8-102(a)(9)). The investments may, for example, comprise U.S. Treasury bills, repurchase agreements and shares in money market mutual funds. The depository bank may maintain both the deposit account and the securities account. In that case it is acting as a depository bank with respect to the deposit account and as a securities intermediary (see U.C.C. § 8-102(a)(14)) with respect to the securities account. Alternatively, the securities account may be main-

account form was a pragmatic one. The task force felt that it was necessary to address the most commonly-negotiated form in which the deposit account was an operational account, such as a checking account, and that, if the task force could not reach consensus on that form, it would not be productive to proceed with further refinements or other forms.

To retain focus, the task force elected for the time being to assume that the transaction for which the form would be used would not involve a related lock box account or investment of the funds in the deposit account in such a way as to suggest that the account was, or was in some way related to, a securities account. The task force also assumed that the secured party was either the sole lender extending credit to the debtor in a bilateral loan transaction, was the collateral agent acting for a syndicate of lenders extending credit to the debtor or was some other representative acting for holders of secured obligations.

The working draft of the deposit account control agreement for a demand deposit account, without lock box arrangements or a related securities account, was revised on several occasions based on a series of meetings of the task force. Since the 2004 Spring Meeting, the task force met seven times in New York and once in Los Angeles for all-day sessions. The task force also met at intervening Spring and Annual Meetings of the Business Law Section. Comments were received by the Co-chairs following each meeting and were incorporated into the working draft.

At its meeting in November of 2005, after reviewing a mature working draft of the deposit account control agreement, the task force decided that the working draft should be divided into two documents: (1) a form of Deposit Account Control Agreement set forth at the end of this report as Attachment A; and (2) a set of General Terms for Deposit Account Control Agreement, set forth at the end of this report as Attachment B, which would be incorporated by reference into the Deposit Account Control Agreement. We refer in this report to the General Terms for Deposit Account Control Agreement as the "General Terms" and to the form of Deposit Account Control Agreement, incorporating by reference the General Terms, as the "DACA."

### III. THE DACA INCLUDING THE GENERAL TERMS AND THE EXHIBIT

A number of provisions of the DACA deserve further explanation. In this part of the report, we first set forth a brief overview of the DACA. We then discuss the general philosophy of the DACA. We then turn to a more detailed discussion

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tained by an affiliate of the depository bank, with the affiliate acting as securities intermediary with respect to the securities account. If both the deposit and investment activities are conducted through a single account maintained by the same financial institution, the account is likely to be a securities account, not a deposit account, and the financial institution is then acting as a securities intermediary, not a depository bank. In that case, to perfect its security interest in the securities account by control, the secured party should be entering into a securities account control agreement (see *supra* note 14) with the financial institution and not using a deposit account control agreement.

of the provisions of the DACA including the General Terms incorporated by reference therein and the exhibit attached to the DACA as referred to below.

#### A. OVERVIEW OF THE DACA

The DACA is the agreement to be executed by the debtor, the secured party and the depositary bank. It is designed to be read and construed together with the General Terms that are incorporated by reference into the DACA. The DACA itself is accordingly a short document that completes, supplements or modifies the General Terms.

It is contemplated that the DACA and the General Terms will be made generally available for downloading on the Internet site home page of the American Bar Association's Business Law Section. The forms are to be accessible to those who are not American Bar Association members. The forms are also to be accessible without charge.<sup>17</sup>

The DACA is a very flexible document. If the parties accept the General Terms, only a small number of provisions need to be completed in the DACA. If the parties wish to add other terms, they may do so in the DACA. If the parties wish to modify a provision in the General Terms, they may do so in the DACA.

However, as a general matter the task force discourages modification of the General Terms. This is because, after numerous meetings and discussions, the task force reached an overall consensus on the General Terms that included compromises among secured parties, depositary banks and debtors. Given that the General Terms were forged out of these meetings and discussions and that an acceptable balance of the various positions was viewed to have been achieved, the task force strongly recommends that, absent significant countervailing circumstances as discussed further below,<sup>18</sup> the General Terms be accepted without modification.

If the parties do wish to modify a provision in the General Terms, the task force encourages them to do so by inserting a term in the DACA that refers to the provision in the General Terms to be modified and sets forth how the provision is being modified from the provision in the General Terms.<sup>19</sup> In that way, the change to the General Terms will be transparent to all of the parties. Especially to be avoided, in the view of the task force, is for the parties to duplicate and then modify the provision by changing the provision in the body of the General Terms. Even if the modified General Terms is then attached to the DACA, the change is less likely to be apparent to one or more of the parties.

There are three key parts of the DACA. The first part, Part A, incorporates by reference the General Terms.

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17. Each form contains a date and version number in the event that any further changes are made to the form by the task force or by any later group authorized by the American Bar Association's Business Law Section.

18. See *infra* text following note 141.

19. *Id.*

The second part, Part B, provides the specific terms of the deposit account control transaction. The terms in Part B are referred to in the DACA as the “Specific Terms.” The Specific Terms accomplish several tasks. They complete terms left in the General Terms to be completed by the parties in the DACA and, except for identifying the deposit account by account number, provide default provisions for terms that are not completed by the parties. They also permit, if the parties so elect, additional terms to be inserted into the DACA that are not contained in the General Terms. The Specific Terms further permit, if the parties so elect, the modification of a provision of the General Terms.

The third part, Part C, refers to an exhibit (the “Exhibit”) to the DACA. The Exhibit contains the form of Initial Instruction discussed below.

The DACA is designed, without further changes, for a certain paradigm deposit account control arrangement. It assumes that the parties intend for the debtor to have access to the funds in the deposit account unless and until the secured party instructs the depository bank otherwise. As a result, the DACA does not provide for a standing order for a cash sweep of the funds in the deposit account to the secured party at the outset of the transaction. The DACA also assumes that the demand deposit account is not associated with a postal lock box and is not linked to a related securities account in which the funds are invested.

The parties will need to insert additional provisions into the DACA to supplement or modify the General Terms if the parties wish the DACA to provide, at the outset of the transaction, for a standing order with the depository bank periodically to sweep the funds in the deposit account to the secured party or to cover a deposit account associated with postal lock box arrangements or linked to a related securities account. The drafting of suggested additional provisions to reflect periodic cash sweeps, lock box arrangements and possibly investment of the funds in the deposit account in a related securities account may be part of the future work of the task force.<sup>20</sup>

In addition, the DACA is not designed to deal with foreign deposit accounts including deposit accounts for which the depository bank’s jurisdiction under Article 9 is not in a Uniform Commercial Code jurisdiction.<sup>21</sup>

In the discussion below relating to the general philosophy and terms of the DACA, this overview should be borne in mind. The discussion refers to the DACA as a single agreement incorporating by reference the General Terms and inclusive of the Exhibit. The core provisions of the DACA are in the General Terms. The Specific Terms and the Exhibit require completion of the DACA for only a few matters. Nevertheless, the reader is guided in the discussion by the footnotes in this report indicating where in the Specific Terms, the General Terms or the Exhibit a particular provision under discussion may be found.

20. See *infra* Part IV of this report.

21. Article 9 contains a choice-of-law rule by which issues relating to the perfection and priority of a security interest in a deposit account as original collateral are governed by the law of the “bank’s jurisdiction” as determined under U.C.C. § 9-304(b). See U.C.C. § 9-304 and *infra* notes 134–35.

## B. GENERAL PHILOSOPHY

As one reads the DACA, several themes emerge.

First, the task force desired to keep the language as simple and straightforward as possible. In doing so, the task force avoided provisions that are best left for the agreement between the debtor and the secured party, such as provisions that would gratuitously suggest that the depository bank had some responsibility with respect to the agreement between the debtor and the secured party *inter se* or those which otherwise need not involve participation of the depository bank. For example, the DACA does not include a grant of a security interest in a deposit account or the events of default that would entitle the secured party to exercise its control rights by way of enforcement. These provisions, it was felt, were more appropriately contained in a credit agreement or security agreement between the debtor and the secured party. Indeed, the DACA only generally refers to the financing or other arrangements between the debtor and the secured party without identifying any particular credit or security agreement or whether the arrangements are bilateral, syndicated or involve a trust indenture. The specific type of financing arrangement or the particular credit documents entered into between the debtor and the secured party need not be of concern to the depository bank for purposes of the depository bank making its agreement with the secured party and the debtor in order for the secured party to achieve perfection of its security interest by control over the deposit account.

Second, the task force wanted the DACA to accommodate both large and small transactions and regardless of the nature or size of the secured party or the depository bank. Accordingly, the task force sought to balance the insertion of detailed provisions that are more prevalent in large financings involving major money-center banks with less detailed provisions for small financings involving community banks. Beyond the basic provisions required to establish perfection of a security interest in the deposit account by control, a number of the provisions of the DACA are the result of considered judgments following discussions focused on this balancing.

Third, the task force sought to accommodate the concerns of secured parties, depository banks and debtors. The accommodation was not easy, given the competing concerns especially of secured parties and depository banks as indicated above. In our task force meetings, secured parties pressed for certainty and monitoring and other rights, and depository banks stressed the accommodation nature of the service provided and the desire to avoid potential exposure for operational and other risks. However, the task force established by consensus early on a "golden rule": no member of the task force would advocate for a provision that it would not be willing to accept whether it was acting as secured party, depository bank or debtor in a particular transaction. This rule was especially meaningful for task force members from or often representing banks that may act in a particular transaction as secured party or depository bank and for task force members from or often representing finance companies that may act in a particular transaction as secured party or, in raising their own funds, as debtor.

Fourth, the task force worked to reach consensus on as many issues and matters in the DACA as practicable and to keep to a minimum those matters and issues on which it could not reach consensus. The task force decided that those matters and issues on which the task force could not reach consensus would be left to the negotiation of the parties and, once negotiated, would be inserted into the Specific Terms. Absent the completion of a Specific Term for an open item other than the identification of the deposit account by account number, the DACA provides a default term. Although not ideal, it was thought that minimizing open items and leaving them to be agreed by the parties and inserted into the Specific Terms would confine negotiations to the few issues referred to in the Specific Terms, reduce the need to negotiate other provisions, especially the more common “boiler plate” provisions contained in the General Terms, and perhaps, even for those open issues to be negotiated, permit over time common market practices to emerge.

Fifth, the task force recognized that the DACA would not only have to satisfy the needs of the business community but also be an agreement with which practitioners would be comfortable for opinion purposes. In particular, the DACA would have to create sufficient mechanics so that the opinion giver, whether the debtor’s counsel or the secured party’s counsel, would be able to opine that under the DACA perfection of the secured party’s security interest in the deposit account has been achieved by control.

Sixth, if the task force could achieve consensus on the DACA, it would, at a second stage, turn to suggested inserts to the DACA or perhaps other forms that would address variations from the prototype transaction on which the DACA was based. The future work of the task force is discussed in Part IV of this report.

## C. DISCUSSION OF THE DACA PROVISIONS

With this philosophy and these general themes in mind, we turn to a more detailed discussion of the provisions of the DACA.

### 1. Identification of the Deposit Account

A depository bank typically identifies a customer’s deposit account by reference to an account number. The DACA contemplates that the number of the deposit account would be inserted as the first item on the Specific Terms.<sup>22</sup> Once identified on the Specific Terms, the deposit account would remain covered by the control agreement even if the deposit account were subsequently renumbered by the depository bank.

The secured party should verify that the debtor is the depository bank’s customer on the deposit account. Once the number is verified to refer to a deposit account for which the debtor is the depository bank’s customer, the number should be sufficient to identify the deposit account. The parties should not insert in the Specific Terms the name of the deposit account, if the deposit account

<sup>22</sup>. DACA Part B(1).

contains a name, or propose a specific name for the deposit account for insertion in the Specific Terms. The name on the deposit account is irrelevant for purposes of the secured party obtaining control of the deposit account under U.C.C. § 9-104(a)(2).<sup>23</sup> Moreover, depository banks report that deposit account names proposed by secured parties often do not comply with the operational and other constraints relating to the name for a deposit account faced by the depository bank, leading to time-consuming and unnecessary efforts by all parties to reach agreement on a mutually acceptable name. The DACA also permits more than one deposit account to be covered by the same DACA.<sup>24</sup> However, since the provisions of the DACA would then apply to each deposit account, each deposit account should be treated in the DACA identically. For example, the DACA should not be used to cover all of the debtor's deposit accounts at the depository bank if not all of the deposit accounts are demand deposit accounts to which the debtor has access to the funds at the outset. In the event that the DACA covers more than one deposit account, for ease of reference, all of the deposit accounts then covered by the DACA are referred to individually and collectively in the DACA as the "Deposit Account."<sup>25</sup>

Even though more than one deposit account may be covered in the DACA, the depository bank's customer on all of the deposit accounts should be a single debtor. Certain provisions of the DACA discussed below, such as provisions relating to setoffs and other charges by the depository bank against the deposit account, would need to be expanded and would become more complex if the DACA permitted multiple debtors in a single DACA.

## 2. Agreement of the Depository Bank to Follow Secured Party's Instructions

In the DACA, the depository bank agrees to follow the instructions of the secured party as to the disposition of the funds in the deposit account without further consent of the debtor.<sup>26</sup> This is the core agreement among the depository bank, the secured party and the debtor that establishes the secured party's control for purposes of Article 9. The depository bank agrees to follow the secured party's instructions even if, as a result of doing so, the depository bank is forced to dishonor checks or other items presented for payment from the deposit account.<sup>27</sup>

23. The DACA would not be used if the secured party is obtaining control of the deposit account by becoming the depository bank's customer with respect to the deposit account as permitted by U.C.C. § 9-104(a)(3).

24. DACA Background ¶ 1.

25. *Id.*

26. General Terms § 3(i).

27. General Terms § 3(ii). It is not necessary, in order to obtain a perfected security interest in a deposit account by control, for the secured party to have the right to instruct the depository bank as to matters concerning the deposit account unrelated to the disposition of the funds in the deposit account. See U.C.C. § 9-104(a)(2). Furthermore, providing in a deposit account control agreement for the secured party to have "dominion and control" over the deposit account, suggesting compliance with the common law requirements for the secured party to obtain a perfected security interest in a deposit account, is not necessary under Article 9 and may, indeed, not be accurate for a deposit

For the secured party to implement the instructions to the depository bank, the secured party needs to give an “Initial Instruction.”<sup>28</sup> The giving of the Initial Instruction involves certain mechanics: a form of Initial Instruction; the recipient or recipients of the Initial Instruction at the depository bank who must be designated; a concept of an “Outside Time” by which the depository bank must comply with the Initial Instruction; the primary effect of the Initial Instruction, without more, being to block the debtor’s access to the funds in the deposit account; and the fact that the giving of the Initial Instruction cannot be reversed without the consent of the depository bank. Each of these matters is discussed in further detail below.

*a. Form of Initial Instruction and Recipients Designated*

The Initial Instruction should be given in the form set forth as the Exhibit to the DACA.<sup>29</sup> Although the form of Initial Instruction is generally straight forward, two aspects of the form deserve special mention.

First, the form needs to designate what person or persons at, or department of, the depository bank is to receive the Initial Instruction. The Initial Instruction is not binding upon the depository bank if the Initial Instruction is not actually received by the person or persons or department so designated.<sup>30</sup> Although ideally a depository bank will use a specific department of the depository bank to receive the Initial Instruction, it is possible that the depository bank may designate one or more individuals, by title or name, to receive the Initial Instruction. Obvious concerns were expressed by a number of members of the task force that the effectiveness of the Initial Instruction may be delayed if a particular individual is not available at the time to receive the Initial Instruction or, worse, that the Initial Instruction may never become effective if no individual designated by title is acting in that capacity or if an individual designated by name has died, is incapacitated or has otherwise left the employ of the depository bank. However, because depository banks do not have a common and uniform way of receiving instructions of this type, it was not possible for the task force to reach a consensus acceptable to all depository banks as to who the recipient or recipients at the depository bank should be for the Initial Instruction.

*Accordingly, in completing the form of Initial Instruction, the parties should pay particular attention to this provision and insert with care what person or persons or department at the depository bank is to receive the Initial Instruction.* Parties may wish to consider the designation of a department or, if that is not practical, an individual or individuals at the depository bank referred to by title rather than the name of a particular individual or individuals. The DACA does provide that, if more than

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account in which the debtor retains the right to direct the disposition of the funds in the deposit account unless and until the secured party instructs the depository bank otherwise. See U.C.C. § 9-104(b).

28. See General Terms § 1.

29. DACA Part C.

30. See General Terms § 10(b).

one individual at the depository bank is designated, whether by title or name, to receive the Initial Instruction, the Initial Instruction is considered to have been received if any one of the designated individuals actually receives the Initial Instruction.<sup>31</sup> Nevertheless, this matter will need to be addressed by the parties when completing the form of Exhibit based upon the operational structure of the particular depository bank.

Second, the Initial Instruction needs to have attached to it a copy of the fully executed DACA.<sup>32</sup> The attachment of the copy will act as a prophylactic device for the secured party to perform the due diligence to determine that the DACA is still in effect and will assist the depository bank in making a like determination. In addition, given that the account number identifying the deposit account is contained in the DACA, the attachment of the copy will also enable the depository bank more quickly to connect the Initial Instruction with the debtor and with the deposit account. The copy attached to the Initial Instruction may be a photocopy; it need not be an original copy.

*b. The Concept of "Outside Time"*

Assuming that the Initial Instruction is given in the form of the Exhibit and the Exhibit is actually received by the designated person or persons or department at the depository bank, the depository bank is given a period of time to react to the receipt of the Initial Instruction before being obligated to comply with it. This period of time expires when the "Outside Time" occurs and is reflected in the definition of the term "Outside Time."<sup>33</sup>

The Outside Time occurs at the expiration of two Business Days commencing on the Business Day upon which the Initial Instruction is actually received by the person or persons or department designated in the Exhibit to receive the Initial Instruction. However, if the Initial Instruction is received by the person or persons or department in the afternoon on a Business Day, the two-Business Day period commences on the next Business Day. The term "Business Day" is defined in the General Terms and allows the parties in the Specific Terms to exclude from being a "Business Day" additional days on which banks are not open for commercial banking business in a particular city or cities, depending upon whether the operations of the depository bank, as they relate to the deposit account, span several geographic locations.<sup>34</sup>

The concept of an Outside Time was not without controversy. Secured parties pressed for a shorter period. Others advocated for the more general "reasonable time to react" standard set forth in Article 4 of the Uniform Commercial Code.<sup>35</sup>

31. General Terms § 10(b).

32. See General Terms § 4(a)(i)(D); see also DACA Exhibit.

33. General Terms § 1.

34. General Terms § 1; DACA Part B(2).

35. See U.C.C. § 4-303(a). The section addresses, among other things, the time at which a depository bank is bound by a stop payment order received by the bank under U.C.C. § 4-403 or a legal process served on the bank relating to a deposit account. The case law interpreting the phrase "reasonable time for the bank to act thereon" under U.C.C. § 4-303(a) is generally viewed by depository

However, the depository banks felt strongly that they needed a clear “safe harbor” time period during which to react to an Initial Instruction. For large money center banks, in particular, the desire for a “safe harbor” was driven by the fact that many of their customers could in the ordinary course of business move millions of dollars through their deposit accounts on a daily basis. These customers often have established sophisticated cash management systems with multiple ways to access accounts other than merely by writing checks. The systems are usually computerized and exist on several independent and separately located platforms. Access to these accounts operationally often cannot be shut down instantaneously.

Under the “safe harbor” approach, the depository bank would have no exposure to the secured party for the depository bank’s failure to comply with the Initial Instruction, or in complying with the debtor’s instructions, prior to the Outside Time.<sup>36</sup> In advocating for this “safe harbor” approach, the depository banks emphasized the accommodation nature of the transaction and the fact they are not being compensated for taking operational risks necessary for a more immediate compliance with the Initial Instruction.

Two factors may mitigate against the concern that the period reflected in the definition of Outside Time is too long. First, if the depository bank chooses to act on the Initial Instruction before the Outside Time, it may do so without liability to the debtor.<sup>37</sup> The depository banks represented at the task force meetings stated they would intend to endeavor to act more quickly in complying with the Initial Instruction in practice. Second, given that some depository banks, especially small community banks, may be able to commit to react quicker, the parties may in the Specific Terms shorten the period reflected in the definition of Outside Time.<sup>38</sup>

Even so, some members of the task force expressed the view that the definition of Outside Time still provided too generous a period of time for the depository bank to react. The concern was that during this period the depository bank could communicate to the debtor that the Initial Instruction had been received. The debtor could then withdraw the funds in the deposit account before the occurrence of the Outside Time.

Two responses to this concern were made. One was that, by the very nature of this type of deposit account control arrangement, the secured party is already taking the risk that there would be no funds in the deposit account. The secured party is taking that risk since, as indicated below, before even the giving of the Initial Instruction, the debtor has the right to withdraw all of the funds in the deposit account.<sup>39</sup> The response illustrated that for most secured parties, when the debtor has pre-default access to the funds in the deposit account, the funds

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banks as not being particularly generous to them. *See, e.g.,* W & D Acquisition, LLC v. First Union Nat’l Bank, 817 A.2d 91 (Conn. 2003) (remand to determine whether 3.5 hours is a “reasonable time” under § 4-303(a)); Harbor Bank of Maryland v. Hanlon Park Condominium Ass’n, Inc., 834 A.2d 993 (Md. Ct. Spec. App. 2003) (remand to determine whether 2.5 hours is a “reasonable time” under § 4-303(a)), *cert. denied*, 841 A.2d 340 (Md. 2004). *See also* U.C.C. § 4-401(c).

36. *See* General Terms §§ 2, 4(a)(ii)(A).

37. General Terms § 2.

38. DACA Part B(3).

39. *See* General Terms § 2(a).

in the deposit account would typically not, in the context of the overall transaction, be collateral on which the secured party is primarily relying when deciding to extend credit to the debtor. If the funds in the deposit account were collateral on which the secured party was primarily relying, the arrangements would be structured differently: from the outset of the transaction, the debtor would not be entitled to access to the funds in the deposit account, and the funds would likely be transferred to the secured party automatically by standing instruction on a periodic basis.

The other response was that a depositary bank that “tips off” the debtor may not have complied with its duty of good faith and fair dealing, a general duty imposed upon a contracting party under the common law of contracts in most jurisdictions in the United States.<sup>40</sup>

*c. Effect of the Initial Instruction*

The effect of the secured party giving the Initial Instruction is to block the debtor’s further access to the funds in the deposit account. The Initial Instruction, or a subsequent instruction, may direct the depositary bank to send the funds to the secured party or its designee (the instruction directing the disposition of the funds in the deposit account being referred to in the General Terms as a “Disposition Instruction”<sup>41</sup>). However, the depositary bank has no obligation to comply with the secured party’s Disposition Instruction unless, among other conditions set forth in the DACA, the depositary bank has received evidence reasonably required by the depositary bank as to the authority of the person purporting to act for the secured party.<sup>42</sup>

The distinction between the Initial Instruction blocking the debtor’s access to the funds in the deposit account and a Disposition Instruction, which may be contained in the Initial Instruction or which may be a subsequent instruction, deserves further explanation. The depositary banks were reluctant to assume the risk of paying an interloper posing as a representative of a secured party without obtaining evidence of the authority of the person to act for the secured party. Although the position of the depositary banks was viewed by some members of the task force as conservative, nevertheless the position is no different than that which depositary banks take with respect to their own customers that are legal entities, by requiring signature cards, directors’ resolutions and the like as evidence of the authority of an individual to act on behalf of a bank’s customer.<sup>43</sup>

40. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). If the DACA is viewed to be a “contract . . . within” the Uniform Commercial Code, the duty of good faith would be imposed by the Uniform Commercial Code itself. See U.C.C. § 1-304. See also U.C.C. § 1-201(b)(20) defining the term “good faith.”

41. General Terms § 1.

42. See General Terms § 4(a)(ii), and, in particular, § 4(a)(ii)(F).

43. Depositary banks also have a number of regulatory issues to resolve in connection with transferring funds to third parties, such as compliance and reporting issues relating to the detection and prevention of money laundering and terrorist financing. This is an area in which the regulatory requirements and scrutiny continue to increase as additional regulations and guidance are issued for compliance with the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), the Bank Secrecy

The depository banks were, however, willing to comply with an instruction to block the debtor's access to the funds in the deposit account pending receipt of evidence of the authority of the person purporting to act for the secured party that wished to move the funds. The blocking of the debtor's access to the funds in the deposit account was a major objective of the secured parties represented on the task force. Moreover, the depository banks were willing, if the secured parties wished, to receive the evidence of authority in advance of an Initial Instruction being given so that a Disposition Instruction could be effectively included in the Initial Instruction.

The form of Initial Instruction provided as the Exhibit likewise states that the effect of the receipt of the Initial Instruction will be to block the debtor's access to the funds in the deposit account. If the secured party has previously provided the depository bank with evidence of the authority of the person purporting to act for the secured party, does so concurrently with the giving of the Initial Instruction or does so shortly thereafter, the Initial Instruction may, as reflected in bracketed language in the Exhibit, include a Disposition Instruction. Otherwise, the secured party may provide that evidence later and give a Disposition Instruction at or after the time that it provides the evidence.

*d. No Reversal of the Giving of the Initial Instruction*

The Initial Instruction, once given, may not be rescinded or otherwise modified without the consent of the depository bank.<sup>44</sup> The primary reason for this requirement is an operational one. Most depository banks, the task force understood, did not have the capability of efficiently blocking and unblocking a debtor's access to the funds in the deposit account *seriatim*. They were agreeable to turning the "toggle switch" once, but not more than once. Moreover, it was recognized by members of the task force that the giving of the Initial Instruction would be a serious step taken by the secured party. In the event of a later resolution of any dispute between the debtor and the secured party, or in successful workout negotiations, where the parties wish to return to the *status quo ante*, the cooperation of the depository bank will be required. It may be that the parties then need to negotiate and execute a new deposit account control agreement.

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Act ("BSA") (codified at 31 U.S.C. §§ 5311–5332), and Office of Foreign Assets Control requirements (available at [www.treas.gov/ofac/](http://www.treas.gov/ofac/)), and as more enforcement and supervisory actions are taken by the regulatory agencies against banks. In addition to the customer identification procedures required under Section 326 of the USA PATRIOT Act (115 Stat. at 317 (codified at 31 U.S.C. § 5318)) and the enhanced diligence and monitoring to "Know Your Customer" required for at least those customers identified as "high risk" for potential money laundering and terrorism financing activity, almost all aspects of bank operations must comply with BSA/anti-money laundering ("AML") requirements. Wire transfers and other funds transfers are viewed to be activities requiring special BSA/AML scrutiny. The BSA/AML compliance obligations for funds transfers set forth in 31 C.F.R. § 103.33 (2005) require that banks meet very specific recordkeeping and transmittal requirements, including the so-called "Travel Rule."

44. General Terms § 3.

### 3. Debtor's Access to the Deposit Account

Unless and until the Initial Instruction has been given and has been received by the person or persons or department set forth in the Exhibit and the Outside Time has occurred, or the depository bank has elected to comply with the Initial Instruction sooner than the Outside Time, the DACA contemplates that the debtor would be permitted to deal with the funds in the deposit account.<sup>45</sup> For example, if the deposit account is a checking account, the debtor may be permitted to write checks against the deposit account, and the depository bank would have no liability to the secured party for permitting the checks to be honored from sufficient funds in the deposit account. The relationship at that point between the depository bank and the debtor would be governed by the deposit account agreement and other arrangements (defined in the General Terms as the "Deposit-related Agreements"<sup>46</sup>) between the depository bank and the debtor as the depository bank's customer relating to the deposit account.

However, once the Initial Instruction has been given and has been received by the person or persons or department set forth in the Exhibit and the Outside Time has occurred, or the depository bank has elected to comply with the Initial Instruction sooner than the Outside Time, the debtor's access to the funds in the deposit account would be blocked. At that point, "[t]he Bank will not comply with the Debtor's Disposition Instructions."<sup>47</sup>

### 4. Exculpation of the Depository Bank

Notwithstanding the depository bank's general agreement to comply with the instructions originated by the secured party as to the disposition of the funds in the deposit account without further consent of the debtor, and even if the Initial Instruction is received by the proper person or persons or department and the Outside Time has occurred, the DACA contemplates situations in which the depository bank need not act on the secured party's instructions.<sup>48</sup> These situations are circumscribed, and some of them are within the control of the secured party.

Some of these situations are obvious and are designed to mitigate operational risks or other exposure to the depository bank. The depository bank need not send funds to the secured party if the funds are not immediately available in the deposit account.<sup>49</sup> The depository bank has no obligation to the secured party or the debtor under the DACA to permit overdrafts in the deposit account.<sup>50</sup> To address automated processing of deposit account transactions, the depository bank and its affiliates need not cease and may complete any transaction involving the deposit account which the depository bank and its affiliates have commenced

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45. General Terms § 2(a).

46. General Terms § 1.

47. General Terms § 2(b).

48. General Terms § 4.

49. General Terms § 4(a)(ii)(D).

50. Nothing in the DACA requires the depository bank to permit an overdraft. A depository bank generally has no obligation to permit an overdraft absent the depository bank's agreement to do so. See U.C.C. § 4-402(a).

to process prior to the Outside Time.<sup>51</sup> Moreover, as indicated above,<sup>52</sup> the depository bank need not comply with a Disposition Instruction from the secured party unless the depository bank has received evidence reasonably required by the depository bank as to the authority of the person giving the Disposition Instruction to act for the secured party.<sup>53</sup> In addition, the depository bank need not comply with a Disposition Instruction that the depository bank determines would violate law or a court order or judicial process binding upon the depository bank.<sup>54</sup>

The depository bank also need not comply with a Disposition Instruction to transmit the funds in the deposit account by a method that the depository bank has not made available to the debtor.<sup>55</sup> For example, if the debtor does not have a funds transfer agreement with the depository bank to wire funds, the secured party is not entitled to request that the depository bank wire the funds in the deposit account to the secured party or its designee any more than the debtor would be entitled to do so. However, the secured party could always enter into its own funds transfer agreement with the depository bank to effect a wire transfer of the funds in the deposit account.

Furthermore, the depository bank need not comply with a Disposition Instruction from the secured party that requires the depository bank to transmit less than all of the funds in the deposit account, or to transmit funds to more than one recipient, unless the parties have otherwise agreed in the Specific Terms.<sup>56</sup> The task force learned that some depository banks, because of their own operational constraints, would not agree to transfer less than all of the funds in the deposit account to the secured party or to “slice and dice” the funds in the deposit account and send them to several recipients. Other depository banks indicated that they might agree to such arrangements depending upon how complicated they were. Accordingly, the task force decided that the default rule in the DACA should be that all of the funds in the deposit account must be transmitted to a single recipient unless the parties agree in the Specific Terms to other arrangements.<sup>57</sup>

The depository bank, of course, need not honor an Initial Instruction that is not complete and received by the person or persons or department designated in

51. General Terms § 4(a)(iii). This is the case even if the depository bank complies with the Initial Instruction before the Outside Time. The task force did not want to discourage the depository bank from complying with the Initial Instruction before the Outside Time, and blocking the debtor's access to as much of the funds in the deposit account as it could, even if the depository bank was then not able operationally to stop processing a particular transaction originated by the debtor. Of particular concern were transactions that were part of the debtor's automated cash management system.

52. See *supra* notes 41–43 and accompanying text.

53. General Terms § 4(a)(ii)(F).

54. General Terms § 4(a)(ii)(C). Under the law of contracts in most jurisdictions in the United States the depository bank's determination must be made in good faith. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). If the DACA is viewed to be a “contract . . . within” the Uniform Commercial Code, the duty of good faith would be imposed by the Uniform Commercial Code itself. See U.C.C. § 1-304. See also U.C.C. § 1-201(b)(20) defining the term “good faith.”

55. General Terms § 4(a)(ii)(B).

56. General Terms § 4(a)(ii)(E); DACA Part B(4).

57. If all of the funds in the deposit account are transmitted to the secured party and the funds transmitted exceed the amount of the secured obligations, the secured party may be obligated to account to the debtor for any surplus funds. See U.C.C. § 9-608(a)(4).

the Exhibit.<sup>58</sup> For example, the Initial Instruction may not have attached to it a fully executed copy of the DACA or may contain minor errors. Nevertheless, the depositary bank may act on an Initial Instruction that is not complete, is not in the form of the Initial Instruction or is not received by the proper person or persons or department. If the depositary bank does so, its action will not expose it to any liability to the debtor.<sup>59</sup>

As a more general matter, the depositary bank is not liable for *force majeure* events, for any claim not directly caused by the gross negligence or willful misconduct of the depositary bank or for any damages other than direct actual damages. Indirect, special, consequential and punitive damages are excluded.<sup>60</sup>

Some members of the task force objected to the provision exculpating the depositary bank for claims not directly caused by the gross negligence or willful misconduct of the depositary bank. They pointed out that the provision would allow the depositary bank to breach a term of the DACA and not be liable for the breach if the breach were not directly the result of the depositary bank's gross negligence or willful misconduct. However, it was pointed out that the gross negligence/willful misconduct standard is customary in other banking arrangements, such as in deposit account agreements, letter of credit reimbursement agreements and agency provisions in syndicated loan agreements. It was also pointed out that the gross negligence/willful misconduct standard is the prevailing standard for persons acting in various representative capacities for others, such as escrow agents, indenture trustees, administrative agents and collateral agents. Accordingly, the provision was viewed to reflect market standards for risks undertaken by banks and that should be no different for deposit account control agreements.

The above discussion relating to the exculpation of the depositary bank assumes that the Outside Time has occurred. As indicated in the discussion relating to the concept of Outside Time,<sup>61</sup> if the depositary bank fails to follow an Initial Instruction before the Outside Time has occurred and, as a result, the debtor withdraws funds from the deposit account, the DACA provides that the depositary bank has no liability to the secured party.<sup>62</sup> If the Outside Time has not occurred and the depositary bank chooses to act on an Initial Instruction or Disposition Instruction from the secured party, the DACA likewise provides that the depositary bank has no liability to the debtor.<sup>63</sup>

## 5. Whether "Control" has been Achieved for Opinion Purposes

As mentioned, under Article 9, the agreement among the debtor, the secured party and the depositary bank that the depositary bank will comply with instruc-

58. See General Terms § 4(a)(i).

59. See General Terms § 4(a)(iv).

60. See General Terms § 4(b).

61. See *supra* notes 33–40 and accompanying text.

62. General Terms §§ 2, 4(a)(ii)(A).

63. General Terms § 4(a)(iv).

tions originated by the secured party as to the disposition of the funds in the deposit account without further consent of the debtor is necessary for the secured party to have achieved perfection of its security interest in the deposit account as original collateral by control.<sup>64</sup>

Some members of the task force initially questioned whether the DACA does result in the secured party obtaining control. The concerns expressed were twofold.

The first concern was whether the mechanism for the secured party first to give the Initial Instruction to the depository bank defers control until the Initial Instruction or a subsequent Disposition Instruction is in fact given. Although Official Comment 3 to U.C.C. § 9-104 states the view that control may be achieved even if the execution of the control rights are subject to conditions, nevertheless the black letter text of U.C.C. § 9-104 suggests the requirement of a present “agreement” of the depository bank and does not address whether the agreement may be subject to conditions.

The second concern was whether the depository bank had entered into an “agreement” at all. The basis for this concern relates to the combination of (a) the necessity for the Initial Instruction to be on a specific form and to be sent to a specific person or persons or department at the depository bank at a particular address, (b) the provisions permitting the depository bank to decline to comply with Disposition Instructions originated by the secured party in certain situations and (c) the depository bank having no liability for failing to comply with an Initial Instruction or a Disposition Instruction unless the depository bank were grossly negligent or acted with willful misconduct.

Ultimately, these concerns were addressed.

It has always been well understood as part of Article 9’s statutory scheme that a security interest may be perfected even though the secured party does not have a present ability to enforce the security interest against a third party obligated on the collateral without taking further steps with respect to the third party.<sup>65</sup> The concept of control is no different. Even without the support of Official Comment 3 to U.C.C. § 9-104, the literal language of U.C.C. § 9-104(a)(2) states that, for the secured party to have control over the deposit account, the depository bank must have “agreed” to comply with the instructions originated by the secured party without further consent of the debtor. The “agreement” is a present one even though the depository bank’s obligation to the secured party to comply with the instruction does not arise unless and until the secured party takes the additional step of giving the instruction to the depository bank. Once the “agreement” is in place, the debtor cannot interfere with the secured party taking the additional step of giving the instruction to the depository bank in order for the secured party

64. See U.C.C. §§ 9-312(b)(1), 9-104(a)(2).

65. For example, a secured party may have a perfected security interest in identifiable cash proceeds in a deposit account under U.C.C. § 9-315(d)(2) but may not have the ability to enforce the security interest against the depository bank without the depository bank’s further consent. See, e.g., U.C.C. §§ 9-341 and 9-607(e) and Official Comment 6 to U.C.C. § 9-607.

to exercise its control rights.<sup>66</sup> Moreover, the conclusion that control is achieved by a present agreement, even before an instruction is given by the secured party to the depository bank, is supported by U.C.C. § 9-104(b). Section 9-104(b) permits control by the secured party to be achieved even though the debtor retains a right of access to the funds in the deposit account unless and until an instruction otherwise is given by the secured party.

Indeed, a contrary interpretation would not seem to be consistent with U.C.C. § 1-103(a)'s admonition for the Uniform Commercial Code to be "liberally construed and applied to promote its underlying purposes." Those purposes include simplifying commercial law and permitting the continued expansion of commercial practices through custom, usage and the agreement of the parties. A contrary interpretation would necessitate that parties take added formalistic steps to achieve control, such as requiring the depository bank to comply with instructions from either the secured party or the debtor until the secured party requires the depository bank to comply with instructions solely from the secured party, or requiring the secured party to instruct the depository bank to honor instructions from the debtor as to the disposition of the funds in the deposit account until contrary instructions are again received from the secured party. The task force felt that, consistent with the interpretive principles of U.C.C. § 1-103(a), such formalistic steps were unnecessary burdens on the parties for the secured party to achieve control so long as the depository bank has agreed at the outset to comply with an instruction if and when later given by the secured party to the depository bank.

Likewise, the task force felt that, notwithstanding the steps that the secured party must take under the DACA for the depository bank to be bound by the Initial Instruction, the ability of the depository bank to decline to follow a Disposition Instruction from the secured party under certain circumstances and the fact that the depository bank's liability for failure to follow an Initial Instruction or a Disposition Instruction had to be grounded in the depository bank's gross negligence or willful misconduct, the depository bank had in fact "agreed" with the secured party as required by U.C.C. § 9-104(a)(2). If an Initial Instruction is given as required by the DACA, the Initial Instruction will become effective. The situations in which the depository bank need not comply with a Disposition Instruction are circumscribed. Some of these are within the control of the secured party, e.g., providing evidence of the authority of the person purporting to act for the secured party or directing the disposition of the funds in the deposit account only by a method that would have been available to the debtor. Others, such as permitting the depository bank to decline to follow an instruction that would violate a law binding on the depository bank, are sufficiently remote and do not

66. "The key here is the lack of any future consent by the debtor; under Revised Article 9, the inability of the debtor to countermand the secured party's actions gives the secured party the control necessary to put others on notice of its interest." Bruce A. Markell, *From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9*, 74 CHI.-KENT L. REV. 963, 985-86 (1999); see also Ingrid Michelson Hillinger, David Line Batty and Richard K. Brown, *Deposit Accounts under the New World Order*, 6 N.C. BANKING INST. 1, 22-23 (2002).

suggest that there is no “agreement” at all. Moreover, if an instruction is effective and there is no applicable situation permitting the depositary bank under the DACA to decline to follow the instruction, the depositary bank could not, under the “gross negligence/willful misconduct” standard, *intentionally* fail to comply with the instruction without exposing itself to liability for breach of the DACA.

## 6. Recourse of the Depositary Bank to the Deposit Account

The DACA also deals with the intercreditor arrangements between the secured party and the depositary bank with respect to the deposit account. Under Article 9, absent a contractual subordination by the depositary bank, any control security interest that the depositary bank may have in the deposit account, and any rights of recoupment and setoff that the depositary bank may have against the deposit account, would be superior in priority to the security interest of the secured party in the deposit account perfected by control under U.C.C. § 9-104(a)(2).<sup>67</sup> Accordingly, the depositary bank generally agrees in the DACA to subordinate its control security interest in and rights of recoupment and setoff against the deposit account to the security interest of the secured party in the deposit account.<sup>68</sup>

However, certain claims of the depositary bank are carved out from the subordination. The depositary bank’s recourse to the deposit account for these claims would under the DACA be superior to the security interest of the secured party.<sup>69</sup> These provisions affording the depositary bank superior recourse for certain claims to the deposit account reflect market practice and were not controversial in the task force.

The claims of the depositary bank for which the depositary bank retains superior recourse to the deposit account consist of those claims (hereinafter referred to as “Permitted Debits”) enumerated in Section 5(b) of the General Terms. These are claims that the depositary bank has against the deposit account or the debtor arising by law or under a Deposit-related Agreement and that consist, for example, of rights of charge back arising from reversed provisional credits to the deposit account or normal deposit account maintenance fees. They may also include a claim for reimbursement for legal fees and expenses incurred by the depositary bank in connection with the DACA if the debtor has agreed to be responsible for the reimbursement.<sup>70</sup>

67. See U.C.C. §§ 9-327(3), 9-340.

68. General Terms § 5(a).

69. In addition, the Federal Deposit Insurance Corporation (“FDIC”) has taken the position under a predecessor version of 12 U.S.C. § 1813(m)(1), in the context of a lead bank waiving its setoff rights in a participation agreement, that the FDIC has a statutory right of setoff upon the FDIC taking over an insolvent insured bank and that the right of setoff is not impaired by any prior contractual waiver or subordination by the bank. See Letter of Lawrence F. Bates, 1984 FDIC Interp. Ltr. LEXIS 20 (Oct. 23, 1984). It is possible that the FDIC could continue to maintain this position under that statute as subsequently amended and could extend that position to a deposit account control agreement.

70. See General Terms § 5(b)(iv).

In addition, the depositary bank retains a superior security interest in any item arising under Article 4 of the Uniform Commercial Code.<sup>71</sup>

A Permitted Debit arising from the reversal of a provisional credit for an item, though, is limited to the face amount of the item.<sup>72</sup> If the depositary bank were to be accountable for damages in excess of the face amount of the item and were to seek compensation from the debtor, the depositary bank's superior recourse to the deposit account would not extend to the amount of damages in excess of the face amount of the item.<sup>73</sup>

### 7. Reimbursement and Indemnification of the Depositary Bank

The DACA addresses the extent to which the depositary bank is entitled to look to the debtor or the secured party for reimbursement for or indemnification against certain losses, costs or expenses incurred or sustained by the depositary bank in connection with the operation of the deposit account.<sup>74</sup> The debtor provides to the depositary bank a broad indemnification for the depositary bank entering into and performing its obligations under the DACA while the reimbursement and indemnification obligations of the secured party to the depositary bank are much more narrowly drawn.

In practice, the reimbursement and indemnification obligations sought by the depositary bank to be imposed on the secured party are often hotly negotiated.

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71. General Terms § 5(a). See U.C.C. § 4-210. For example, the depositary bank may give provisional credit to the debtor against a deposited check on which payment by the drawee bank has been stopped by the drawer under U.C.C. § 4-403. The depositary bank would have right to charge the debtor for the amount of the provisional credit under U.C.C. § 4-214(a). The depositary bank has a security interest in the check under U.C.C. § 4-210 to secure the customer's chargeback obligation. The subordination of the depositary bank's security interest in the deposit account does not affect the depositary bank's security interest in the check or its right as a holder of the check to pursue the drawer based on the drawer's signature on the check.

72. General Terms § 5(b)(i).

73. Such a situation could conceivably arise under the Check Clearing for the 21st Century Act, Pub. L. No. 108-100, 117 Stat. 1177 (2003) (codified at 12 U.S.C. §§ 5001-5018) (the "Check 21 Act"). Since General Terms § 5(b)(i)(B) allows the depositary bank recourse to the deposit account for the face amount of any item subject to a warranty claim, the depositary bank would have recourse to the deposit account for the face amount of an item subject to a Check 21 substitute check breach of warranty claim arising under § 5 of the Check 21 Act, 117 Stat. at 1181 (codified at 12 U.S.C. § 5004). If the substitute check breach of warranty also results in an indemnity claim under § 6 of the Check 21 Act, 117 Stat. at 1181-82 (codified at 12 U.S.C. § 5005), the indemnity claim might include a claim for damages "proximately caused" by the breach. See Check 21 Act § 6, 117 Stat. at 1181-82 (codified at 12 U.S.C. § 5005(b)(1)). The "proximately caused" damages might also be in an amount that exceeds the face amount of the substitute check. The task force felt that in such a case the depositary bank would then likely in turn have additional recourse to another bank in the chain of collection, usually the reconverting bank, and would not need to rely upon superior recourse to the deposit account fully to recover. If the depositary bank were itself the reconverting bank, and particularly if the depositary bank's own customer were the creator of the substitute check (see definition of "reconverting bank" in the Check 21 Act § 3, 117 Stat. at 1179-80 (codified at 12 U.S.C. § 5002(15))), the task force felt that the risk to the depositary bank would be more efficiently addressed through a separate agreement between the depositary bank and its customer. It is possible that, as banks gain more experience with operations under Check 21, this view may at some point be reexamined.

74. General Terms § 6.

The task force attempted to devise appropriate provisions for reimbursement and indemnity of the depositary bank by the secured party that would resolve the major areas of contention.

*a. Reimbursement*

In the event that, following a Disposition Instruction originated by the secured party, the depositary bank is entitled to make a Permitted Debit to the deposit account but is unable to do so because of insufficient funds in the deposit account, the secured party agrees to reimburse the depositary bank for the amount that the depositary bank is unable to collect.<sup>75</sup> The theory for creating such a reimbursement obligation is that, absent the depositary bank's compliance with the Disposition Instruction, the deposit account may have contained sufficient funds to satisfy the debit. In practice, reimbursement rights, whether phrased as such or as an indemnification right, have often been requested by depositary banks and granted by secured parties in deposit account control agreements.

However, there are several important limitations in the DACA to the depositary bank's reimbursement right. First, the reimbursement claim must be made by the depositary bank within a certain number of days following the termination of the DACA.<sup>76</sup> The task force was unable to determine a market convention as to the exact number of days, and even depositary banks themselves did not have a uniform view given their own differing operations and risk tolerances. Accordingly, the number of days is left to be negotiated by the parties and to be set forth in the Specific Terms.<sup>77</sup> If the parties fail to insert the number of days in the Specific Terms, then the Specific Terms provide that the number of days is 90.<sup>78</sup>

Various members of the task force felt that the number of days in which the depositary bank's claim for reimbursement must be made should be counted, not from the date on which the DACA terminated, but rather from the date on which the relevant funds were transmitted from the deposit account as a result of a Disposition Instruction originated by the secured party. The depositary banks resisted this approach on the basis that it was too difficult for them to trace funds operationally in order to link particular Permitted Debits with serial funds movements.

Second, the secured party has no obligation to reimburse the depositary bank for a Permitted Debit caused by the gross negligence or willful misconduct of the depositary bank.<sup>79</sup> For example, the depositary bank might be grossly negligent in paying an item that on its face was not complete or properly payable.

Third, the secured party's reimbursement obligation is limited in amount. The maximum liability of the secured party may not exceed the amount of the funds transmitted from the deposit account as a result of Disposition Instructions orig-

75. General Terms § 6(b).

76. General Terms § 6(b); DACA Part B(5).

77. DACA Part B(5).

78. *Id.*

79. General Terms § 6(c)(ii).

inated by the secured party.<sup>80</sup> This limitation means that, if the secured party never gives a Disposition Instruction, it has no reimbursement liability. If it does give one or more Disposition Instructions and the amounts transmitted total, let us say, \$50,000, then the secured party's reimbursement liability could not exceed \$50,000.

Fourth, the secured party has no obligation to reimburse the depository bank for a Permitted Debit that consists of a right of recourse that the depository bank has against the debtor for reimbursement of legal fees and expenses incurred in connection with a claim or defense by the depository bank relating to the DACA itself.<sup>81</sup> For example, one or more of the Deposit-related Agreements may be so broadly worded that the debtor is liable to the depository bank for such reimbursements. It was understandably thought unfair, whether or not the depository bank had such a right of reimbursement, for the depository bank to be able to charge the secured party, through the mechanism of the secured party's reimbursement obligations for unpaid Permitted Debits, for the legal fees and expenses incurred by the depository bank in connection with the enforcement by the secured party against the depository bank of the secured party's own rights or the defense of the secured party's own obligations under the DACA.

Likewise, if the depository bank does incur legal fees and expenses in connection with a claim or defense by the depository bank relating to the DACA, and the debtor has agreed to reimburse the depository bank so as to give rise to a Permitted Debit, the depository bank may seek reimbursement by applying the funds in the deposit account. In that case, the maximum liability of the secured party for reimbursement to the depository bank for uncollectible Permitted Debits is reduced by the amount of the funds applied from the deposit account against the Permitted Debits for the legal fees and expenses.<sup>82</sup> Without such an adjustment, the secured party might find itself indirectly reimbursing the depository bank for the legal fees and expenses if other funds in the deposit account prove to be insufficient to satisfy other Permitted Debits.

Finally, before the depository bank can make demand on the secured party for reimbursement, the depository bank must first make demand upon the debtor with respect to the debtor's indemnity of the depository bank.<sup>83</sup> If the debtor fails to satisfy the claim within 15 days following the depository bank's demand, then the depository bank may make demand upon the secured party.<sup>84</sup> Of course, if the depository bank is prohibited by operation of law from making demand upon the debtor, as may be the case where the debtor is a debtor in a bankruptcy case under the federal Bankruptcy Code, then the depository bank is relieved of the requirement of making demand upon the debtor as a condition to seeking reimbursement from the secured party.<sup>85</sup>

80. General Terms § 6(b).

81. General Terms § 6(c)(i).

82. General Terms § 6(c).

83. General Terms § 6(b).

84. General Terms § 6(b)(i).

85. General Terms § 6(b)(ii).

*b. Indemnification*

In addition to the depository bank receiving a broad indemnity from the debtor under the DACA, the depository bank receives from the secured party an indemnity for any loss, cost or expense sustained or incurred by the depository bank in following a Disposition Instruction originated by the secured party.<sup>86</sup> But there is excluded from the indemnification obligation of each of the debtor and the secured party any indemnification for any loss, cost or expense resulting from the gross negligence or willful misconduct of the depository bank.<sup>87</sup>

The DACA does not provide for an indemnity by the debtor in favor of the secured party. Any such indemnity should be contained in the credit agreement or security agreement or another separate agreement between the debtor and the secured party.

*c. Fee Shifting*

The DACA does not generally contain a provision by which a prevailing party in litigation against another party to the DACA recovers its legal fees and expenses from the non-prevailing party in connection with a reimbursement, indemnity or other claim under the DACA.<sup>88</sup> Any shifting of the responsibility for payment of legal fees and expenses from one party to another would be governed by other contractual arrangements or other law. Although the DACA does exclude the amount of the depository bank's legal fees and expenses from the reimbursement obligation of the secured party under the DACA, it does so only for purposes of computing the amount of the secured party's reimbursement obligation.

But there is one exception. Once the amount of the secured party's reimbursement obligation is determined, then, if the secured party fails to pay the amount when required to do so under the DACA, the depository bank may recover its legal fees and expenses in collecting the amount of the reimbursement obligation from the secured party.<sup>89</sup>

## **8. Certain Representations, Warranties and Covenants of the Depository Bank**

The depository bank's representations and warranties under the DACA are confined to factual matters. The depository bank represents that it is a bank, that it maintains the deposit account as a demand deposit account in the ordinary course of its business and that the depository bank has not entered into a conflicting control agreement.<sup>90</sup> The depository bank also covenants that it will not enter into a conflicting control agreement.<sup>91</sup>

86. General Terms § 6(e).

87. General Terms §§ 6(a), (e).

88. *See, e.g.*, General Terms § 6(c).

89. General Terms § 6(d).

90. General Terms § 7.

91. *Id.*

The depositary bank does not make representations and warranties as to legal conclusions. For example, the depositary bank does not represent or warrant that the deposit account is a “deposit account” for purposes of Article 9 or that the secured party has achieved control over the deposit account under U.C.C. § 9-104. The secured party should perform sufficient due diligence to make those determinations based upon the representations and warranties that the depositary bank in fact makes and other inquiries in cooperation with the debtor.

As part of its due diligence, the secured party should verify not only that the deposit account is a “deposit account” for purposes of Article 9 (and is not, for example, a securities account) but also that the debtor is the depositary bank’s sole customer with respect to the deposit account.

### **9. Deposit Account Information**

The depositary bank agrees upon request of the secured party to make available to the secured party, to the extent the depositary bank has the operational capability to do so, each periodic account statement that the depositary bank makes available to the debtor.<sup>92</sup> The request may be a standing request for the secured party to receive or have access to each periodic account statement. The depositary bank may comply with the request, for example, by mailing a copy of the account statement to the secured party or by giving Internet or like access to the secured party to view the debtor’s account statement. In addition, if the secured party requests additional information from the depositary bank concerning the deposit account, the depositary bank may provide that information to the secured party without liability to the debtor.

### **10. Order or Process Relating to the Deposit Account**

A depositary bank is not precluded by the DACA from complying with a court order or legal process relating to the deposit account and binding upon the depositary bank. The task force spent a good deal of time discussing what duties, if any, the depositary bank should have to inform the secured party of a court order or a garnishment or other legal process requiring the blocking or disposition of the funds in the deposit account. Secured parties pressed especially for prior notice before any funds are transmitted from the deposit account in response to the order or process. But depositary banks claimed that their operational controls were not sufficiently adequate to accommodate such a requirement. In some depositary banks the department that receives service of an order or legal process may not be the same department that deals with deposit account control agreements. Also, depositary banks are not uniformly required by all state laws to inform a customer of the receipt of a court order or legal process relating to a deposit account. Depositary banks explained that, although in these cases they may voluntarily from time to time notify a customer of the court order or legal process, their internal processes are not sufficiently developed for them to enter

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<sup>92</sup>. General Terms § 8.

into a contractual undertaking to inform secured parties of the order or process. Given the strong resistance from the depository banks, the DACA contains no provision obligating the depository bank to inform the secured party of a court order or legal process that the depository bank receives relating to the deposit account.

Nor does the DACA address the effect on the duties of the depository bank resulting from the automatic stay arising from a bankruptcy case being commenced by or against the debtor.<sup>93</sup> The effect of the commencement of a bankruptcy case by or against the debtor will be determined by the bankruptcy law itself. The secured party will likely be barred from originating Disposition Instructions by the automatic stay arising from the commencement of the bankruptcy case, and the depository bank will likely be obliged by the automatic stay to refrain from complying with any Disposition Instructions, absent an order from the bankruptcy court.

## **11. Interpleader**

The DACA does not contain an express provision by which the depository bank is permitted to interplead the funds in the deposit account in the event of a dispute as to the entitlement to the funds in the deposit account. Such a dispute could arise if the debtor claims that the secured party is not entitled to give the Initial Instruction or a Disposition Instruction under the financing arrangements between the debtor and the secured party. It could also arise if the depository bank is served with an order or legal process by a third party relating to the funds in the deposit account.

The task force felt that a contractual right of the depository bank to interplead the funds could be problematic in the event of a dispute between the debtor and the secured party as to the entitlement to the funds. The concern was that, if the depository bank has a contractual right to interplead the funds in the event of a dispute between the debtor and the secured party, an argument could be made that the secured party had not achieved perfection by control. This would be because, as might be argued, so long as the depository bank has a contractual right in the DACA to interplead the funds, the depository bank should not be viewed to have agreed, as required by U.C.C. § 9-104(a)(2), to follow the secured party's instructions as to the disposition of the funds in the deposit account without further consent of the debtor.

Nor did it seem appropriate to include in the DACA a contractual right of the depository bank to interplead the funds in the deposit account in the event of a dispute between the secured party and a person other than the debtor as to the entitlement to the funds. Under the civil procedure laws of most, if not all, jurisdictions in the United States the depository bank would be entitled to commence an interpleader action in the event of such a dispute even if the DACA itself did not contain a contractual right of interpleader.

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93. See Bankruptcy Code § 362, 11 U.S.C.A. § 362 (2004 & Supp. Dec. 2005).

## 12. Closure of the Deposit Account and Termination of the Control Agreement

The DACA provides that neither the debtor nor the depositary bank may close the deposit account until the DACA itself is terminated.<sup>94</sup> It was obvious that the debtor should not be permitted to terminate the DACA without the consent of the secured party. Accordingly, the DACA provides that any notice from the debtor to the depositary bank purporting to terminate the DACA must be sent jointly by the debtor and the secured party.<sup>95</sup> It was also obvious that the secured party should be able to terminate the DACA at any time.<sup>96</sup>

The main discussion of the task force concerning termination of the DACA related to under what circumstances the depositary bank could unilaterally terminate the DACA and what the effect of the termination would be with respect to the funds in the deposit account.

It was acknowledged that the depositary bank should not be required by the DACA to continue its deposit account relationship with the debtor for the duration of the secured party's financing if the depositary bank would have otherwise terminated its relationship with the debtor. In order to provide to the secured party an opportunity to work with the debtor on alternative deposit account control arrangements, it was agreed that the depositary bank would be permitted to terminate the DACA on not less than 30 days' prior notice to the secured party and the debtor.<sup>97</sup> However, the DACA may be terminated earlier by the depositary bank under two circumstances.

The first is where the debtor is in material breach of any of the Deposit-related Agreements or the secured party or the debtor is in material breach of the DACA itself.<sup>98</sup> In that case, termination of the DACA by the depositary bank is permitted on five Business Days' notice to the secured party and the debtor.

The second is where the depositary bank becomes obligated to terminate the DACA or to close the deposit account by law or legal process.<sup>99</sup> In that case, the depositary bank will want to terminate the deposit account relationship with the debtor immediately and may do so under the DACA upon notice to the secured party and the debtor.

Upon termination of the DACA by the depositary bank, the depositary bank would be required to remit at the secured party's directions any funds then in the deposit account, regardless of whether the secured party has given an Initial Instruction, so long as the directions were received by the depositary bank before termination.<sup>100</sup> In the rare event where the depositary bank terminates the DACA, when required to do so by law or legal process, merely upon notice to the secured party and the debtor, and the depositary bank has received no contrary directions

94. General Terms § 9(a).

95. *Id.*

96. General Terms § 9(a)(i).

97. General Terms § 9(a)(ii)(C).

98. General Terms § 9(a)(ii)(B).

99. General Terms § 9(a)(ii)(A).

100. General Terms § 9(b).

as to the funds from the secured party, the depository bank is required to remit the funds to the secured party by check.<sup>101</sup>

However, the depository bank need not remit the funds for any reason (other than the need for the occurrence of the Outside Time) on which the depository bank could have declined to follow a Disposition Instruction (e.g., in the case of remittance instructions given by the secured party to the depository bank, failure of the secured party to provide evidence reasonably required by the depository bank as to the authority of the person giving the remittance instructions to act for the secured party)<sup>102</sup> or if the secured party has communicated to the depository bank that the secured party does not wish to receive or direct the disposition of the funds.<sup>103</sup>

The task force learned that depository banks generally view termination of a deposit account control agreement much like an encumbrance being removed from the deposit account. They view their post-termination obligations at that point as being governed by their deposit account relationship with the debtor without any ongoing post-termination obligations to the secured party. Accordingly, the depository bank's standard procedures will govern the handling of funds or items that are received by the depository bank *after* termination of the DACA. For example, if the deposit account remained open after the termination of the DACA, the funds or items received by the depository bank for deposit to the deposit account post-termination would most likely be so deposited and made available to the debtor. If the deposit account were closed after termination of the DACA, the funds or items would most likely be returned to the senders.

*Secured parties and debtors are encouraged to provide in their loan and security documents for the possibility that the DACA may be terminated prematurely by the depository bank and to include provisions for the disposition of the funds then or thereafter received by the secured party or the debtor.*

Even so, the depository bank's obligation to remit to the secured party the funds in the deposit account at the time of the termination of the DACA continues to survive post-termination upon the terms of the DACA as does the subordination, but for Permitted Debits, of any security interest or right of setoff or recoupment of the depository bank with respect to those funds.<sup>104</sup> Moreover, following termination of the DACA, the exculpation, reimbursement and indemnification provisions of the DACA continue to survive.<sup>105</sup>

### 13. Notices and Other Communications

The DACA requires any notice, the Initial Instruction, any Disposition Instruction and any other communication under the DACA to be in "writing."<sup>106</sup> The

101. General Terms § 9(b)(ii).

102. See the reference in General Terms § 9(b) to clauses (B) through (F) of General Terms § 4(a)(ii).

103. General Terms § 9(c).

104. General Terms § 9(d).

105. *Id.*

106. General Terms § 10(a).

term “writing” means a tangible writing including a facsimile.<sup>107</sup> It may include an electronic record but only if the parties so agree in the Specific Terms.<sup>108</sup>

The Initial Instruction must be delivered or sent to the depository bank at the address and to the person or persons or department at the depository bank set forth in the Exhibit.<sup>109</sup> Receipt of the Initial Instruction does not occur unless and until the person or persons or department at the depository bank actually receive the Initial Instruction.<sup>110</sup> If more than one person is specified in the Exhibit to receive the Initial Instruction, receipt occurs when the Initial Instruction is actually received by one of the persons.<sup>111</sup> Other communications must be delivered or sent to the recipient at its address on the signature pages of the DACA.<sup>112</sup> Any party may, of course, change its address for future communications by so communicating to the other parties.<sup>113</sup>

A notice, instruction or other communication delivered or sent to the address required under the DACA is effective when received.<sup>114</sup> Since Article 1 of the Uniform Commercial Code applies generally to the interpretation of the DACA, Article 1 may be consulted to determine when a communication is received by an organization.<sup>115</sup>

Even though a communication under the DACA must be in “writing” to be effective, the parties are not discouraged from communicating orally to give informal notices in advance of or to confirm receipt of effective communications. Telephone numbers of the parties are to be inserted on the signature pages for this purpose. A party may, of course, at any time communicate a change in its telephone number to the other parties.

#### 14. Transfer of Rights and Duties

As a general rule, the DACA is binding upon the successors and permitted assigns or other transferees of the parties.<sup>116</sup> Although the debtor is not permitted to transfer its rights and duties under the DACA, the DACA does set forth circumstances under which the secured party or the depository bank is permitted to transfer its rights and duties.

The secured party may transfer its rights and duties under the DACA to a transferee to which the secured party transfers its rights and duties under the credit arrangement secured by the security interest in the deposit account, as in the case of a sale of the secured loan.<sup>117</sup> Moreover, if the secured party is a trustee,

107. See General Terms § 1.

108. DACA Part B(6).

109. General Terms § 10(b)(i).

110. General Terms § 10(b).

111. *Id.*

112. General Terms § 10(b)(ii).

113. General Terms § 10(c).

114. See General Terms § 10(b).

115. See, e.g., U.C.C. §§ 1-202(e), (f).

116. General Terms § 11(a).

117. General Terms § 11(c)(i).

collateral agent or other representative, the secured party may transfer its rights and duties under the DACA to a successor representative.<sup>118</sup>

Likewise, the depositary bank may transfer its rights and duties under the DACA to a transferee to which the depositary bank transfers substantially all of its rights and duties under its deposit agreement with the debtor.<sup>119</sup> For example, the depositary bank may sell some of its deposit account arrangements, including the arrangement for the deposit account subject to the DACA, to a buyer, or the depositary bank may merge into another banking institution with that banking institution being the survivor.

However, a transfer of rights and duties by the secured party or the depositary bank will not be binding upon the other parties unless the transferor or the transferee has notified the other parties of the transfer in a writing signed by the transferee.<sup>120</sup> The notification must include the identity of the transferee and the transferee's address for purposes of receiving communications under the DACA and must state that the transferee is a permitted transferee and is entitled to the benefit of the transferor's rights and has assumed all of the transferor's duties under the DACA.<sup>121</sup>

The depositary bank, in the case of a transfer by the secured party, or the secured party, in the case of a transfer by the depositary bank, may, but is not obligated to, request reasonable proof of the transfer or that the transferee is a transferee permitted under the DACA. The DACA does not impose an obligation on the secured party or the depositary bank to make such a request.<sup>122</sup> The task force understood that, for example, some depositary banks routinely ask for additional information to confirm a transfer by a secured party, or that the transfer is to a permitted transferee, while other depositary banks rely merely upon the notification of the transfer received. Similarly, if there has been a series of transfers leading to the transfer of which the secured party or depositary bank is notified, there is no obligation for the secured party or the depositary bank to seek information to confirm each transfer or that each transfer is permitted by the DACA to establish a link to the ultimate transferee.

The transfer becomes binding upon the other parties once the notification is received and, if reasonable proof of the transfer or the eligibility of the transferee is requested by the depositary bank or the secured party, at such time as the reasonable proof is provided.<sup>123</sup> However, if the transfer is by merger of the depositary bank and the depositary bank is not the survivor of the merger, the transfer becomes binding on the other parties to the DACA without the necessity

118. General Terms § 11(c)(ii).

119. General Terms § 11(b).

120. General Terms § 11(d). The notification may but need not be signed by the transferor in addition to the transferee.

121. *Id.*

122. General Terms § 11(e).

123. See General Terms §§ 11(d), (e).

of the depository bank notifying the other parties of the transfer or providing reasonable proof of the transfer if requested.<sup>124</sup>

When a transfer has become binding, the transferor is relieved of its obligations under the DACA to the extent that the obligations accrue thereafter.<sup>125</sup> The transferor remains responsible for any obligations that have accrued up to the time that the transfer becomes binding upon the other parties.

### 15. Relation to Other Agreements

If a term of the DACA conflicts with a term of any of the Deposit-related Agreements or any other agreement between the depository bank and the debtor, the term of the DACA generally prevails.<sup>126</sup> However, the DACA does not impair any claim or defense that the depository bank may have against the debtor arising under any Deposit-related Agreement or other agreement.<sup>127</sup> Nor does the DACA create any third party beneficiary rights in favor of the secured party with respect to any of the Deposit-related Agreements.<sup>128</sup> Furthermore, if a provision inserted by the parties in the Specific Terms conflicts with a provision in the General Terms, the provision in the Specific Terms prevails.<sup>129</sup>

Also, the DACA does not modify the financing arrangements between the secured party and the debtor.<sup>130</sup> In particular, the DACA does not, and should not be interpreted to, as between the debtor and the secured party, provide the debtor with a right of access to the funds in the deposit account in violation of the terms of the financing arrangements.

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124. General Terms § 11(g). Depository banks were reluctant to provide in the DACA that a depository bank must give notifications of transfer to all debtors and secured parties that had entered into deposit account agreements with the depository bank when the depository bank merges into another entity and is not the survivor of the merger. Such a requirement was viewed as unnecessarily burdensome. Indeed, the general requirement in General Terms § 11(d) of notification of the transfer for the transfer to be binding on the other parties and the provision in General Terms § 11(e) that the secured party not be bound by the transfer until any requested reasonable proof of the transfer is provided to the secured party, make little practical sense in such a case. The merger results in an assumption of the depository bank's duties under the DACA. Given that the depository bank would cease to exist as a result of the merger, there would be no predecessor transferor to remain liable to perform those duties. However, the considerations are different if the secured party merges into an other entity and does not survive the merger. In that case, the merger results in an assignment of the secured party's rights under the DACA. If the secured party later exercises those rights by giving an Initial Instruction or Disposition Instruction, the depository bank needs to know that by complying with the instruction, it is being discharged from its duties under the DACA to the extent of the compliance.

125. General Terms § 11(f).

126. General Terms § 12(c). Because the DACA terms prevail over any conflicting terms in the Deposit-related Agreements, it should not be necessary for the secured party to incur the due diligence expense of reviewing the Deposit-related Agreements for the purpose of determining whether any of the Deposit-related Agreements do contain a conflicting provision.

127. *Id.*

128. *Id.*

129. General Terms § 12(b).

130. General Terms § 12(d).

## 16. Choice of Law and Choice of Forum

The DACA contains a standard governing law clause.<sup>131</sup> The specific state or other jurisdiction whose laws would govern the contractual relationships among the parties under the DACA should be inserted in the Specific Terms.<sup>132</sup>

*The parties are strongly encouraged to complete this provision of the Specific Terms.* If the parties fail to insert the identification of the jurisdiction in the Specific Terms and a dispute later arises as to a provision in the DACA relating to the contractual relationship among the parties under the DACA, the dispute will be resolved by the forum applying its own choice of law rules to determine which jurisdiction's law governs the DACA. The parties will not generally know *ex ante* what forum will hear the dispute. Even if they did know the forum, the choice of law rules that the forum might apply may not be well established. Accordingly, the failure of the parties to insert the identification of the jurisdiction in the Specific Terms will create unneeded uncertainty and grounds for litigation.

The DACA also contemplates that the DACA will amend the Deposit-related Agreements for purposes of subpart 1 of part 3 of Article 9 to provide the depositary bank's jurisdiction.<sup>133</sup> That jurisdiction is to be set forth in the Specific Terms and will be the jurisdiction whose laws will govern the perfection and priority of the security interest in the deposit account perfected by control.<sup>134</sup> If the parties fail to insert the identification of the depositary bank's jurisdiction in the Specific Terms, the depositary bank's jurisdiction will most likely be the jurisdiction whose law governs the Deposit-related Agreement controlling the deposit account.<sup>135</sup>

The DACA does not contain a consent of the parties to submit to the jurisdiction or venue of a particular forum, whether on an exclusive or non-exclusive basis. Although it is fairly customary for parties to agree to submit to a forum in the jurisdiction whose laws govern their contractual relationships, some depositary

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131. General Terms § 13(a).

132. DACA Part B(7). Given that the DACA is premised upon the secured party's security interest being created and attaching, and being capable of being enforced, under Article 9, it is not recommended that the parties insert in Part B(7) the name of a jurisdiction that has not enacted the Uniform Commercial Code.

133. General Terms § 13(b).

134. DACA Part B(8). *See* U.C.C. §§ 9-304(a), 9-304(b)(1). Section 9-304(a) provides that "the local law of a bank's jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in a deposit account maintained with a bank." Section 9-304(b)(1) permits "an agreement between the bank and the debtor governing the deposit account" expressly to set forth the bank's jurisdiction for purposes of part 3 of Article 9. By inserting the name of a state or other jurisdiction in Part B(8) of the DACA, the parties are taking advantage of the permission given by U.C.C. § 9-304(b)(1) to amend the Deposit-related Agreements, i.e., the agreements "governing the deposit account," to provide that the laws of that state or other jurisdiction determine the perfection and priority of the secured party's security interest in the deposit account. Given that the DACA is premised upon the perfection and priority of the secured party's security interest being governed by Article 9, it is not recommended that the parties insert in Part B(8) the name of a jurisdiction that has not enacted the Uniform Commercial Code.

135. *See* U.C.C. § 9-304(b)(2). In the unlikely event that the applicable Deposit-related Agreement does not contain a governing law clause, U.C.C. § 9-304(b) contains other statutory rules to determine the depositary bank's jurisdiction.

banks were reluctant to agree in advance to consent to jurisdiction or venue of a forum in that jurisdiction. The concern was that, although it may be appropriate for the laws of a particular jurisdiction chosen by the parties to govern their contractual relationship *inter se*, nevertheless a depository bank, especially a smaller community bank, might well not be willing to submit to the jurisdiction and venue of a forum in the chosen jurisdiction if the chosen jurisdiction is well outside of depository bank's geographical sphere of operations. Doing so might subject the depository bank to added costs and expenses in the event of litigation in a forum in the chosen jurisdiction. Those parties desiring to submit to the jurisdiction and venue of a particular forum, whether on an exclusive or non-exclusive basis, may do so by inserting an additional provision in the Specific Terms of the DACA to that effect.<sup>136</sup>

### **17. Jury Trial Waiver**

The DACA contains a standard jury trial waiver that applies to the extent permitted by applicable law.<sup>137</sup>

### **18. Miscellaneous Provisions**

The DACA contains a standard "merger" clause reflecting that it embodies the entire agreement of the parties.<sup>138</sup> It also contains a standard counterpart clause.<sup>139</sup>

### **19. Additional Provisions**

The DACA provides for the parties to supplement or modify the General Terms by inserting additional provisions in the Specific Terms of the DACA.<sup>140</sup>

A supplement would involve the insertion of a provision relating to a matter not addressed in the General Terms. An example of a supplemental provision might be a submission of the parties to the jurisdiction and venue of a particular forum.

A modification would involve the insertion of a provision conflicting with and overriding a provision in the General Terms. For the reasons mentioned earlier in this report,<sup>141</sup> the task force discourages modifications to the provisions of the General Terms.

However, the task force recognizes that the modification of a provision may be appropriate in a particular transaction where there are significant countervailing circumstances. For example, it may be necessary to modify the reimbursement and indemnification provisions of the General Terms where the secured party is an indenture trustee that does not customarily incur reimbursement and indem-

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136. See DACA Part B(10).

137. General Terms § 13(c).

138. See General Terms § 12(a).

139. See DACA Part D.

140. DACA Part B(10).

141. See *supra* text accompanying note 18.

nification obligations to a depository bank under deposit account control agreements and where the depository bank has received other credit enhancements or has otherwise satisfied itself with respect to its need to receive coverage for those obligations. Likewise, it may be necessary to modify the General Terms in a securitization or other structured finance transaction to reflect, among other things, the transfer of a deposit account to a special purpose vehicle and the use of a servicer or like person, where rights but not duties under the DACA are assigned.

## 20. Execution

The DACA contemplates that it will be signed with the contact information applicable to each party inserted, that the Specific Terms will be completed by the parties and that the Exhibit will be completed with the name and address of the depository bank and the person or persons or department at the depository bank to receive the Initial Instruction.

Section 1 of the Specific Terms (Part B(1) of the DACA) requires the identification of the deposit account by account number and must be completed by the parties. Moreover, the parties are strongly encouraged to complete the governing law provision in Section 7 of the Specific Terms (Part B(7) of the DACA). Each other provision in the Specific Terms must be completed by the parties unless the parties are satisfied with the default provision of the Specific Terms that applies in the event that parties fail to complete that provision.

Counterparty copies of the DACA as executed, if not physically delivered in paper form, may be delivered by facsimile.<sup>142</sup> They may also be delivered by another form of electronic transmission, such as a PDF, only if the Specific Terms permit.<sup>143</sup>

## 21. The Initial Instruction When Originated

The Exhibit contemplates that the secured party will set forth in the actual Initial Instruction that it originates where and how the funds in the deposit account will be directed to be transmitted to the secured party or its designee if the secured party wishes to include a Disposition Instruction as part of the Initial Instruction. Otherwise, the secured party may provide this information in a later Disposition Instruction to the depository bank.

The first note on the Exhibit emphasizes the importance of the parties completing with care the address line for the depository bank including the person or persons or department at the depository bank specified to receive the Initial Instruction.

## IV. FUTURE WORK OF THE TASK FORCE

Having completed its work on the DACA, the task force will turn its attention to one or more of the following variations on deposit account control arrange-

<sup>142</sup> DACA Part D.

<sup>143</sup> DACA Part B(9).

ments for which suggested inserts to the DACA (Part B(10)) or possibly other forms may be completed in due course:

- Deposit account control agreement—blocked account
- Deposit account control agreement—sweep account
- Deposit account control agreement with lock box arrangements
- Account control agreement—with a related securities account
- Deposit account control agreement—senior and junior secured parties

These projects will be ongoing for the time being. Other members of the Business Law Section are encouraged to join in the work of the task force and to become members of the task force.

## **V. CONCLUDING REMARKS**

The members of the task force have spent many hours producing the DACA. Although not everyone is in agreement with every provision, the DACA was forged in an effort to reach as broad a consensus as possible. There was wide representation, good will and good humor throughout this process. It is the hope of the task force that the DACA, together with other inserts and forms emerging from the future work of the task force, will gain wide industry acceptance.

DEPOSIT ACCOUNT CONTROL AGREEMENT

version 1 dated February 13, 2006

available from the American Bar Association's Business Law Section at  
[http://www.abanet.org/dch/committee.cfm?com=CL710060\\*](http://www.abanet.org/dch/committee.cfm?com=CL710060)

Executed and Delivered as of \_\_\_\_\_, 20\_\_

PARTIES

This Agreement is among the persons signing this Agreement as the "Secured Party," the "Debtor" and the "Bank."

BACKGROUND

The Debtor is the Bank's customer with respect to one or more demand deposit accounts identified by the account numbers specified below (individually and collectively, as re-numbered and including any funds in the account or accounts, the "Deposit Account"). The Debtor has granted the Secured Party a security interest in the Deposit Account. The Debtor is requesting that the Bank enter into this Agreement. The Bank is willing to do so upon the terms contained in this Agreement.

This Agreement includes the General Terms, the Specific Terms and the Exhibit, each as defined or referred to below.

AGREEMENTS

A. *GENERAL TERMS.* This Agreement is subject to the General Terms for Deposit Account Control Agreement version 1 dated February 13, 2006, developed by a special task force of the American Bar Association's Business Law Section and available from the Business Law Section at <http://www.abanet.org/dch/committee.cfm?com=CL710060> (the "General Terms"). The General Terms are incorporated in this Agreement by reference and without modification except as may be provided in Section 10 of the Specific Terms.

B. *SPECIFIC TERMS.* The following terms (the "Specific Terms") complete, supplement or modify the General Terms:

1. **Deposit Account** (*see "Background" above*). The following account or accounts comprise the Deposit Account [*list by account number*]:

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\* This document is a model form produced by the Joint Task Force on Deposit Account Control Agreements of the Business Law Section of the American Bar Association. The provisions of the form have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

**2. Business Day (see definition of “Business Day” in Section 1 of the General Terms):**

A day will not be considered as a “Business Day” if commercial banks in the following city or cities are closed on that day:

\_\_\_\_\_. If the preceding sentence is not completed, no additional days are excluded from the definition of “Business Day.”

**3. Outside Time (see definition of “Outside Time” in Section 1 of the General Terms):**

If the Outside Time is to be based on a period of less than two Business Days, the following is the earlier period: \_\_\_\_\_. If an earlier period is not inserted in the preceding sentence, then the Outside Time will be based on two Business Days.

**4. Disposition of less than all or multi-disposition of funds (see Section 4(a)(ii)(E) of the General Terms):**

The following is any computation or formula by which a Disposition Instruction originated by the Secured Party may provide for a disposition of less than all of the funds in the Deposit Account and whether there may be multiple recipients of the funds:

\_\_\_\_\_  
\_\_\_\_\_

If the preceding paragraph is not completed to permit a disposition of less than all of the funds in the Deposit Account, then a Disposition Instruction originated by the Secured Party must be for a disposition of all of the funds. If the preceding paragraph is not completed to permit a disposition of the funds in the Deposit Account to multiple recipients, then a Disposition Instruction originated by the Secured Party must require that the funds be sent to a single recipient.

**5. Reimbursement Claim Period (see Section 6(b) of the General Terms):**

The number of days following the termination of the Agreement in which a reimbursement claim must be made against the Secured Party under Section 6(b) of the General Terms is \_\_\_\_\_. If a number is not inserted in the preceding sentence, the number is 90.

**6. Electronic Records (see definition of “writing” in Section 1 of the General Terms):**

Checking this line \_\_\_\_ means that the parties permit a writing to include an electronic record and permit communications by email. Otherwise, the parties do not permit a writing to include an electronic record and do not permit communications by email.

**7. Governing Law (see Section 13(a) of the General Terms):**

The jurisdiction whose law governs this Agreement is \_\_\_\_\_. If a jurisdiction is not inserted in the preceding sentence, the jurisdiction will be determined by applicable law.

**8. Bank's Jurisdiction for UCC Purposes (see Section 13(b) of the General Terms):**

The Bank's jurisdiction for purposes of part 3 of UCC Article 9 is \_\_\_\_\_. If the Bank's jurisdiction for such purposes is not inserted in the preceding sentence, the Bank's jurisdiction for such purposes will be determined by applicable law.

**9. Delivery of Executed Copy (see Part D):**

Checking this line \_\_\_\_ means that the delivery of an executed copy of this Agreement may be made by electronic transmission in addition to a transmission by facsimile. Otherwise, delivery of an executed copy of this Agreement may not be made by a form of electronic transmission other than facsimile.

**10. Additional Provisions (see Section 12(b) of the General Terms):**

The following provisions modify or supplement the General Terms:

If no provisions are inserted above in this Section 10, then there are no modifications to or supplements of the General Terms.

C. **EXHIBIT.** The parties have completed and attach hereto the Exhibit to be used as the form of the Initial Instruction. [*Note to person completing this Agreement: the Exhibit requires the designation of the person or persons or department at the Bank to receive the Initial Instruction. See Note 1 to the Exhibit.*]

D. **SINGLE AGREEMENT; COUNTERPARTS.** The General Terms, the Specific Terms and the Exhibit shall be read and construed together with the other provisions of this Agreement as a single agreement. Delivery of executed copies of this Agreement may be made by facsimile or, if so permitted in Section 9 of Part B, by another form of electronic transmission. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which collectively shall constitute a single agreement.

[remainder of page intentionally left blank]

SIGNATURES

Debtor:

\_\_\_\_\_

By: \_\_\_\_\_

Name:

Title:

Address:

Attention:

Telephone Number (for information only):

Facsimile Number:

Electronic mail address (if Section 6 of Part B permits):

Secured Party:

\_\_\_\_\_

By: \_\_\_\_\_

Name:

Title:

Address:

Attention:

Telephone Number (for information only):

Facsimile Number:

Electronic mail address (if Section 6 of Part B permits):

Bank:

\_\_\_\_\_

By: \_\_\_\_\_

Name:

Title:

Address:

Attention:

Telephone Number (for information only):

Facsimile Number:

Electronic mail address (if Section 6 of Part B permits):

Exhibit  
[LETTERHEAD OF THE SECURED PARTY]  
DEPOSIT ACCOUNT CONTROL AGREEMENT  
INITIAL INSTRUCTION  
[Date]

\_\_\_\_\_  
[Name of Bank]

\_\_\_\_\_  
[Address of Bank]

Attention: \_\_\_\_\_  
[Person or Persons or Department] *[See Note 1 below]*

Ladies and Gentlemen:

This is the Initial Instruction as defined in the Deposit Account Control Agreement dated \_\_\_\_\_, 20\_\_\_\_, among you, us and [Debtor] (the “Debtor”) (as currently in effect, the “Control Agreement”). A copy of the Control Agreement as fully executed is attached. Capitalized terms used in this Initial Instruction have the meanings given them in the Control Agreement.

This Initial Instruction directs the Bank no longer to comply with the Debtor’s Disposition Instructions.

[As an included Disposition Instruction, we direct you to send the funds in the Deposit Account to us by the method and at the address indicated below. We recognize that, as a condition to your complying with this Disposition Instruction and to the extent that we have not already done so, we must provide to you evidence reasonably required by you as to the authority of the person giving this Disposition Instruction to act for us. We also recognize that your obligation to comply with this Disposition Instruction is subject to the other provisions of Section 4(a)(ii) of the General Terms. *[See Note 2 below]*

Funds transfer instructions:

Receiving bank: \_\_\_\_\_.

ABA routing number for domestic wire: \_\_\_\_\_.

ABA routing number for ACH transaction: \_\_\_\_\_.

International: Swift Code No. \_\_\_\_\_.

Reference details: \_\_\_\_\_.]

Very truly yours,

[SECURED PARTY]

By: \_\_\_\_\_

Title: \_\_\_\_\_

*Notes to the person completing this form of Initial Instruction:*

- 1. The "attention" line should be completed with particular care. Until the Initial Instruction is actually received by the person or persons or department at the Bank designated in the "attention" line, the time period by which the Bank must comply with the Initial Instruction will not commence. Accordingly, it is advisable to provide in the "attention" line a specific department or specific officer or officers at the Bank by title rather than by name. If an individual at the Bank is to be designated by title or even by name, it is advisable that one or more additional individuals at the Bank be designated as alternatives to receive the Initial Instruction if the first individual is not available.*
- 2. The bracketed language relating to a Disposition Instruction (including funds transfer instructions) is optional. Not including this language does not preclude the Secured Party from subsequently giving a Disposition Instruction.*



GENERAL TERMS FOR DEPOSIT ACCOUNT CONTROL AGREEMENT

version 1 dated February 13, 2006

available from the American Bar Association's Business Law Section at  
<http://www.abanet.org/dch/committee.cfm?com=CL710060><sup>1</sup>

1. **Definitions and Rules of Interpretation.** In this Agreement (a) terms defined in the UCC and not otherwise defined in this Agreement have the same meanings in this Agreement as in the UCC, (b) the rules of interpretation in Article 1 of the UCC apply to the interpretation of this Agreement and (c) the term "or" is not exclusive. Unless otherwise stated, section references are to sections of these General Terms. In addition, the following terms in this Agreement have the following meanings or interpretations:

This "Agreement" means the Deposit Account Control Agreement dated the Agreement Date among the Secured Party, the Debtor and the Bank. The Deposit Account Control Agreement includes these General Terms (incorporated by reference), the Specific Terms and the Exhibit read and construed together as a single agreement.

"**Agreement Date**" means the date set forth at the beginning of this Agreement as the date as of which this Agreement was executed and delivered by the parties.

An "**address**" includes the person or persons or department of the Bank on an "attention" line.

"**Bank**" means the organization signing this Agreement as the Bank.

"**Business Day**" means:

(i) for communications to the Bank, a day other than a day (A) that is not a "business day" as defined in Federal Reserve Board Regulation CC, 12 CFR Part 229, (B) on which the office, branch or department of the Bank specified as the Bank's address in the Exhibit is closed, or (C) on which commercial banks are closed in the city or cities set forth in the Specific Terms; and

(ii) for communications to any other party, a day, other than a Saturday or Sunday, on which the other party is open for business at the location to which the communication is sent.

"**Claim**" means a claim, loss, cost or expense, and includes out-of-pocket or allocable internal legal fees and expenses incurred in bringing or defending a claim.

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1. This document is a model form produced by the Joint Task Force on Deposit Account Control Agreements of the Business Law Section of the American Bar Association. The provisions of the form have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

A “**communication**” includes the Initial Instruction, a Disposition Instruction or a notice.

“**Debtor**” means the person signing this Agreement as the Debtor.

“**Deposit Account**” has the meaning set forth in the “Background” of this Agreement. The Deposit Account is identified in Section 1 of the Specific Terms.

“**Deposit-related Agreements**” means, collectively, the deposit account agreement and any other agreements between the Bank and the Debtor governing the Deposit Account and any cash management or similar services provided by the Bank to the Debtor in connection with the Deposit Account.

“**Disposition Instruction**” means an instruction to the Bank directing the disposition of the funds in the Deposit Account.

“**Exhibit**” means the Exhibit referred to in Part C of and attached to this Agreement as the form to be used as the Initial Instruction.

“**Initial Instruction**” means the first instruction to the Bank originated by the Secured Party directing that the Bank no longer comply with the Debtor’s Disposition Instructions. The Initial Instruction may also contain a Disposition Instruction originated by the Secured Party.

“**Order or Process**” means an order, judgment, decree or injunction, or a garnishment, restraining notice or other legal process, directing, or prohibiting or otherwise restricting, the disposition of the funds in the Deposit Account.

“**Outside Time**” means, unless an earlier Outside Time is stated in the Specific Terms, the opening of business on the second Business Day after the Business Day on which the Initial Instruction in substantially the form of the Exhibit is actually received at the address for the Bank specified in the Exhibit. If the Initial Instruction is actually received at that address after 12:00 noon, local time, at that address, then in determining the Outside Time, the Initial Instruction will be considered to have been actually received on the following Business Day.

“**Secured Party**” means the person signing this Agreement as the Secured Party, whether the person is acting in a representative capacity or otherwise.

“**Specific Terms**” means the terms contained in Part B of this Agreement.

“**UCC**” means the Uniform Commercial Code of the jurisdiction whose law governs this Agreement or, if relevant to any matter other than the meaning of a defined term, the Uniform Commercial Code of the jurisdiction whose law applies to the matter under the choice of law rules of the jurisdiction whose law governs this Agreement.

A “**writing**” means a tangible writing, including a facsimile and, if the Specific Terms permit, an electronic record; “*written*” refers to a communication in the form of a writing.

## 2. The Debtor’s Dealings with the Deposit Account

(a) Except as provided in Section 2(b), the Bank may comply with the Debtor’s Disposition Instructions in accordance with the Deposit-related Agreements.

(b) The Bank will not comply with the Debtor’s Disposition Instructions after the Outside Time. In its discretion the Bank may cease complying with the Debtor’s Disposition Instructions at an earlier time as permitted by Section 4(a)(iv).

**3. The Secured Party's Right to Give Instructions as to the Deposit Account.** The Bank will comply with the Initial Instruction, and with any Disposition Instructions originated by the Secured Party, in each case (i) without the Debtor's further consent, and (ii) even if following the instruction results in the dishonoring by the Bank of items presented for payment from the Deposit Account or the Bank otherwise not complying with the Debtor's Disposition Instructions. The Initial Instruction may not be rescinded or otherwise modified without the Bank's consent.

**4. Exculpation of the Bank**

(a) Notwithstanding the Bank's agreements in Sections 2 and 3, the Bank will not be liable to any other party for:

(i) either failing to follow an Initial Instruction that (A) is not in the form of the Exhibit, (B) does not specify the address to which the Initial Instruction was to have been sent, (C) is not otherwise completed, or (D) does not have attached to it a copy of this Agreement as fully executed or, as a result of any such defect in the Initial Instruction, continuing to comply with the Debtor's Disposition Instructions;

(ii) failing to follow a Disposition Instruction originated by the Secured Party (A) before the Outside Time, (B) that requires the disposition of the funds in the Deposit Account by a method not available to the Debtor under the Deposit-related Agreements, (C) that the Bank determines would result in the Bank's failing to comply with a statute, rule or regulation, or an Order or Process, binding upon the Bank, (D) that requires the disposition of funds that are not immediately available in the Deposit Account, (E) that, unless otherwise set forth in the Specific Terms, directs the disposition of less than all the funds in the Deposit Account or directs that the funds be sent to more than one recipient, or (F) for which the Bank has not received evidence reasonably required by the Bank as to the authority of the person giving the Disposition Instruction to act for the Secured Party;

(iii) complying with the Debtor's Disposition Instructions, or otherwise completing a transaction involving the Deposit Account, that the Bank or an affiliate had started to process before the Outside Time; or

(iv) after the Bank becomes aware that the Secured Party has sent the Initial Instruction, but before the Outside Time, complying with the Initial Instruction or a Disposition Instruction originated by the Secured Party, notwithstanding any fact or circumstance and even if the Initial Instruction (A) has not been actually received at the address specified in the Exhibit, (B) fails to have attached to it a copy of this Agreement as fully executed, or (C) is not completed or otherwise fails to be in the form of Initial Instruction set forth on the Exhibit.

(b) The Bank will not be liable to any other party for:

(i) wrongful dishonor of any item as a result of the Bank following the Initial Instruction or any Disposition Instruction originated by the Secured Party,

(ii) failing to comply or delaying in complying with the Initial Instruction, any Disposition Instruction or any provision of this Agreement due to a com-

puter malfunction, interruption of communication facilities, labor difficulties, act of God, war, terrorist attack, or other cause, in each case beyond the Bank's reasonable control,

(iii) any other Claim, except to the extent directly caused by the Bank's gross negligence or willful misconduct, or

(iv) any indirect, special, consequential or punitive damages.

(c) The Bank will have no fiduciary duties under this Agreement to any other party, whether as trustee, agent, bailee or otherwise. The Bank will have no duties to the Secured Party except as expressly set forth in this Agreement. The Bank will have no duty to inquire into or determine the existence or enforceability of the Debtor's obligations to the Secured Party or whether, under any separate agreement between the Debtor and the Secured Party, the Debtor's obligations to the Secured Party are in default, the Debtor may originate a Disposition Instruction or the Secured Party may originate the Initial Instruction or any Disposition Instruction.

#### **5. The Bank's Recourse to the Deposit Account**

(a) Except for amounts referred to in Section 5(b), the Bank (i) subordinates any security interest, lien or other encumbrance against the Deposit Account to the Secured Party's security interest and (ii) will not exercise any right of recoupment, setoff or debit against the Deposit Account. This subordination will not apply to any security interest that the Bank has in an item under UCC Article 4 as a collecting bank.

(b) Notwithstanding Section 5(a), and regardless of any agreement of the Debtor to compensate the Bank by means of balances in the Deposit Account, the Bank may charge the Deposit Account, to the extent permitted by any of the Deposit-related Agreements or applicable law, for:

(i) the face amount of a check, draft, money order, instrument, wire transfer of funds, automated clearing house entry, credit from a merchant card transaction, other electronic transfer of funds or other item (A) deposited in or credited to the Deposit Account, whether before or after the Agreement Date, and returned unpaid or otherwise uncollected or subject to an adjustment entry, whether for insufficient funds or for any other reason and without regard to the timeliness of the return or adjustment or the occurrence or timeliness of any other person's notice of nonpayment or adjustment, (B) subject to a claim against the Bank for breach of transfer, presentment, encoding, retention or other warranty under Federal Reserve Regulations or Operating Circulars, clearing house rules, the UCC or other applicable law, or (C) for a merchant card transaction, against which a contractual demand for chargeback has been made;

(ii) normal service charges or fees payable to the Bank in connection with the Deposit Account or any related services;

(iii) any adjustments or corrections of any posting or encoding errors; and

(iv) reimbursements for out-of-pocket or allocable internal legal fees and expenses in connection with the negotiation, administration or enforcement of this Agreement by the Bank.

#### **6. Indemnification and Reimbursement**

(a) The Debtor indemnifies the Bank against all Claims incurred, sustained or payable by the Bank arising out of this Agreement except to the extent directly caused by the Bank's gross negligence or willful misconduct.

(b) The Secured Party agrees to reimburse the Bank for any charge against the Deposit Account under Section 5(b) for which there were insufficient funds in the Deposit Account to satisfy the charge. Such reimbursement will be limited to the aggregate amount transferred from the Deposit Account as a result of the Bank's acting upon Disposition Instructions originated by the Secured Party or pursuant to Section 9(b). Any demand by the Bank for reimbursement must be made within the number of days after the termination of this Agreement set forth in the Specific Terms. The Bank may not make a Claim for reimbursement under this subsection unless (i) the Debtor fails to satisfy the Claim within 15 days after the Bank makes a demand on the Debtor under Section 6(a) or (ii) the Bank is enjoined, stayed or prohibited by operation of law from making the demand on the Debtor.

(c) The Secured Party's reimbursement obligations under Section 6(b) will not apply to (i) a charge for reimbursement of or indemnification for any out-of-pocket or allocable internal legal fees and expenses incurred by the Bank in connection with any claim or defense by the Bank against the Secured Party relating to this Agreement or (ii) the amount of any loss incurred by the Bank to the extent directly caused by the Bank's gross negligence or willful misconduct. If the Bank satisfies any Claim against the Debtor referred to in the foregoing clause (i) by charging the Deposit Account, the amount of the Secured Party's maximum liability for reimbursement obligations under Section 6(b) will be reduced by the amount of the Claim so satisfied.

(d) If the Secured Party fails to reimburse the Bank for any amount under Section 6(b), the Secured Party will pay the Bank's out-of-pocket or allocable internal legal fees and expenses in collecting from the Secured Party the amount payable.

(e) The Secured Party indemnifies the Bank against all other Claims incurred, sustained or payable by the Bank arising from the Bank following an Initial Instruction or a Disposition Instruction originated by the Secured Party, or from the Bank's remittance of funds pursuant to Section 9(b), except to the extent directly caused by the Bank's gross negligence or willful misconduct.

**7. Representations and Warranties; Agreements with Other Persons.** The Bank represents and warrants to the Secured Party that the Bank (i) is an organization engaged in the business of banking, (ii) maintains the Deposit Account as a demand deposit account or accounts in the ordinary course of the Bank's business and (iii) has not entered into any currently effective agreement with any person under which the Bank may be obligated to comply with Disposition Instructions originated by a person other than the Debtor or the Secured Party. The Bank will not enter into any agreement with any person under which the Bank may be obligated to comply with Disposition Instructions originated by a person other than the Debtor or the Secured Party.

**8. Deposit Account Information.** If the Secured Party so requests, to the extent that the Bank has the operational ability to do so, the Bank will provide to the Secured Party, whether by Internet access or otherwise, a copy of each periodic account statement relating to the Deposit Account ordinarily furnished by the Bank to the Debtor. The Bank's liability for failing to provide the account statement will not exceed the Bank's cost of providing the statement. The Debtor authorizes the Bank to provide to the Secured Party, whether by Internet access or otherwise, any other information concerning the Deposit Account that the Bank may agree to provide to the Secured Party at the Secured Party's request.

**9. Termination; Closure of the Deposit Account**

(a) Neither the Debtor nor the Bank will close the Deposit Account prior to termination of this Agreement. This Agreement may not be terminated by the Debtor except by a notice to the Bank given jointly by the other parties. This Agreement may be terminated (i) by the Secured Party at any time by notice to the other parties and (ii) by the Bank (A) immediately upon notice to the other parties if the Bank becomes obligated to terminate this Agreement or to close the Deposit Account under any statute, rule or regulation, or any Order or Process, binding upon the Bank, (B) upon five Business Days' notice to the other parties if any other party is in material breach of any of the Deposit-related Agreements or this Agreement, and (C) otherwise upon 30 days' notice to the other parties.

(b) If the Bank terminates this Agreement pursuant to clause (A) of Section 9(a)(ii), the Bank will remit any funds in the Deposit Account on the date of termination (i) at the direction of the Secured Party if the direction is received by the Bank prior to the date of termination of this Agreement or (ii) if no such direction is received by the Bank prior to such date, by check mailed to the address of the Secured Party for receiving communications under this Agreement. If the Bank terminates this Agreement pursuant to clause (B) or (C) of Section 9(a)(ii), the Bank will remit any funds in the Deposit Account on the date of termination at the direction of the Secured Party only if the direction is received by the Bank prior to the date of termination of this Agreement. Any obligation of the Bank to remit any funds to or at the direction of the Secured Party under this subsection is subject to clauses (B) through (F) of Section 4(a)(ii).

(c) Except as provided in Section 9(b) and in any event if the Secured Party has communicated to the Bank that the Secured Party does not wish to receive or direct the disposition of the funds, the Secured Party will not receive from the Bank any remittance of funds from the Deposit Account upon termination of this Agreement by the Bank.

(d) The termination of this Agreement will not affect any rights created or obligations incurred under this Agreement before the termination. Sections 4 and 6 will survive the termination of this Agreement for actions taken or omitted before the termination. Sections 9(b) and (c) will survive the termination of this Agreement, and Section 5 will survive the termination of this Agreement solely for any funds to be remitted to or at the direction of the Secured Party pursuant to Section 9(b).

#### 10. Communications

(a) All communications under this Agreement must be in writing and must be delivered by hand or overnight courier service, mailed by certified or registered mail, or sent by facsimile to the party addressee. If the Specific Terms permit a writing to include an electronic record, a communication, other than the Initial Instruction, may be sent by email.

(b) For a communication under this Agreement to be effective, it must be received (i) for the Initial Instruction, at the Bank's address specified on the Exhibit and (ii) in all other cases, at the party's address indicated below the party's signature to this Agreement, in each case subject to any change in address provided in Section 10(c). Receipt of the Initial Instruction does not occur until it is received by the person or persons or department specified on the "attention" line on the Exhibit. If more than one person is specified, receipt occurs when the Initial Instruction is received by one of the persons.

(c) The Bank may communicate to the Secured Party changes in the address for the Initial Instruction, and any party may communicate to the other parties changes in its address for communications under this Agreement.

#### 11. Successors and Transferees

(a) This Agreement will inure to the benefit of, and be binding upon, the parties and their respective successors and other transferees permitted under this Section. Except as provided in this Section, a voluntary transfer of a party's rights or duties under this Agreement without the written consent of the other parties will be void.

(b) The Bank may transfer its rights and duties under this Agreement to a transferee to which, by contract or operation of law, the Bank transfers substantially all of its rights and duties under the Deposit-related Agreements.

(c) The Secured Party may transfer its rights and duties under this Agreement to (i) a transferee to which, by contract or operation of law, the Secured Party transfers substantially all of its rights and duties under the financing or other arrangements between the Secured Party and the Debtor for which the Deposit Account acts as collateral security or (ii) if the Secured Party is acting as a trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest is created or provided for, a transferee that is a successor trustee, indenture trustee, agent, collateral agent, or other representative.

(d) No transfer under this Section will be binding upon a non-transferring party until the transferring party or the transferee notifies the non-transferring parties of the transfer in a writing signed by the transferee that identifies the transferee, gives the transferee's address for communications under this Agreement, and states that the transferee is a successor of the transferor or other transferee permitted under this Section and is entitled to the benefit of the transferring party's rights and has assumed all of the transferring party's duties under this Agreement.

(e) A non-transferring party need not request proof of any transfer or that the transferee is a successor of the transferor or other transferee permitted by this Section. If requested by a non-transferring party, however, the transferring party

or the transferee will provide reasonable proof thereof. If the Bank or the Secured Party, as a non-transferring party, requests such proof, then the effectiveness of the notification of transfer as to the non-transferring party will be suspended until the proof is provided.

(f) When a transfer becomes binding on the non-transferring parties, the transferring party will not be entitled to exercise any rights, and will be relieved of its obligations, accruing under this Agreement from and after that time. Those rights may be exercised and those obligations will be incurred by the transferee.

(g) The provisions of subsections (d) and (e) requiring notification for a transfer to be binding on the non-transferring parties and suspending the effectiveness of the notification of transfer until reasonable proof of the transfer has been provided do not apply to the Bank as the transferring party if the transfer is by operation of law and by operation of the law (i) the transferee succeeds to all or substantially all of the rights and becomes generally bound by all of the duties of the Bank, including the Bank's duties under this Agreement, and (ii) the Bank ceases to exist.

## 12. Entire Agreement; Relation to Other Agreements

(a) This Agreement constitutes the entire agreement of the parties, and supercedes all previous and contemporaneous negotiations, understandings and agreements, with respect to its subject matter, all of which have become merged and finally integrated into this Agreement.

(b) If a term in the Specific Terms conflicts with a term of this Agreement not in the Specific Terms, the term in the Specific Terms controls.

(c) If this Agreement conflicts with any of the Deposit-related Agreements, this Agreement will control. However, this Agreement will not (i) derogate from any Claim or defense that the Bank may have against the Debtor under any of the Deposit-related Agreements or (ii) create any third party beneficiary rights under any of the Deposit-related Agreements in favor of the Secured Party.

(d) This Agreement does not amend or otherwise modify any of the agreements between the Debtor and the Secured Party or provide any rights for the Debtor to originate a Disposition Instruction in contravention of any agreement between the Debtor and the Secured Party.

## 13. Governing Law, Depositary Bank's Jurisdiction and Waiver of Jury Trial

(a) Except as otherwise required by Article 9 of the UCC, this Agreement will be governed by the law of that jurisdiction set forth in the *Specific Terms* without giving effect to any choice of law rule that would require the application of the law of another jurisdiction.

(b) If the *Specific Terms* are completed expressly to designate the Bank's jurisdiction for purposes of part 3 of Article 9 of the UCC, then the Deposit-related Agreements are amended to provide that for those purposes that jurisdiction is the Bank's jurisdiction so designated.

(c) **To the extent permitted by applicable law, each party waives all rights to trial by jury in any action, claim or proceeding (including any counter-**

**claim) of any type arising out of or directly or indirectly relating to this Agreement.**

**14. Miscellaneous**

(a) No amendment to this Agreement will be binding on any party unless it is in writing and signed by all of the parties. Any provision of this Agreement benefiting a party may be waived only by a writing signed by that party.

(b) If a provision of this Agreement is held invalid or unenforceable in any respect, the validity or enforceability of the remaining provisions will not in any way be affected, it being understood that the invalidity or unenforceability of an affected provision in a particular jurisdiction will not in and of itself affect the validity or enforceability of the provision in any other jurisdiction.

DEPOSIT ACCOUNT CONTROL AGREEMENT  
(For Securitization Transactions)

version 1 dated June 19, 2008

available from the American Bar Association's Business Law Section at  
<http://www.abanet.org/dch/committee.cfm?com=CL710060><sup>1</sup>

Executed and Delivered as of \_\_\_\_\_, 20\_\_

PARTIES

This Agreement is among the persons signing this Agreement as the "*Secured Party*", the "*Debtor*", the "*Servicer*" and the "*Bank*".

BACKGROUND

The Debtor<sup>2</sup> is the Bank's customer with respect to one or more demand deposit accounts identified by the account numbers specified below [Alternative to the foregoing if

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<sup>1</sup> This document is a model form produced by the Joint Task Force on Deposit Account Control Agreements of the Business Law Section of the American Bar Association. The provisions of the form have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>2</sup> This model form of DACA assumes that the Debtor is a bankruptcy-remote, special purpose entity that has been organized to acquire receivables in connection with the securitization thereof and that the Debtor is the Bank's customer with respect to the deposit accounts into which collections of such receivables are deposited. In some securitizations, the deposit accounts are owned by the Servicer or by a trustee for the benefit of securitization investors, and in such situations this model form of DACA will need to be modified appropriately. In cases in which the trustee is also the depository bank, it may be that the DACA provisions are included in the indenture or other appropriate securitization agreement, rather than being documented in a separate DACA. However, since trustee functions and commercial depository bank account and lock box functions are likely to be managed by different units within the Bank, it is important for the Bank to involve both units in the preparation of any such agreement. Some members of the Task Force believe strongly that it is better practice not to include the DACA provisions in the indenture or other securitization agreement. To so include DACA provisions, the DACA General Terms would have to be incorporated by reference into the indenture or other agreement in order to be applicable to the commercial bank account and lock box functions. Also, the comparable provisions that are already in the indenture or other agreement for a trustee function are generally not appropriate for these commercial functions. For example, although a trustee normally has the ability to resign from its appointment, such resignation is usually not effective until a successor is appointed; in contrast, a commercial depository bank in a DACA has certain unilateral rights to terminate the DACA irrespective of whether a substitute depository bank has been appointed. In addition, having both trust and depository banking functions in the same document can create significant future complications if the depository bank decides to sell, restructure or discontinue one but not both of these functions (for example, to sell its corporate trustee business but retain its commercial deposits/lock box business).

accounts are being concurrently transferred to Debtor<sup>3</sup>: One or more affiliates of the Debtor have transferred one or more demand deposit accounts to the Debtor pursuant to separate documentation with the Bank, and the Debtor is now the Bank's customer with respect to such accounts, which are identified by the account numbers specified below] (individually and collectively, as re-numbered and including any funds in the account or accounts, the "Deposit Account"). The Debtor has granted the Secured Party a security interest in the Deposit Account, and the Servicer has been appointed to perform certain administrative duties with respect to the Deposit Account. The Debtor is requesting that the Bank enter into this Agreement. The Bank is willing to do so upon the terms contained in this Agreement.

This Agreement includes the General Terms, the Specific Terms and the Exhibit, each as defined or referred to below.

## AGREEMENTS

A. GENERAL TERMS. This Agreement is subject to the General Terms for Deposit Account Control Agreement (For Securitization Transactions) version 1 dated \_\_\_\_\_, 2007, developed by a special task force of the American Bar Association's Business Law Section and available from the Business Law Section at <http://www.abanet.org/dch/committee.cfm?com=CL710060> (the "General Terms"). The General Terms are incorporated in this Agreement by reference and without modification except as may be provided in Section 10 of the Specific Terms.

B. SPECIFIC TERMS. The following terms (the "Specific Terms") complete, supplement or modify the General Terms:

1. Deposit Account (see "Background" above). The following account or accounts comprise the Deposit Account [*list by account number*]:

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2. Business Day (see definition of "Business Day" in Section 1 of the General Terms):

A day will not be considered as a "Business Day" if commercial banks in the following city or cities are closed on that day:

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<sup>3</sup> At the inception of a securitization, it is common for bank accounts maintained by the originator of the receivables to be transferred to the Debtor. Any such transfer will typically be separately documented pursuant to the Bank's standard forms. The parties to this Agreement should allow sufficient time in the securitization timetable for such transfer documentation to be prepared and executed and for the Bank to obtain and review any documentation concerning the Debtor that is required by "Know Your Customer" rules.

\_\_\_\_\_. If the preceding sentence is not completed, no additional days are excluded from the definition of “Business Day”.

3. Outside Time (see definition of “Outside Time” in Section 1 of the General Terms):

If the Outside Time is to be based on a period of less than two Business Days, the following is the earlier period: \_\_\_\_\_. If an earlier period is not inserted in the preceding sentence, then the Outside Time will be based on two Business Days.<sup>4</sup>

4. Disposition of less than all or multi-disposition of funds (see Section 4(a)(ii)(E) of the General Terms):

The following is any computation or formula<sup>5</sup> by which a Disposition Instruction may provide for a disposition of less than all of the funds in the Deposit Account and whether there may be multiple recipients of the funds:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

If the preceding paragraph is not completed to permit a disposition of less than all of the funds in the Deposit Account, then a Disposition Instruction must be for a disposition of all of the funds. If the preceding paragraph is not completed to permit a disposition of the funds in the Deposit Account to multiple recipients, then a Disposition Instruction must require that the funds be sent to a single recipient.

<sup>4</sup> If the parties choose to negotiate a different cutoff time from that specified in the second sentence of the definition of “Outside Time”, which may be appropriate, for example, due to the time zones involved, the following sentence should be inserted here: The second sentence of the definition of “Outside Time” in Section 1 of the General Terms is amended by replacing the time “12:00 noon” with the time “\_\_\_\_\_”.

<sup>5</sup> In some securitizations, the Secured Party may request that dispositions be made by another method, for example, based on a distribution report prepared by a calculation agent. If the Bank is willing to agree to make such dispositions, the following phrase should be added after the word formula: or other methodology. See the discussion relating to this provision in the fourth paragraph of Section 4 of the Initial Report of the Task Force. It is not intended that this provision would be utilized to cause the Bank to make the large number of payments that are typically provided for in the waterfall provision of a securitization agreement.

5. Reimbursement Claim Period (see Section 6(b) of the General Terms):<sup>6</sup>

The number of days following the termination of the Agreement in which a reimbursement claim must be made against the Secured Party under Section 6(b) of the General Terms is \_\_\_\_\_. If a number is not inserted in the preceding sentence, the number is 90.

6. Electronic Records (see definition of “writing” in Section 1 of the General Terms):

Checking this line \_\_\_ means that the parties permit a writing to include an electronic record and permit communications by email. Otherwise, the parties do not permit a writing to include an electronic record and do not permit communications by email.

7. Governing Law (see Section 13(a) of the General Terms):

The jurisdiction whose law governs this Agreement is \_\_\_\_\_. If a jurisdiction is not inserted in the preceding sentence, the jurisdiction will be determined by applicable law.

8. Bank’s Jurisdiction for UCC Purposes (see Section 13(b) of the General Terms):

The Bank’s jurisdiction for purposes of part 3 of UCC Article 9 is \_\_\_\_\_. If the Bank’s jurisdiction for such purposes is not inserted in the preceding sentence, the Bank’s jurisdiction for such purposes will be determined by applicable law.

9. Delivery of Executed Copy (see Part D):

Checking this line \_\_\_ means that the delivery of an executed copy of this Agreement may be made by electronic transmission in addition to a transmission by facsimile. Otherwise, delivery of an executed copy of this Agreement may not be made by a form of electronic transmission other than facsimile.

10. Additional Provisions (see Section 12(b) of the General Terms):

The following provisions modify or supplement the General Terms:

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<sup>6</sup> If Section 6(b) of the General Terms is deleted (which may occur if the Secured Party is a trustee or agent acting for numerous investors), this Section should be replaced by: Intentionally Omitted.

## Securitization Transaction Provisions.<sup>7</sup>

(a) The first sentence of Section 8 is amended to read as follows: If the Secured Party or the Servicer so requests, the Bank will provide to the Secured Party or the Servicer (as applicable), whether by Internet access or otherwise, a copy of each periodic account statement relating to the Deposit Account ordinarily furnished by the Bank to the Debtor.<sup>8</sup>

[Add any other appropriate provisions, e.g. Lock Box Insert.<sup>9</sup>]

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<sup>7</sup> Paragraph (a) is an optional provision which may be appropriate for certain securitizations. See also Annex A for suggested wording of additional provisions which the parties may wish to utilize in certain transactions.

<sup>8</sup> The Servicer will need to review copies of the account statements in order to perform its servicing duties. However, the Bank must confirm that it has the operational ability to send account statements to multiple persons. If account statements are accessible by Internet, there will presumably be no problem granting access to the Servicer, and the parties may wish to provide for access by the Servicer upon the effectiveness of this Agreement (without the need for a separate request).

<sup>9</sup> If the Lock Box Insert is utilized, paragraph (c) of the Lock Box Insert should be modified as follows to include references to the Servicer:

(c) The Bank will not comply with any instructions from the Debtor or the Servicer regarding the checks or other items received by the Bank for the Lock Box. However, the Bank may, if so provided under the Lock Box Agreement, comply with the Debtor's or the Servicer's instructions as to dealing with routine check processing matters, such as handling of full payment checks, not sufficient funds checks and the like unless, for items and correspondence to be sent to the Debtor or the Servicer, the Outside Time has occurred, the Secured Party has instructed the Bank to send the items and correspondence to the Secured Party and the Bank has had a reasonable period of time to act thereon.

The Secured Party will generally wish to include optional paragraph (e) of the Lock Box Insert (relating to forwarding checks and correspondence during a post-termination period). If the Bank is unwilling to include paragraph (e), the bracketed final sentence of paragraph (d) of the Lock Box Insert should be included and should be modified as follows (due to certain changes in cross-references):

Section 9(b) of the General Terms applies to the checks and other items received by the Bank for the Lock Box, and not at the time already deposited to the Deposit Account, as of the date of any termination of this Agreement by the Bank pursuant to Section 9(a)(ii) of the General Terms as if the items were funds in the Deposit Account.

The Secured Party should note that neither this Agreement nor the Lock Box Insert prevents the Bank and the Debtor from amending the terms of the Lock Box Agreement (unless the amendment would actually conflict with this Agreement, in which case Section 12(c) of the General Terms provides that this Agreement controls). Accordingly, the Secured Party should review the Lock Box Agreement carefully prior to entering into the securitization arrangements, and if the Secured Party determines that certain provisions of the Lock Box Agreement are important to its credit decision (for example, the timeliness of pick up or processing of items), the Secured Party should consider obtaining a covenant from the Debtor, the Servicer and possibly the Bank (which may or may not be willing to agree to such a covenant) that such provisions may not be amended without the Secured Party's prior consent. See footnote 5 of the Lock Box Insert for further discussion of this issue. Note that if the Secured Party is a trustee, the trustee

(continued...)

If no provisions are inserted above in this Section 10, then there are no modifications to or supplements of the General Terms.

C. EXHIBIT. The parties have completed and attach hereto the Exhibit to be used as the form of the Initial Instruction. [*Note to person completing this Agreement: the Exhibit requires the designation of the person or persons or department at the Bank to receive the Initial Instruction. See Note 1 to the Exhibit.*]

D. SINGLE AGREEMENT; COUNTERPARTS. The General Terms, the Specific Terms and the Exhibit shall be read and construed together with the other provisions of this Agreement as a single agreement. Delivery of executed copies of this Agreement may be made by facsimile or, if so permitted in Section 9 of Part B, by another form of electronic transmission. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which collectively shall constitute a single agreement.

[remainder of page intentionally left blank]

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would not be willing to make a determination on its own as to whether or not consent should be given and would seek direction from the investors or other parties for whom it acts.

SIGNATURES

Debtor:

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By: \_\_\_\_\_

Name:

Title:

Address:

Attention:

Telephone Number (for information only):

Facsimile Number:

Electronic mail address (if Section 6 of Part B permits):

Servicer:

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By: \_\_\_\_\_

Name:

Title:

Address:

Attention:

Telephone Number (for information only):

Facsimile Number:

Electronic mail address (if Section 6 of Part B permits):

Secured Party:

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By: \_\_\_\_\_

Name:

Title:

Address:

Attention:

Telephone Number (for information only):

Facsimile Number:

Electronic mail address (if Section 6 of Part B permits):

Bank:

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By: \_\_\_\_\_

Name:

Title:

Address:

Attention:

Telephone Number (for information only):

Facsimile Number:

Electronic mail address (if Section 6 of Part B permits):

Exhibit

[LETTERHEAD OF THE SECURED PARTY]

DEPOSIT ACCOUNT CONTROL AGREEMENT

INITIAL INSTRUCTION

[Date]

\_\_\_\_\_  
[Name of Bank]

\_\_\_\_\_  
[Address of Bank]

Attention:

\_\_\_\_\_  
[Person or Persons or Department] *[See Note 1 below]*

Ladies and Gentlemen:

This is the Initial Instruction as defined in the Deposit Account Control Agreement dated \_\_\_\_\_, 20\_\_, among you, us, [Debtor] and [Servicer] (the “*Servicer*”) (as currently in effect, the “*Control Agreement*”). A copy of the Control Agreement as fully executed is attached. Capitalized terms used in this Initial Instruction have the meanings given them in the Control Agreement.

This Initial Instruction directs the Bank no longer to comply with the Servicer’s Disposition Instructions.

[As an included Disposition Instruction, we direct you to send to us on each Business Day the funds in the Deposit Account by the method and at the address indicated below. We recognize that, as a condition to your complying with this Disposition Instruction and to the extent that we have not already done so, we must provide to you evidence reasonably required by you as to the authority of the person giving this Disposition Instruction to act for us. We also recognize that your obligation to comply with this Disposition Instruction is subject to the other provisions of Section 4(a)(ii) of the General Terms. *[See Note 2 below]*

Funds transfer instructions:

Receiving bank: \_\_\_\_\_.

ABA routing number for domestic wire: \_\_\_\_\_.

ABA routing number for ACH transaction: \_\_\_\_\_.

International: Swift Code No. \_\_\_\_\_.

Account Number: \_\_\_\_\_.

Account Name: \_\_\_\_\_.

Reference details: \_\_\_\_\_.]

Very truly yours,

[SECURED PARTY]

By: \_\_\_\_\_

Title: \_\_\_\_\_

*Notes to the person completing this form of Initial Instruction:*

1. The "attention" line should be completed with particular care. Until the Initial Instruction is actually received by the person or persons or department at the Bank designated in the "attention" line, the time period by which the Bank must comply with the Initial Instruction will not commence. Accordingly, it is advisable to provide in the "attention" line a specific department or specific officer or officers at the Bank by title rather than by name. If an individual at the Bank is to be designated by title or even by name, it is advisable that one or more additional individuals at the Bank be designated as alternatives to receive the Initial Instruction if the first individual is not available.

2. The bracketed language relating to a Disposition Instruction (including funds transfer instructions) is optional. Not including this language does not preclude the Secured Party from subsequently giving a Disposition Instruction.

ANNEX A  
to Deposit Account Control Agreement

The Task Force does not believe that a standard market practice exists for the issues covered in this Annex A, and Banks may or may not be willing to agree to these provisions.

Additional optional provisions for Section 10 of the Specific Terms:

Clause (F) of Section 4(a)(ii) is deleted, and Section 9(b) is amended by changing the reference to clause (F) in the last sentence to clause (E). The Bank will not be liable to any other party by acting on any Disposition Instruction believed by it in good faith to be genuine and signed or sent by the Servicer (prior to the Outside Time) or the Secured Party (thereafter).<sup>10</sup>

The Bank will not charge the Deposit Account for service charges or fees described in clause (ii) of Section 5(b) unless the Bank shall have first sent an invoice for such amounts to both the Debtor and Servicer and such invoice shall not have been paid within 30 days after it was sent. No such demand is required on the Debtor if the Bank is enjoined, stayed or prohibited by operation of law from making such a demand on the Debtor, and no such demand is required on the Servicer if the Bank is enjoined, stayed or prohibited by operation of law from making such a demand on the Servicer.<sup>11</sup>

Sections 6(b) through 6(e) are deleted.<sup>12</sup>

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<sup>10</sup> Alternatively, some Banks may be willing to dispense with the requirement for further evidence of authority if the Disposition Instruction provides for payment of funds to an account in the name of the Secured Party. If this clause is included in Section 10 of the Specific Terms, then the following conforming changes should be made to the third paragraph of the Exhibit: (1) delete the second sentence and (2) delete the words “also” and “other” in the third sentence.

<sup>11</sup> The Secured Party and the Debtor may request inclusion of this clause so that recurring service charges are paid from sources other than receivables collections, thereby maximizing the amount of securities which can be issued based upon the cash flow arising from the securitized receivables. The Task Force has been advised that some banks’ systems are set up so as to charge the deposit account automatically for periodic service charges, and these banks do not have the operational ability to send invoices and collect the service charges by another method.

<sup>12</sup> [Note to user – this footnote describes another issue (unrelated to the possible deletion of Sections 6(b) through 6(e)) which the parties may wish to address in Section 10 of the Specific Terms.] Possible ways to handle the short time period in clause (ii)(B) of Section 9(a) (relating to termination of this Agreement by the Bank) include: (1) if payments are made to a lock box associated with the Deposit Account, include optional paragraph (e) in the Lock Box Insert, providing for the Bank to forward mail received at the lock box to the Secured Party during a post termination period, and (2) if funds transfers or other direct payments are made to the Deposit Account, (a) provide for the transfer of the Deposit Account from the Debtor to the Secured Party prior to the end of such five day notice period or (b) determine if the Bank can, subsequent to an early termination, either (i) redirect funds transfers to the Secured Party or (ii) keep the Deposit Account open for the limited purpose of receiving funds transfers and forwarding funds to the Secured Party. If funds transfers or other direct payments are made to the Deposit Account and neither of the alternatives described in the preceding clause (b) is operationally possible or contractually agreeable, then the parties could consider extending the five Business Day notice period, providing more specificity as to what events constitute a “material breach” or adding a cure period. Following is sample language for a cure provision which could be added at the end of clause (ii)(B): “and (provided that the party in material breach is not the Secured Party) such breach is not cured by the end of such five Business Day period.” If the Bank is concerned that additional breaches are likely

(continued...)

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to occur, the Bank could provide the 30 day notice of termination pursuant to Section 9(a)(ii)(C) concurrently with the notice pursuant to clause (ii)(B). In this manner, the Bank would be able to terminate a potentially problematic relationship, while assuring that all payment obligations remain current, and the Secured Party has a reasonable period of time to institute other deposit account arrangements.



# Perfecting Security Interests in Deposit Accounts

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# Perfecting Security Interests in Deposit Accounts

- What is a “Deposit Account”?
- UCC §9-102(a)(29) – “Deposit Account” means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.



# Perfecting Security Interests in Deposit Accounts

- What is “Control”?
- UCC §9-104(a) – A secured party has control of a deposit account if:
  - (1) the secured party is the bank with which the deposit account is maintained;
  - (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instruction originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or
  - (3) the secured party becomes the bank’s customer with respect to the deposit account.



# Perfecting Security Interests in Deposit Accounts

- Necessity of Control

- §9-312(b)(1) – Except as otherwise provided in Section 9-315(c) and (d) for proceeds, a security interest in a deposit account may be perfected only by control under Section 9-314.
- §9-314(a) – A security interest in...deposit accounts...may be perfected by control of the collateral under Section 9-104...
- §9-314(b) – A security interest in deposit accounts...is perfected by control under Section 9-104...when the secured party obtains control and remains perfected by control only while the secured party retains control.



# Perfecting Security Interests in Deposit Accounts

- Exceptions

- Proceeds - §9-315 (c) and (d)

- A perfected security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.
    - A perfected security interest in proceeds becomes unperfected on the 21<sup>st</sup> day after the security interest attaches to the proceeds unless certain conditions are satisfied.

- Depository Bank's Rights - §9-327(3)

- Unless the secured party is the depository bank's customer, a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.



# Perfecting Security Interests in Deposit Accounts

- Secured Creditor's Concerns
  - Understanding the Debtor's cash management system
    - If more than one Debtor, in whose name are the accounts held
    - Must use proper documentation starting point – current dominion, springing dominion, confirmation of deposit account, lockbox
  - Control in accordance with 9-104(a) is achieved
  - Scope of depository bank's offset rights



# Perfecting Security Interests in Deposit Accounts

- Secured Creditor's Concerns (cont'd)
  - Scope of Indemnity
  - Multiple Secured Parties
  - Information Rights



# Perfecting Security Interests in Deposit Accounts

- Depository Bank's Concerns
  - Minimize (or appropriately balance) risk
  - Appropriate procedures to effectuate control
  - Consistency across agreements
  - Administrative Requirements



# Perfecting Security Interests in Deposit Accounts

- Debtor's Concerns
  - Scope of Indemnity
  - Largely a bystander
  - Opinion Issues (for Debtors counsel)



# Perfecting Security Interests in Deposit Accounts

- Jessica L. DeBruin

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## SUMMARY AND ANALYSIS OF THE ABA TASK FORCE MODEL DEPOSIT ACCOUNT CONTROL AGREEMENT

A task force of the American Bar Association has recently completed work on a form deposit account control agreement, with the goal of standardizing practice and facilitating ease of negotiation. Usage of the new model agreement, which may be downloaded free of charge from the American Bar Association's Business Law Section website<sup>1</sup>, is not required, however the support of the task force suggests that it may emerge as the basis of future negotiation of deposit account control agreements. This Client Alert summarizes the key features and design of the new model form (referred to in this Alert as "DACA"), so that our lending clients may make informed decisions regarding acceptance of this new model approach.

The model form is comprised of two basic parts. The first part is the form Deposit Account Control Agreement, a tri-party agreement among the secured creditor, depository bank and debtor. The form agreement is approximately five pages in length, and contains about ten blanks requiring completion by the negotiating parties. These items for completion are referred to in DACA as the "Specific Terms".

The second part of DACA is the "General Terms for Deposit Account Control Agreement", a document of 11 pages setting forth definitions, rules of interpretation and other substantive provisions. This document, which is physically distinct from the Specific Terms, does not contain any blanks for completion, and is not separately signed by the contracting parties. The report issued by the DACA task force in connection with the publication of DACA (the "Report") repeatedly and strenuously discourages contracting parties from making any modification to the General Terms. In our experience, and as noted below, some of the most important and frequently negotiated terms in control agreements in the marketplace today are contained in the General Terms.

Because the General Terms are physically separate from the Specific Terms, and because the General Terms are designed not to be negotiated, it may be the case that some or even many secured lenders presented with DACA as a form for negotiation never actually receive the General Terms. However, the form Deposit Account Control Agreement expressly incorporates the General Terms, so the contracting parties approve the General Terms by signing the Specific Terms. We urge our clients – particularly those individuals among our clients who will determine the usage of DACA as a matter of their institutional practice – to review the General Terms.

Under DACA, a secured creditor seeking to exercise control rights must first deliver to the bank an "Initial Instruction", a form of which is set forth as an exhibit to the model control agreement. A fully signed copy of the DACA must be attached to the Initial Instruction. We therefore recommend that our

client's keep ready access to the signed DACA, and verify the existence of a fully signed copy as part of any loan workout.

The function of the Initial Instruction is to direct the bank to cease complying with the debtor's instructions regarding deposit account operations. Both the Task Force report and DACA clearly indicate that the bank has no obligation to comply with an issued Initial Instruction until the document has been actually received by the person, persons or department of the bank designated in the "attention line" of the bank's address set forth in the form Initial Instruction. Accordingly, we strongly recommend that our lending clients complete this notice information with great care. In most cases, we recommend choosing a bank's department as addressee over any specific individual or individuals, as any given individual may be absent from the bank at the time actual delivery is attempted (and DACA provides for no remedy to the secured lender should this be the case). We also recommend that our clients periodically investigate the continued validity of the address information they have specified in any form Initial Instructions, particularly as part of any standard loan workout. The depository banks have no obligation under DACA to notify their contracting parties should changes in bank personnel or departmental structure render the address information stale.

Concurrent with and at any time following successful delivery of an Initial Instruction, the secured creditor may issue transfer instructions to the depository bank regarding funds on deposit. However, the bank is not necessarily required under DACA to immediately honor such instructions. First, DACA forestalls the bank's obligations for two business days following receipt of the Initial Instruction, even if disposition instructions are given concurrently with the Initial Instruction. The Specific Terms provide for a negotiated reduction of this gap period but, absent express agreement between secured lender and depository bank, the default period is two business days. Second, DACA further forestalls the bank's obligations until the bank has received "evidence reasonably required" by the bank "as to the authority of the person" giving the transfer instructions on behalf of the secured creditor. DACA suggests that this "evidence of authority" may take the form of signature cards, directors' resolutions or other comparable proof of authority.

Our lending clients are not generally required to present such corporate authority documents as a condition to the exercise of their foreclosure rights. Accordingly, to the extent any of our clients accept the use of DACA as the basis of negotiating control agreements, we recommend that they consider delivering corporate authority materials to the applicable depository banks as a standard part of any workout of the credit or earlier Incorporating the delivery of such *(Continued . . .)*

<sup>1</sup>See <http://www.abanet.org/dch/committee.cfm?com=CL710060>

materials at the beginning stages of a workout or earlier may help avoid delays associated with such deliveries at a more critical stage of the workout. Moreover, delivery of such materials as a routine part of workout strategy, as compared to delivery at a "meltdown" stage of a workout, may prevent the bank and the borrower (should it learn of such delivery) from viewing such deliveries as an early indicator of imminent foreclosure plans.

DACA also sets forth rules, contained in the General Terms, regarding reimbursement and indemnification obligations, topics that have traditionally received significant negotiation. As a general matter, DACA preserves in favor of the depositary bank priority setoff rights against the deposit account, to the extent exercised to recover uncollected, but provisionally credited, funds, merchant card chargebacks, normal service or other fees in connection with the deposit account or any "related services", account adjustments or corrections and reimbursements for out-of-pocket fees and expenses, including the allocable fees and expenses of counsel (including internal counsel) to the depositary bank in connection with the negotiation, administration or enforcement of the agreement by the bank. Other bank setoff rights are subordinated and suspended while the DACA is in place. In addition, the secured creditor agrees to indemnify the depositary bank for all such items, with this specific indemnity limited to the amounts transferred from the deposit account as a result of the bank's transfer instructions. DACA also provides that the contracting parties may limit the survival period for this particular indemnification, with the default rule (absent specific agreement among the parties) being 90 days following termination of the DACA.

Additionally, the General Terms provide for the secured creditor to indemnify the depositary bank for claims "incurred, sustained or payable" by the bank arising from the bank following instructions initiated by the secured creditor, "except to the extent directly caused by the Bank's gross negligence or willful misconduct". While some of our lending clients have often successfully narrowed, and at times even eliminated, this general indemnity as part of negotiations, DACA presents this indemnity as a "non-negotiable" element of the General Terms.

The General Terms also strongly narrow the standard of liability for depositary banks under the agreement. Depositary banks are not liable to secured creditors for claims arising under the agreement "except to the extent directly caused by the Bank's gross negligence or willful misconduct". Secured creditors in many transactions have succeeded in expanding this standard of bank liability to include any bank breach of the deposit account control agreement, without regard to whether the breach constituted "gross negligence or willful misconduct". The Task Force's report acknowledged, but rejected, this market provision. This standard of liability is

another "non-negotiable" element of the General Terms.

Finally, DACA raises the question, which is not definitively answered in existing case law, whether certain elements of DACA – such as actual delivery of the Initial Instruction and the tendering of satisfactory evidence of authority – result in a failure to obtain legal control at the time of contract formation for purposes of perfection of a lien on the deposit account under the Uniform Commercial Code. DACA compounds this legal risk to lenders by eliminating all representations and warranties that might otherwise be made by depositary banks concerning the establishment of legal control, thereby shifting this risk entirely to the lenders. To help mitigate this risk, we strongly recommend that our clients utilizing DACA request an unqualified legal opinion of borrower's counsel concerning the establishment of legal control as of the closing date. It may be the case that some counsel will decline to give an unqualified legal opinion on this topic, and instead may be willing to offer only a qualified or "reasoned" opinion. Whether this alternative approach should be acceptable to our clients will turn on the specific content of the opinions and any changes in opinion practice generally in response to DACA.

Secured lenders have three general options to consider with respect to DACA. First, they may fully endorse the model approach. This option has the benefit of reducing transaction costs, at the cost of subjecting lenders to the troublesome provisions of DACA described above. Second, lenders may endorse DACA, subject to making changes to one or more of the "non-negotiable" General Terms. This approach may place lenders in a difficult market position, as they could be portrayed as "cherry pickers". Also, it may be particularly difficult to seek selective negotiation of a document that carries the stamp of approval of a working arm of the American Bar Association. Finally, our clients may reject DACA in its entirety. This approach also risks negative market portrayal. We do suspect that some number of banks will show flexibility on the form of control agreement as a means of garnering cash management business. If lenders reject DACA in its entirety, they may need to be prepared to require their borrowers to change their cash management banks, often a difficult position to strike.

As of the date of this Client Alert, we have seen limited requests for usage of the model form, with most banks still using their pre-DACA, internally developed forms. We expect that over the next several months the dynamics will change, with many banks, particularly large money-center banks, gradually adopting DACA as their standard approach. Please feel free to contact any members of the Goldberg Kohn Commercial Finance Group if you would like to discuss this topic in any further detail.

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