



*O - NOTE*

*BN Wed 1/25 pm*

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

*Ed:  
This bill is based on a uniform act. Therefore, I have made virtually no changes to the language of the uniform act.  
-MDK*

*Gen*

1 **AN ACT** ...; **relating to:** letters of credit under the Uniform Commercial Code.

*Analysis by the Legislative Reference Bureau*

This is a preliminary draft. An analysis will be prepared for a subsequent version of this draft.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

2 **SECTION 1.** 401.105 (2) (bm) of the statutes is created to read:

3 401.105 (2) (bm) Section 405.116 on letters of credit.

4 **SECTION 2.** 402.512 (1) (b) of the statutes is amended to read:

5 402.512 (1) (b) Despite tender of the required documents the circumstances  
6 would justify injunction against honor under s. ~~405.114~~ 405.109 (2).

7 History: 1991 a. 316.

**SECTION 3.** Chapter 405 of the statutes is repealed and recreated to read:

**CHAPTER 405**

**UNIFORM COMMERCIAL CODE**

LB. - 2 -  
change to  
em dash

1

LETTERS OF CREDIT

em dash

2 405.101 Short title. This chapter may be cited as uniform commercial code

3

letters of credit.

4 405.102 Definitions. (1) In this chapter:

5 (a) "Adviser" means a person who, at the request of the issuer, a confirmer, or  
6 another adviser, notifies or requests another adviser to notify the beneficiary that a  
7 letter of credit has been issued, confirmed, or amended.

8 (b) "Applicant" means a person at whose request or for whose account a letter  
9 of credit is issued. The term includes a person who requests an issuer to issue a letter  
10 of credit on behalf of another if the person making the request undertakes an  
11 obligation to reimburse the issuer.

12 (c) "Beneficiary" means a person who under the terms of a letter of credit is  
13 entitled to have its complying presentation honored. The term includes a person to  
14 whom drawing rights have been transferred under a transferable letter of credit.

15 (d) "Confirmer" means a nominated person who undertakes, at the request or  
16 with the consent of the issuer, to honor a presentation under a letter of credit issued  
17 by another.

18 (e) "Dishonor" of a letter of credit means failure timely to honor or to take an  
19 interim action, such as acceptance of a draft, that may be required by the letter of  
20 credit.

21 (f) "Document" means a draft or other demand, document of title, investment  
22 security, certificate, invoice, or other record, statement, or representation of fact, law,  
23 right, or opinion which is presented in a written or other medium permitted by the  
24 letter of credit or, unless prohibited by the letter of credit, by the standard practice

1 referred to in s. 405.108 (5); and which is capable of being examined for compliance  
2 with the terms and conditions of the letter of credit. A document may not be oral.

3 (g) “Good faith” means honesty in fact in the conduct or transaction concerned.

4 (h) “Honor” of a letter of credit means performance of the issuer’s undertaking  
5 in the letter of credit to pay or deliver an item of value. Unless the letter of credit  
6 otherwise provides, “honor” occurs upon payment; except that if the letter of credit  
7 provides for acceptance, “honor” occurs upon acceptance of a draft and, at maturity,  
8 upon its payment; and except that if the letter of credit provides for incurring a  
9 deferred obligation, “honor” occurs upon incurring the obligation and, at maturity,  
10 upon its performance.

11 (i) “Issuer” means a bank or other person that issues a letter of credit, but does  
12 not include an individual who makes an engagement for personal, family, or  
13 household purposes.

14 (j) “Letter of credit” means a definite undertaking that satisfies the  
15 requirements of s. 405.104 by an issuer to a beneficiary at the request or for the  
16 account of an applicant or, in the case of a financial institution, to itself or for its own  
17 account, to honor a documentary presentation by payment or delivery of an item of  
18 value.

19 (k) “Nominated person” means a person whom the issuer designates or  
20 authorizes to pay, accept, negotiate, or otherwise give value under a letter of credit  
21 and whom undertakes by agreement or custom and practice to reimburse.

22 (L) “Presentation” means delivery of a document to an issuer or nominated  
23 person for honor or giving of value under a letter of credit.

24 (m) “Presenter” means a person making a presentation as or on behalf of a  
25 beneficiary or nominated person.

1 (n) "Record" means information that is inscribed on a tangible medium, or that  
2 is stored in an electronic or other medium and is retrievable in perceivable form.

3 (o) "Successor of a beneficiary" means a person who succeeds to substantially  
4 all of the rights of a beneficiary by operation of law, including a corporation with or  
5 into which the beneficiary has been merged or consolidated, an administrator,  
6 executor, personal representative, trustee in bankruptcy, debtor in possession,  
7 liquidator, and receiver.

8 (2) Definitions in other chapters applying to this chapter and the sections in  
9 which they appear are:

10 (a) "Accept" or "acceptance" <sup>emdash</sup> s. 403.409.

11 (b) "Value" ss. 403.303 and 404.211.

12 (3) Chapter 401 contains general definitions and principles of construction and  
13 interpretation applicable throughout this chapter.

14 **405.103 Scope.** (1) This chapter applies to letters of credit and to certain  
15 rights and obligations arising out of transactions involving letters of credit.

16 (2) The statement of a rule in this chapter does not by itself require, imply, or  
17 negate application of the same or a different rule to a situation not provided for, or  
18 to a person not specified, in this chapter.

19 (3) With the exception of this subsection, subs. (1) and (4), s. 405.102 (1) (i) and  
20 (j), 405.106 (4), and 405.114 (4), and except to the extent prohibited in ss. 401.102 (3)  
21 and 405.117 (4), the effect of this chapter may be varied by agreement or by a  
22 provision stated or incorporated by reference in an undertaking. A term in an  
23 agreement or undertaking generally excusing liability or generally limiting  
24 remedies for failure to perform obligations is not sufficient to vary obligations  
25 prescribed by this chapter.

1           (4) Rights and obligations of an issuer to a beneficiary or a nominated person  
2 under a letter of credit are independent of the existence, performance, or  
3 nonperformance of a contract or arrangement out of which the letter of credit arises  
4 or which underlies it, including contracts or arrangements between the issuer and  
5 the applicant and between the applicant and the beneficiary.

6           **405.104 Formal requirements.** A letter of credit, confirmation, advice,  
7 transfer, amendment, or cancellation may be issued in any form that is a record and  
8 is authenticated by a signature or in accordance with the agreement of the parties  
9 or the standard practice referred to in s. 405.108 (5).

10          **405.105 Consideration.** Consideration is not required to issue, amend,  
11 transfer, or cancel a letter of credit, advice, or confirmation.

12          **405.106 Issuance, amendment, cancellation, and duration.** (1) A letter  
13 of credit is issued and becomes enforceable according to its terms against the issuer  
14 when the issuer sends or otherwise transmits it to the person requested to advise or  
15 to the beneficiary. A letter of credit is revocable only if it so provides.

16          (2) After a letter of credit is issued, rights and obligations of a beneficiary,  
17 applicant, confirmer, and issuer are not affected by an amendment or cancellation  
18 to which that person has not consented except to the extent the letter of credit  
19 provides that it is revocable or that the issuer may amend or cancel the letter of credit  
20 without that consent.

21          (3) If there is no stated expiration date or other provision that determines its  
22 duration, a letter of credit expires one year after its stated date of issuance or, if none  
23 is stated, after the date on which it is issued.

24          (4) A letter of credit that states that it is perpetual expires <sup>5</sup>five years after its  
25 stated date of issuance, or if none is stated, after the date on which it is issued.

1           **405.107 Confirmer, nominated person, and advisor.** (1) A confirmer is  
2 directly obligated on a letter of credit and has the rights and obligations of an issuer  
3 to the extent of its confirmation. The confirmer also has rights against and  
4 obligations to the issuer as if the issuer were an applicant and the confirmer had  
5 issued the letter of credit at the request and for the account of the issuer.

6           (2) A nominated person who is not a confirmer is not obligated to honor or  
7 otherwise give value for a presentation.

8           (3) A person requested to advise may decline to act as an adviser. An adviser  
9 that is not a confirmer is not obligated to honor or give value for a presentation. An  
10 adviser undertakes to the issuer and to the beneficiary accurately to advise the terms  
11 of the letter of credit, confirmation, amendment, or advice received by that person  
12 and undertakes to the beneficiary to check the apparent authenticity of the request  
13 to advise. Even if the advice is inaccurate, the letter of credit, confirmation, or  
14 amendment is enforceable as issued.

15           (4) A person who notifies a transferee beneficiary of the terms of a letter of  
16 credit, confirmation, amendment, or advice has the rights and obligations of an  
17 adviser under sub. (3). The terms in the notice to the transferee beneficiary may  
18 differ from the terms in any notice to the transferor beneficiary to the extent  
19 permitted by the letter of credit, confirmation, amendment, or advice received by the  
20 person who so notifies.

21           **405.108 Issuer's rights and obligations.** (1) Except as otherwise provided  
22 in s. 405.109, an issuer shall honor a presentation that, as determined by the  
23 standard practice referred to in sub. (5), appears on its face strictly to comply with  
24 the terms and conditions of the letter of credit. Except as otherwise provided in s.

1 405.113 and unless otherwise agreed with the applicant, an issuer shall dishonor a  
2 presentation that does not appear so to comply.

3 (2) An issuer has a reasonable time after presentation, but not beyond the end  
4 of the 7th business day of the issuer after the day of its receipt of documents to do one  
5 of the following:

6 (a) Honor.

7 (b) If the letter of credit provides for honor to be completed more than seven  
8 business days after presentation, accept a draft or incur a deferred obligation.

9 (c) Give notice to the presenter of discrepancies in the presentation.

10 (3) Except as otherwise provided in sub. (4), an issuer is precluded from  
11 asserting as a basis for dishonor any discrepancy if timely notice is not given, or any  
12 discrepancy not stated in the notice if timely notice is given.

13 (4) Failure to give the notice specified in sub. (2) or to mention fraud, forgery,  
14 or expiration in the notice does not preclude the issuer from asserting as a basis for  
15 dishonor fraud or forgery as described in s. 405.109 (1) or expiration of the letter of  
16 credit before presentation.

17 (5) An issuer shall observe standard practice of financial institutions that  
18 regularly issue letters of credit. Determination of the issuer's observance of the  
19 standard practice is a matter of interpretation for the court. The court shall offer the  
20 parties a reasonable opportunity to present evidence of the standard practice.

21 (6) An issuer is not responsible for any of the following:

22 (a) The performance or nonperformance of the underlying contract,  
23 arrangement, or transaction.

24 (b) An act or omission of others.

1 (c) Observance or knowledge of the usage of a particular trade other than the  
2 standard practice referred to in sub. (5).

3 (7) If an undertaking constituting a letter of credit under s. 405.102 (1) (j)  
4 contains nondocumentary conditions, an issuer shall disregard the nondocumentary  
5 conditions and treat them as if they were not stated.

6 (8) An issuer that has dishonored a presentation shall return the documents  
7 or hold them at the disposal of, and send advice to that effect to, the presenter.

8 (9) If an issuer has honored a presentation as permitted or required by this  
9 chapter, all of the following apply:

10 (a) The issuer is entitled to be reimbursed by the applicant in immediately  
11 available funds not later than the date of its payment of funds.

12 (b) The issuer takes the documents free of claims of the beneficiary or presenter.

13 (c) The issuer is precluded from asserting a right of recourse on a draft under  
14 ss. 403.414 and 403.415.

15 (d) Except as otherwise provided in ss. 405.110 and 405.117, the issuer is  
16 precluded from restitution of money paid or other value given by mistake to the  
17 extent the mistake concerns discrepancies in the documents or tender which are  
18 apparent on the face of the presentation.

19 (e) The issuer is discharged to the extent of its performance under the letter of  
20 credit unless the issuer honored a presentation in which a required signature of a  
21 beneficiary was forged.

22 **405.109 Fraud and forgery.** (1) If a presentation is made that appears on  
23 its face strictly to comply with the terms and conditions of the letter of credit, but a  
24 required document is forged or materially fraudulent, or honor of the presentation



1 would facilitate a material fraud by the beneficiary on the issuer or applicant, all of  
2 the following apply:

3 (a) The issuer shall honor the presentation, if honor is demanded by any of the  
4 following:

5 1. A nominated person who has given value in good faith and without notice  
6 of forgery or material fraud.

7 2. A confirmer who has honored its confirmation in good faith.

8 3. A holder in due course of a draft drawn under the letter of credit which was  
9 taken after acceptance by the issuer or nominated person.

10 4. An assignee of the issuer's or nominated person's deferred obligation that  
11 was taken for value and without notice of forgery or material fraud after the  
12 obligation was incurred by the issuer or nominated person.

13 (b) The issuer, acting in good faith, may honor or dishonor the presentation in  
14 any other case not specified in par. (a).

15 (2) If an applicant claims that a required document is forged or materially  
16 fraudulent or that honor of the presentation would facilitate a material fraud by the  
17 beneficiary on the issuer or applicant, a circuit court may temporarily or  
18 permanently enjoin the issuer from honoring a presentation or grant similar relief  
19 against the issuer or other persons only if the court finds that all of the following are  
20 satisfied:

\*\*\*NOTE: The uniform act refers to "court of competent jurisdiction," which is  
inconsistent with our drafting style.

21 (a) The relief is not prohibited under the law applicable to an accepted draft or  
22 deferred obligation incurred by the issuer.

1 (b) A beneficiary, issuer, or nominated person who may be adversely affected  
2 is adequately protected against loss that it may suffer because the relief is granted.

3 (c) All of the conditions to entitle a person to the relief under the law of this state  
4 have been met.

5 (d) On the basis of the information submitted to the court, the applicant is more  
6 likely than not to succeed under its claim of forgery or material fraud and the person  
7 demanding honor does not qualify for protection under sub. (1) (a).

8 **405.110 Warranties.** (1) If its presentation is honored, the beneficiary  
9 warrants all of the following:

10 (a) To the issuer, any other person to whom presentation is made, and the  
11 applicant: that there is no fraud or forgery of the kind described in s. 405.109 (1).

12 (b) To the applicant: that the drawing does not violate any agreement between  
13 the applicant and beneficiary or any other agreement intended by them to be  
14 augmented by the letter of credit.

15 (2) The warranties in sub. (1) are in addition to warranties arising under chs.  
16 403, 404, 407, and 408 because of the presentation or transfer of documents covered  
17 by any of those chapters.

18 **405.111 Remedies.** (1) If an issuer wrongfully dishonors or repudiates its  
19 obligation to pay money under a letter of credit before presentation, the beneficiary,  
20 successor, or nominated person presenting on its own behalf may recover from the  
21 issuer the amount that is the subject of the dishonor or repudiation. If the issuer's  
22 obligation under the letter of credit is not for the payment of money, the claimant may  
23 obtain specific performance or, at the claimant's election, recover an amount equal  
24 to the value of performance from the issuer. In either case, the claimant may also  
25 recover incidental but not consequential damages. The claimant is not obligated to

1 take action to avoid damages that might be due from the issuer under this  
2 subsection. If, although not obligated to do so, the claimant avoids damages, the  
3 claimant's recovery from the issuer must be reduced by the amount of damages  
4 avoided. The issuer has the burden of proving the amount of damages avoided. In  
5 the case of repudiation the claimant need not present any document.

6 (2) If an issuer wrongfully dishonors a draft or demand presented under a letter  
7 of credit or honors a draft or demand in breach of its obligation to the applicant, the  
8 applicant may recover damages resulting from the breach, including incidental but  
9 not consequential damages, less any amount saved as a result of the breach.

10 (3) If an adviser or nominated person other than a confirmer breaches an  
11 obligation under this chapter or an issuer breaches an obligation not covered in sub.  
12 (1) or (2), a person to whom the obligation is owed may recover damages resulting  
13 from the breach, including incidental but not consequential damages, less any  
14 amount saved as a result of the breach. To the extent of the confirmation, a confirmer  
15 has the liability of an issuer specified in this subsection and subs. (1) and (2).

16 (4) An issuer, nominated person, or adviser who is found liable under sub. (1),  
17 (2), or (3) shall pay interest on the amount owed thereunder from the date of wrongful  
18 dishonor or other appropriate date.

19 (5) Reasonable attorney's fees and other expenses of litigation must be  
20 awarded to the prevailing party in an action in which a remedy is sought under this  
21 chapter.

22 (6) Damages that would otherwise be payable by a party for breach of an  
23 obligation under this chapter may be liquidated by agreement or undertaking, but  
24 only in an amount or by a formula that is reasonable in light of the harm anticipated.

1           **405.112 Transfer of letter of credit.** (1) Except as otherwise provided in s.  
2           405.113, unless a letter of credit provides that it is transferable, the right of a  
3           beneficiary to draw or otherwise demand performance under a letter of credit may  
4           not be transferred.

5           (2) Even if a letter of credit provides that it is transferable, the issuer may  
6           refuse to recognize or carry out a transfer if any of the following apply:

7           (a) The transfer would violate applicable law.

8           (b) The transferor or transferee has failed to comply with any requirement  
9           stated in the letter of credit or any other requirement relating to transfer imposed  
10          by the issuer which is within the standard practice referred to in s. 405.108 (5) or is  
11          otherwise reasonable under the circumstances.

12          **405.113 Transfer by operation of law.** (1) A successor of a beneficiary may  
13          consent to amendments, sign and present documents, and receive payment or other  
14          items of value in the name of the beneficiary without disclosing its status as a  
15          successor.

16          (2) A successor of a beneficiary may consent to amendments, sign and present  
17          documents, and receive payment or other items of value in its own name as the  
18          disclosed successor of the beneficiary. Except as otherwise provided in sub. (5), an  
19          issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full  
20          substitution for its predecessor upon compliance with the requirements for  
21          recognition by the issuer of a transfer of drawing rights by operation of law under the  
22          standard practice referred to in s. 405.108 (5) or, in the absence of such a practice,  
23          compliance with other reasonable procedures sufficient to protect the issuer.

1           (3) An issuer is not obliged to determine whether a purported successor is a  
2 successor of a beneficiary or whether the signature of a purported successor is  
3 genuine or authorized.

4           (4) Honor of a purported successor's apparently complying presentation under  
5 sub. (1) or (2) has the consequences specified in s. 405.108 (9) even if the purported  
6 successor is not the successor of a beneficiary. Documents signed in the name of the  
7 beneficiary or of a disclosed successor by a person who is neither the beneficiary nor  
8 the successor of the beneficiary are forged documents for the purposes of s. 405.109.

9           (5) An issuer whose rights of reimbursement are not covered by sub. (4) or  
10 substantially similar law and any confirmer or nominated person may decline to  
11 recognize a presentation under sub. (2).

12           (6) A beneficiary whose name is changed after the issuance of a letter of credit  
13 has the same rights and obligations as a successor of a beneficiary under this section.

14           **405.114 Assignment of proceeds.** (1) In this section, "proceeds of a letter  
15 of credit" means the cash, check, accepted draft, or other item of value paid or  
16 delivered upon honor or giving of value by the issuer or any nominated person under  
17 the letter of credit. The term does not include a beneficiary's drawing rights or  
18 documents presented by the beneficiary.

19           (2) A beneficiary may assign its right to part or all of the proceeds of a letter  
20 of credit. The beneficiary may do so before presentation as a present assignment of  
21 its right to receive proceeds contingent upon its compliance with the terms and  
22 conditions of the letter of credit.

23           (3) An issuer or nominated person need not recognize an assignment of  
24 proceeds of a letter of credit until it consents to the assignment.

1 (4) An issuer or nominated person has no obligation to give or withhold its  
 2 consent to an assignment of proceeds of a letter of credit, but consent may not be  
 3 unreasonably withheld if the assignee possesses and exhibits the letter of credit and  
 4 presentation of the letter of credit is a condition to honor.

5 (5) Rights of a transferee beneficiary or nominated person are independent of  
 6 the beneficiary's assignment of the proceeds of a letter of credit and are superior to  
 7 the assignee's right to the proceeds.

8 (6) Neither the rights recognized by this section between an assignee and an  
 9 issuer, transferee beneficiary, or nominated person nor the issuer's or nominated  
 10 person's payment of proceeds to an assignee or a <sup>3rd</sup> (third) person affect the rights  
 11 between the assignee and any person other than the issuer, transferee beneficiary,  
 12 or nominated person. The mode of creating and perfecting a security interest in or  
 13 granting an assignment of a beneficiary's rights to proceeds is governed by ch. 409  
 14 or other law. Against persons other than the issuer, transferee beneficiary, or  
 15 nominated person, the rights and obligations arising upon the creation of a security  
 16 interest or other assignment of a beneficiary's right to proceeds and its perfection are  
 17 governed by ch. 409 or other law.

18 **405.115 Statute of limitations.** An action to enforce a right or obligation  
 19 arising under this chapter must be commenced within one year after the expiration  
 20 date of the relevant letter of credit or one year after the cause of action accrues,  
 21 whichever occurs later. A cause of action accrues when the breach occurs, regardless  
 22 of the aggrieved party's lack of knowledge of the breach.

\*\*\*\*NOTE: The uniform act refers to "cause of action" or "claim for relief". "Cause of action" is consistent with our drafting style.

\*\*\* X NOTE: The 2nd sentence refers to "rights to proceeds" but the last sentence refers to "right to proceeds." Is that okay?

1           **405.116 Choice of law and forum.** (1) The liability of an issuer, nominated  
2 person, or adviser for action or omission is governed by the law of the jurisdiction  
3 chosen by an agreement in the form of a record signed or otherwise authenticated by  
4 the affected parties in the manner provided in s. 405.104 or by a provision in the  
5 person's letter of credit, confirmation, or other undertaking. The jurisdiction whose  
6 law is chosen need not bear any relation to the transaction.

7           (2) Unless sub. (1) applies, the liability of an issuer, nominated person, or  
8 adviser for action or omission is governed by the law of the jurisdiction in which the  
9 person is located. The person is considered to be located at the address indicated in  
10 the person's undertaking. If more than one address is indicated, the person is  
11 considered to be located at the address from which the person's undertaking was  
12 issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch  
13 letters of credit, but not enforcement of a judgment, all branches of a bank are  
14 considered separate juridical entities and a bank is considered to be located at the  
15 place where its relevant branch is considered to be located under this subsection.

16           (3) Except as otherwise provided in this subsection, the liability of an issuer,  
17 nominated person, or adviser is governed by any rules of custom or practice, such as  
18 the Uniform Customs and Practice for Documentary Credits, to which the letter of  
19 credit, confirmation, or other undertaking is expressly made subject. Except to the  
20 extent of any conflict with the nonvariable provisions specified in s. 405.103 (3), those  
21 rules govern if all of the following apply:

      \*\*\*NOTE: Shouldn't the above specify the source for the Uniform Customs and  
Practice for Documentary Credits? Can the reference to these customs be made clearer?

22           (a) This chapter would govern the liability of an issuer, nominated person, or  
23 adviser under sub. (1) or (2).

1 (b) The relevant undertaking incorporates rules of custom or practice.

2 (c) There is conflict between this chapter and those rules as applied to that  
3 undertaking.

4 (4) If there is conflict between this chapter and ch. 403, 404, 409, or 410, this  
5 chapter governs.

6 (5) The forum for settling disputes arising out of an undertaking within this  
7 chapter may be chosen in the manner and with the binding effect that governing law  
8 may be chosen in accordance with sub. (1).

9 **405.117 Subrogation of issuer, applicant, and nominated person. (1)**

10 An issuer that honors a beneficiary's presentation is subrogated to the rights of the  
11 beneficiary to the same extent as if the issuer were a secondary obligor of the  
12 underlying obligation owed to the beneficiary and of the applicant to the same extent  
13 as if the issuer were the secondary obligor of the underlying obligation owed to the  
14 applicant.

15 (2) An applicant that reimburses an issuer is subrogated to the rights of the  
16 issuer against any beneficiary, presenter, or nominated person to the same extent as  
17 if the applicant were the secondary obligor of the obligations owed to the issuer and  
18 has the rights of subrogation of the issuer to the rights of the beneficiary stated in  
19 sub. (1).

20 (3) A nominated person who pays or gives value against a draft or demand  
21 presented under a letter of credit is subrogated to the rights of all of the following:

22 (a) The issuer against the applicant to the same extent as if the nominated  
23 person were a secondary obligor of the obligation owed to the issuer by the applicant.

24 (b) The beneficiary to the same extent as if the nominated person were a  
25 secondary obligor of the underlying obligation owed to the beneficiary.



1 (c) The applicant to <sup>the</sup> same extent as if the nominated person were a secondary  
2 obligor of the underlying obligation owed to the applicant.

3 (4) Notwithstanding any agreement or term to the contrary, the rights of  
4 subrogation stated in sub<sup>s</sup>(1) and (2) do not arise until the issuer honors the letter  
5 of credit or otherwise pays and the rights in sub. (3) do not arise until the nominated  
6 person pays or otherwise gives value. Until then, the issuer, nominated person, and  
7 the applicant do not derive under this section present or prospective rights forming  
8 the basis of a claim, defense, or excuse.

9 **SECTION 4.** 409.102 (1) (rs) 6. of the statutes is amended to read:

10 409.102 (1) (rs) 6. A person that holds a security interest arising under s.  
11 402.401, 402.505, 402.711 (3), 404.210, 405.118 405.117, or 411.508 (5).

12 History: 2001 a. 10; 2003 a. 321.

12 **SECTION 5.** 409.109 (1) (f) of the statutes is amended to read:

13 409.109 (1) (f) A security interest arising under s. 404.210 or ~~405.118~~ 405.117.

14 History: 2001 a. 10, 64.

14 **SECTION 6.** 409.203 (3) of the statutes is amended to read:

15 409.203 (3) OTHER UNIFORM COMMERCIAL CODE PROVISIONS. Subsection (2) is  
16 subject to s. 404.210 on the security interest of a collecting bank, s. ~~405.118~~ 405.117  
17 on the security interest of a letter-of-credit issuer or nominated person, s. 409.110  
18 on a security interest arising under ch. 402 or 411, and s. 409.206 on security  
19 interests in investment property.

20 History: 2001 a. 10.

20 **SECTION 7.** 409.309 (8) of the statutes is amended to read:

21 409.309 (8) A security interest of an issuer or nominated person arising under  
22 s. ~~405.118~~ 405.117;

23 History: 2001 a. 10.

23 **SECTION 8.** 409.322 (6) (c) of the statutes is amended to read:



**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-3528/P1dn

MDK...*kgf*

*Date*

Rep. Cullen:

*a*  
This is a preliminary draft based on the uniform act that you provided. I have included a few NOTES in the text for you to review. In addition, please note the following:

1. The uniform act includes changes to Article 9 of the Uniform Commercial Code that I don't know how to incorporate into ch. 409 of the statutes because the uniform act appears to refer to different version of Article 9. Please review my changes to ch. 409. In particular, I'm not sure whether or not the amended references to s. 405.117 work, and I would appreciate your input on this issue.

*x*  
2. In the following provisions, note that I changed the structure of the uniform act to conform to our drafting style; proposed ss. 405.102 (1) (f) and (h), 405.104, 405.108 (2), (6), and (9), 405.109 (1) and (2), 405.110, 405.112 (2), 405.116 (3), and 405.117 (3).

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August 10, 2001

Mr. Daniel J. Eastman  
Microgy Cogeneration Systems, Inc.  
166 North Green Bay Road  
Suite C  
Thiensville, WI 53092

Re: State Bar of Wisconsin; Revised Article 5

Dear Mr. Eastman:

I am writing to you in your capacity as Chairman of the Business Law Section of the State Bar of Wisconsin. I have acted as Chairman of a subcommittee of the Business Law Section which has been charged with examining revised Article 5 of the Uniform Commercial Code. The subcommittee includes myself, Janet M. Neal, Patrick D. Walsh, and Gilbert L. Southwell. I am pleased to advise you that our subcommittee enthusiastically supports the enactment of revised Article 5 and strongly recommends that the Business Law Section of the State Bar of Wisconsin take a position supporting its enactment.

Revised Article 5 represents a major revision to the provisions of the Uniform Commercial Code governing letters of credit. The changes are too numerous to summarize in detail in this letter, but the drafters have done an excellent job of modernizing the provisions of Article 5.

Revised Article 5 has already been adopted in 48 states and the District of Columbia. The only holdouts are Wisconsin and Georgia. Frankly, Wisconsin's tardiness on this subject is somewhat of an embarrassment.

I am enclosing a copy of an internal memorandum which discusses Wisconsin's minor non-uniform changes to the prior version of Article 5, and the non-uniform changes which have been adopted to revised Article 5 in other states. Our subcommittee urges the adoption of the uniform version of revised Article 5 with one exception: We recommend changing section 5-108(e) by deleting the phrase "of the issuer's observance" preceding "of the standard practice," in section 5-108(e):

Mr. Daniel J. Eastman  
August 10, 2001  
Page 2

"An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice."

The purpose of the change is to make clear that the court should determine the standard practice, but that it is up to the jury to determine whether the issuer in fact observed that standard practice. As discussed in more detail in the attached memorandum, this is a clarification, not a substantive change to the meaning of the official text.

Our subcommittee does not recommend adoption of any of the other non-uniform variations adopted in other states. In particular, our subcommittee recommends adoption of the uniform version of subsection 5-108(b), regarding the time period available for an issuer to honor a letter of credit, even though no minimum time period is specified; the uniform versions of subsections 5-111(a) and (b), which exclude recovery of consequential damages; and the uniform version of subsection 5-111(e), which provides for the mandatory award of attorneys' fees to the prevailing party in the event of litigation (even though this is contrary to the usual Wisconsin rule about attorneys' fees). Our subcommittee feels that providing for the mandatory award of attorneys' fees to the prevailing party will help to deter unnecessary litigation.

Please do not hesitate to call if you would like to discuss this matter further, or if I can provide any additional information.

Very truly yours,



Emory Ireland

cc: Jennifer Boese  
David I. Cisar  
Janet M. Neal  
Patrick D. Walsh  
Gilbert L. Southwell

honor and then defend its dishonor or assert a setoff on the ground that it is subrogated to another person's rights. The issuer may complain after honor if its subrogation rights have been impaired by any good faith dealings between the beneficiary and the applicant or any other person. Assume, for example, that the beneficiary under a standby letter of

credit is a mortgagee. If the mortgagee were obliged to issue a release of the mortgage upon payment of the underlying debt (by the issuer under the letter of credit), that release might impair the issuer's rights of subrogation, but the beneficiary would have no liability to the issuer for having granted that release.

#### Action in Adopting Jurisdictions

##### Variations from Official Text:

##### ALASKA

In subsec. (d), in the first sentence inserts "of subrogation stated" preceding "the rights".

##### LOUISIANA

In subsec. (a), deletes "obligor of the underlying" preceding "obligation owed to the applicant".

##### OHIO

In subsec. (c)(2), substitutes "as if the issuer were" for "as if the nominated person were".

In subsec. (c)(3), substitutes "were the secondary obligor" for "were a secondary obligor".

##### OREGON

In subsec. (d), in the second sentence substitutes "Until the rights in subsections (1), (2) or (3) of this section arise" for "Until then".

#### Law Review and Journal Commentaries

Letters of Credit: What Does Revised Article 5 Have to Offer to Issuers, Applicants, and

Beneficiaries? Dellas W. Lee, 101 Com.L.J. 234, 243 (1996).

#### Library References

Banks and Banking § 191.  
Subrogation § 2.  
Westlaw Topic Nos. 52, 366.  
C.J.S. Banks and Banking § 174.

C.J.S. Bills and Notes; Letters of Credit §§ 341 to 366, 368 to 370, 372 to 376.  
C.J.S. Subrogation § 16.

#### Notes of Decisions

Persons able to subrogate 1

Persons able to subrogate

Letter of credit applicant could not subrogate in position of issuing bank and sue confirming

bank for fraud, negligence and violation of the Uniform Commercial Code (UCC). Tokyo Kogyo Boeki Shokai v. U.S. Nat. Bank of Oregon, C.A.9 (Or.) 1997, 126 F.3d 1135.

### § 5-118. Security Interest of Issuer or Nominated Person.

*Text of section 5-118 added to Revised Article 5 as a conforming amendment to adoption of Revised Article 9 (2000) of the Code.*

(a) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation.

(b) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under subsection (a), the security interest continues and is subject to Article 9, but:

- (1) a security agreement is not necessary to make the security interest enforceable under Section 9-203(b)(3);
- (2) if the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and
- (3) if the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has priority over a conflicting security interest in the document so long as the debtor does not have possession of the document.

Official Comment

1. This section gives the issuer of a letter of credit or a nominated person thereunder an automatic perfected security interest in a "document" (as that term is defined in Section 5-102(a)(6)). The security interest arises only if the document is presented to the issuer or nominated person under the letter of credit and only to the extent of the value that is given. This security interest is analogous to that awarded to a collecting bank under Section 4-210. Subsection (b) contains special rules governing the security interest arising under this section. In all other respects, a security interest arising under this section is subject to Article 9. See Section 9-109. Thus, for example, a security interest arising under this section may give rise to a security interest in proceeds under Section 9-315.

2. Subsection (b)(1) makes a security agreement unnecessary to the creation of a security interest under this section. Under subsection (b)(2), a security interest arising under this section is perfected if the document is presented in a medium other than a written or tangible medium. Documents that are written and that are not an otherwise-defined type of collateral under Article 9 (e.g., an invoice or inspection certificate) may be goods, in which an issuer or nominated person could perfect its security interest by possession. Because the definition of document in Section 5-102(a)(6) includes records (e.g., electronic records) that may not be goods, subsection (b)(2) provides for automatic perfection (i.e., without filing or possession).

Under subsection (b)(3), if the document (i) is in a written or tangible medium, (ii) is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, and (iii) is not in the debtor's possession, the security interest is perfected and has priority over a conflicting security interest. If the document is a type of tangible collateral that subsection (b)(3) excludes from its perfection and priority rules, the issuer or nominated person must comply with the normal method of perfection (e.g., possession of an instrument) and is subject to the applicable Article 9 priority rules. Documents to which subsection (b)(3) applies may be important to an issuer or nominated person. For example, a confirmer who pays the beneficiary must be assured that its rights to all documents are not impaired. It will find it necessary to present all of the required documents to the issuer in order to be reimbursed. Moreover, when a nominated person sends documents to an issuer in connection with the nominated person's reimbursement, that activity is not a collection, enforcement, or disposition of collateral under Article 9.

One purpose of this section is to protect an issuer or nominated person from claims of a beneficiary's creditors. It is a fallback provision inasmuch as issuers and nominated persons frequently may obtain and perfect security interests under the usual Article 9 rules, and, in many cases, the documents will be owned by the issuer, nominated person, or applicant.

The following states have adopted or modified the Code:

- Alabama
- Alaska
- Arizona
- post.
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Florida
- Georgia
- Hawaii
- Idaho
- post.
- Illinois
- Indiana
- Iowa
- Kansas
- post.
- Kentucky
- Louisiana
- Note,
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Mississippi
- Missouri
- Montana
- Note
- Nebraska
- Nevada
- post.
- New Hampshire
- New Jersey
- New Mexico
- New York
- Note
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- Note
- Oregon
- Pennsylvania
- Rhode Island
- Note
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont

**Action in Adopting Jurisdictions**

The following jurisdictions, unless otherwise noted, have enacted section 5-118, which was adopted to conform to Revised Article 9 (2000) of the Code:

- Alabama
- Alaska
- Arizona. See, however, the Variation Note, post.
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Florida
- Georgia
- Hawaii
- Idaho. See, however, the Variation Note, post.
- Illinois
- Indiana
- Iowa
- Kansas. While Kansas has adopted Revised Article 9 (2000) of the Code, it did not adopt this section.
- Kentucky
- Louisiana. See, however, the Variation Note, post.
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Mississippi
- Missouri
- Montana. See, however, the Variation Note, post.
- Nebraska
- Nevada. See, however, the Variation Note, post.
- New Hampshire
- New Jersey
- New Mexico
- New York. See, however, the Variation Note, post.
- North Carolina
- North Dakota
- Ohio
- Oklahoma. See, however, the Variation Note, post.
- Oregon
- Pennsylvania
- Rhode Island. See, however, the Variation Note, post.
- South Carolina. See, however, the Variation Note, post.
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont

- Virgin Islands
- Virginia
- Washington
- West Virginia
- Wisconsin
- Wyoming

**Variations from Official Text:**

**ARIZONA**

In subsec. (b), in the introductory paragraph, substitutes "As long as" for "So long as".

**IDAHO**

In subsec. (b)(3), adds a second and third sentence, which provide: "This act applies to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act."

**LOUISIANA**

In subsec. (a), inserts "and any identifiable proceeds of the collateral" preceding "to the extent".

Subsec. (b) provides:

"(b) Subject to subsection (c), as long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest under subsection (a), the security interest continues and is subject to Chapter 9, but:

"(1) a security agreement is not necessary to make the security interest enforceable under R.S. 10:9-203(b)(3); and

"(2) the security interest is perfected and has priority over conflicting security interests in the collateral or its proceeds."

Adds a subsection [designated (c) in the Louisiana act], which provides:

"(c) A security interest that arises under this section is subject to the rights of a subsequent purchaser under R.S. 10:9-330 or 9-331 or a transferee under R.S. 10:9-332."

**MONTANA**

In subsec. (a), inserts "and any identifiable proceeds of the collateral" preceding "to the extent".

**NEVADA**

In subsec. (a), inserts "and any identifiable proceeds of the collateral" preceding "to the extent".



§ 5-118

UNIFORM COMMERCIAL CODE

ART.

NEW YORK

In subsec. (a), inserts "and any identifiable proceeds of the collateral" preceding "to the extent".

In subsec. (b), in the introductory paragraph, inserts "Subject to subsection (a)," at the beginning, and substitutes "as long as" for "So long as".

OKLAHOMA

In subsec. (a), inserts "and any identifiable proceeds of the collateral" preceding "to the extent".

In subsec. (b), in the introductory paragraph, substitutes "As long as" for "So long as".

RHODE ISLAND

In subsec. (a), inserts "and any identifiable proceeds of the collateral" preceding "to the extent".

In subsec. (b), in the introductory paragraph, substitutes "Subject to subsection (c)," at the beginning, and substitutes "as long as" for "So long as".

SOUTH CAROLINA

In subsec. (a), inserts "and any identifiable proceeds of the collateral" preceding "to the extent".

Library References

Secured Transactions §§ 84, 88 to 89, 115, 133 to 150. Westlaw Topic No. 349A.

C.J.S. Secured Transactions §§ 10 to 11, 51 to 52, 56, 58 to 60, 62 to 64, 68, 72, 88, 90 to 91, 93 to 110, 118, 184.

TRANSITION PROVISIONS

§ [ ]. Effective Date.

This [Act] shall become effective on \_\_\_\_, 199\_\_.

§ [ ]. Repeal.

This [Act] [repeals] [amends] [insert citation to existing Article 5].

§ [ ]. Applicability.

This [Act] applies to a letter of credit that is issued on or after the effective date of this [Act]. This [Act] does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this [Act].

§ [ ]. Savings Clause.

A transaction arising out of or associated with a letter of credit that was issued before the effective date of this [Act] and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this [Act] as if repeal or amendment had not occurred, and may be terminated, completed, consummated, or enforced under that statute or other law.

ADD: O

ANSAS section

118. A chap... does... letter... 1, 195

19. § transac... letter... 1, 19... flows... by an... had no... statute c

FLORIDA

75.118.

(1) This... is issue... not ap... or di... letter of... including ar... was r... amendment

(2) A tra... with a letter... the right... that tra... amended o... as if... occurred ar... comple... for such la

IDAHO

Adds sect "§ 5-118"

This act issued on c This act dc obligation,