

D-NOTE

tomorrow 2/15  
3 pm

# 2001 SENATE BILL 203

-3528/1

RM not run

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LPS

June 12, 2001 - Introduced by Senators HUELSMAN and GEORGE, cosponsored by Representatives GUNDRUM and CULLEN, by request of the Wisconsin Commission on Uniform State Laws. Referred to Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform.

LPS: P.W.F.  
all bill sections containing amended text.

gen cat.

1 AN ACT *to amend* 127.07 (6) (a) 2., 402.512 (1) (b), 409.103 (1) (title), 409.103 (1)

2 (a), 409.104 (13), 409.106, 409.304 (title), 409.304 (1), 409.305, 440.92 (3) (c) 3.,

3 565.25 (5) (b) 3. and 707.49 (4); *to repeal and recreate* chapter 405; and *to*

4 *create* 401.105 (2) (bm), 409.104 (14), 409.105 (3) (cm) and 409.105 (3) (dm) of

5 the statutes; **relating to:** adopting revised Article 5 of the Uniform Commercial

6 Code, concerning letters of credit.

### Analysis by the Legislative Reference Bureau

Under current law, a letter of credit is a promise to pay certain amounts to a third-party beneficiary upon presentation of certain documents required by the letter of credit. A letter of credit typically facilitates dealings between a commercial buyer and seller by involving the buyer's bank, which promises to pay specified amounts to the seller or another beneficiary. Parties also frequently use a letter of credit to facilitate an international transaction. For example, a domestic bank may issue a letter of credit, substituting its credit for that of the buyer who is purchasing goods from a seller in another country. A letter of credit, however, is not a guaranty or surety agreement. Rather, a letter of credit is independent of the underlying sales contract between a buyer and seller and generally must be honored regardless of the performance of the underlying transaction.

Currently, Wisconsin's version of the Uniform Commercial Code (UCC), article 5, governs letters of credit. On November 13, 1995, the national conference of

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commission on Uniform State Laws and the American Law Institute promulgated changes to the UCC, article 5. This bill incorporates these changes and other updates to the UCC into Wisconsin law.

→ ***Confirmer, adviser, and nominated person***

Under current law, a bank other than the issuer of a letter of credit may act as an intermediary between the issuer and the beneficiary of a letter of credit. For example, in a commercial transaction, the buyer's bank may send a letter of credit it has issued to a correspondent bank in the seller's location, rather than directly to the seller. Under current law, the correspondent bank may then provide two types of notice to the seller. The correspondent bank may act as a confirmer, independently verifying that it will honor the letter of credit already issued by the buyer's bank or that the issuer or a third party will honor the letter of credit. Otherwise, the correspondent bank may act as an adviser, simply notifying the seller that the buyer's bank has issued the letter of credit. This bill does not substantially change the rights and duties of a confirmer or adviser. However, this bill clarifies that persons other than banks may act as confirmers and advisers.

In addition, current law establishes a third level of involvement for a bank that negotiates under a letter of credit. Often, a letter of credit is freely negotiable, allowing the beneficiary to present the required documents to a third party and authorizing the third party to pay out to the beneficiary under the terms of the letter of credit. The issuer then reimburses this third party, if the documents presented are in order. This bill further outlines this third level of involvement for persons the issuer nominates to negotiate under a letter of credit. This bill provides that a nominated person who is not a confirmer generally has no duty to a beneficiary of a letter of credit and may generally refuse to receive the documents presented.

***Issuing, amending, and canceling a letter of credit***

Current law provides different times at which the same letter of credit may become effective as to the applicant and as to the beneficiary. For an applicant, a letter of credit is effective when the letter of credit is sent to the applicant or when the letter of credit or advice of its issuance is sent to the beneficiary. For a beneficiary, the letter of credit is effective when the beneficiary receives the letter of credit or advice of its issuance. As a result of these different effective dates, an issuer may have different rights to modify a letter of credit depending upon whether the modification effects the applicant or the beneficiary. This bill creates a single test for when a letter of credit is effective by providing that a letter of credit generally becomes enforceable when the issuer sends the letter to the beneficiary or to another person the issuer authorizes to advise the beneficiary.

Under current law, a letter of credit may be revocable or irrevocable. A revocable letter of credit generally may be amended by the issuer without notice. The current statute provides no default rule, though, that applies if a letter of credit is silent as to revocability. Federal courts interpreting similar statutes of other states have held that a letter of credit that is silent as to revocability is irrevocable and, therefore, may not be freely amended by the issuer. This bill codifies this holding into the statutes.

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Current law similarly provides no default rule regarding the term of a letter of credit. This bill establishes a default rule by providing that, if a letter of credit contains no stated duration, the letter of credit expires after one year. In addition, under this bill, a letter of credit that states that the letter of credit is perpetual expires after five years.

***Issuer's rights and obligations***

Under current law, an issuer generally must honor a letter of credit if the documents presented appear on their face to comply with the letter of credit. Furthermore, under current law an issuer must follow standard banking practice in examining the documents, unless the issuer is not a bank and has no notice of standard banking practice. However, current law is ambiguous as to whether substantial compliance with the terms of a letter of credit is sufficient to result in a duty to honor. This bill restricts the issuer's duty to honor a letter of credit by requiring that the presented documents on their face strictly comply with the terms of the letter of credit. Furthermore, this bill expands the applicability of the duty to follow standard practices by requiring all issuers to follow the standard practice of financial institutions that regularly issue letters of credit. Unlike current law, the bill specifies that, in litigation, the court and not the jury must determine ~~whether~~ ~~an issuer has followed~~ standard practices.

Under current law, an issuer generally must honor a demand for payment under a letter of credit before the end of the third business day after the issuer receives the presented documents. This bill changes this time period to a reasonable period not to exceed seven business days. Current law is silent regarding the duty of an issuer to notify of defects in the documents presented. However, at least one court has held that a failure to provide timely notice of defects precludes an issuer from relying on those defects as a basis for dishonoring the letter of credit. With certain exceptions, this bill codifies this holding into the statutes; however, this bill requires that the issuer provide notice to the person demanding payment within a reasonable period not to exceed seven business days after receiving the presented documents. Furthermore, an issuer may dishonor a letter of credit regardless of the notice requirements, if the issuer dishonors because of fraud, forgery, or expiration of the letter of credit.

***Fraud***

Under current law, the issuer may generally refuse to honor a letter of credit that is forged or fraudulent, as long as the demand for payment under the letter of credit is not made by an innocent third party. Current law does not specify who must perpetrate the fraud or how serious the fraud must be before the issuer may refuse to honor. This bill narrows the right of an issuer to refuse to honor a letter of credit by authorizing the issuer to refuse to honor, if the fraud is material and is either in the documents or perpetrated by the beneficiary on the issuer or applicant. In addition, this bill clarifies that the issuer may defend its refusal to honor by proving this type and degree of fraud or forgery. The bill continues to require an issuer to honor a letter of credit when an innocent third party demands payment, despite the existence of material fraud by the beneficiary.

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Current law allows an applicant to obtain an injunction against an issuer that the applicant has notified of material fraud. However, Wisconsin's version of UCC, article 5, currently provides no standards for courts to apply in determining whether an injunction is appropriate. This bill specifies four conditions that the applicant must meet in order to obtain an injunction, including a showing that the applicant is more likely than not to succeed under its claim of forgery or material fraud.

***Warranties***

Under current law, a beneficiary that transfers or presents a demand for payment warrants to all interested parties that the necessary conditions of the letter of credit have been met. In addition, current law establishes a limited warranty when the issuer or various intermediaries present or transfer a demand for payment. This bill generally restricts the warranties applicable to a letter of credit. This bill repeals the provisions for warranties given by an issuer or intermediary, except to the extent that an issuer or intermediary is also a beneficiary. Furthermore, this bill narrows the type and application of a beneficiary's warranties. To the issuer, the applicant, and any other person to whom the beneficiary presents documents under a letter of credit, the beneficiary warrants that it has not committed material fraud and that the documents presented are not forged. To the applicant, the beneficiary warrants that the payment demanded does not violate any agreement between the applicant and the beneficiary or any other agreement the parties intended to be augmented by the letter of credit. In addition, this bill changes the time when a beneficiary's warranties become effective from the date of the beneficiary's presentation of documents to the date on which the presentation is honored. Thus, this bill eliminates the possibility that an issuer may claim the beneficiary's breach of warranty as a basis for refusing to honor a letter of credit.

***Remedies***

Under current law, when an issuer wrongfully dishonors a demand under a letter of credit, the person entitled to honor may sue for the amount of the demand, incidental damages, and interest, minus the proceeds of any resale or other use of the subject matter of the transaction. In addition, when an issuer wrongfully cancels a letter of credit before being presented with a demand for payment, the beneficiary may sue for wrongful dishonor, if the beneficiary has prepared the documents necessary to make a demand under the letter of credit. If the beneficiary has not prepared the necessary documents, the beneficiary may sue for anticipatory breach of contract.

This bill expands the available remedies for anticipatory breach of contract to include specific performance. In addition, under this bill, if an issuer wrongfully cancels a letter of credit before being presented with a demand for payment, the person presenting the demand need not take action to avoid damages. Furthermore, unlike current law, this bill specifies incidental damages as the typical remedy for an adviser or nominated person's breach of an obligation under UCC, article 5, and for an issuer's wrongful dishonor or wrongful payment of a demand, in breach of its obligations to the applicant. Contrary to current law, this bill requires a court to order payment of the prevailing party's reasonable attorney's fees. In addition, unlike current law, the court must order payment of the prevailing party's expenses

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of litigation. This bill also clarifies that the parties may set a reasonable amount of damages by contract, payable in the event of breach.

***Transfer of beneficiary's right to receive payment under a letter of credit***

Under current law, a beneficiary may not transfer its right to demand performance under a letter of credit, unless the letter of credit provides that it is transferrable. This bill retains this restriction on a beneficiary's transfer of the right to demand performance under a letter of credit. Furthermore, under this bill, even if the letter of credit is transferrable, the letter of credit may impose conditions of transfer or the issuer may impose reasonable requirements consistent with the standard practice of financial institutions that deal in letters of credit. Except for requiring a beneficiary to comply with applicable law, this bill does not specify the conditions or requirements a beneficiary must fulfill in order to transfer its rights to demand payment.

***Transfer of beneficiary's rights by operation of law***

Under this bill, a successor beneficiary may consent to amendments, sign and present documents, and receive payment under a letter of credit, either in its own name as a successor or in the name of the original beneficiary. However, if the successor discloses its status as a successor beneficiary, the issuer generally may require the successor to meet certain requirements consistent with the standard practices of financial institutions that deal in letters of credit. For example, the issuer may require the successor beneficiary to present a certificate of merger or certificate of appointment as bankruptcy trustee before the issuer will recognize the transfer. Furthermore, any confirmer or nominated person may decline to recognize the presentation required by the issuer. Current law does not contain provisions specifically regarding transfer of a beneficiary's rights by operation of law.

***Assignment of proceeds of letter of credit***

Under current law, a beneficiary may assign its right to receive payment under a letter of credit, as long as the beneficiary delivers the letter of credit or advice of the letter of credit to the assignee. The issuer may continue honoring demands for payment under the letter of credit until it receives adequate notification of the assignment. After receiving notification and in order to avoid double payment, the issuer may stop honoring demands until the assignee shows the issuer the letter of credit or advice.

This bill clarifies that the assignment of proceeds of a letter of credit is different from a transfer of the right to demand payment under a letter of credit. Unlike after a transfer, the beneficiary retains the right to demand payment under the letter of credit after an assignment. It is that payment, or a portion of it, that the beneficiary assigns to a third party. Also, under this bill, an issuer or nominated person may refuse to honor an assignment of proceeds until the issuer or nominated person consents to the assignment. However, an issuer or nominated person generally may not unreasonably withhold this consent. Furthermore, this bill clarifies that an assignee's rights are subordinate both to the rights of a transferee beneficiary and to the rights of a nominated person.

**SENATE BILL 203*****Scope of UCC, article 5, and choice of law***

This bill restricts the potential scope of UCC, article 5, by clarifying that the article does not apply to a guaranty or surety agreement. Furthermore, unlike current law, this bill provides that an applicant and an issuer generally may agree to vary from the requirements of UCC, article 5, in establishing their obligations to one another, with certain exceptions. However, an issuer may not vary its obligations to an applicant simply by inserting a boilerplate disclaimer or limitation of remedy clause in the parties' agreement.

Under current law, the parties to a transaction under UCC, article 5, generally may agree which state's law applies when the transaction is reasonably related to both Wisconsin and another state or nation. If the parties make no agreement, then the laws of Wisconsin apply, as long as the transaction bears a reasonable relation to this state.

This bill expands the ability of parties to choose what law will apply, in certain circumstances. Under this bill, if the issue is the liability of a nominated person, issuer, or adviser, but not an applicant, the parties may choose the law of any state regardless of that state's relation to the transaction. If the parties do not agree, then the law of the jurisdiction where the issuer, nominated person, or adviser subject to the action is located applies. In addition, this bill allows for further development of commercial practices by providing that a rule of practice or custom that is incorporated into a letter of credit will govern the issue of a nominated person's, issuer's, or adviser's liability, if the rule or custom conflicts with certain provisions of UCC, article 5.

***Subrogation***

Current law is silent as to whether and when an applicant, issuer, or nominated person may assume the rights of another party to a letter of credit transaction in the event of breach. Because the letter of credit is independent of the underlying transaction between a buyer and a seller, some courts have held that this right of subrogation does not exist. This bill does not grant a right of subrogation. However, this bill clarifies that an applicant, issuer, or nominated person seeking subrogation has the right that would exist if the person seeking subrogation were a guarantor, surety, or other secondary obligor. Furthermore, this bill requires a party to perform under a letter of credit before it may assert a right of subrogation. Thus, the bill prevents a party from using subrogation to avoid the duty to honor a letter of credit.

***Repealed statutes***

This bill eliminates certain sections of Wisconsin's version of UCC, article 5, as obsolete or covered by other law. For example, this bill deletes the section currently dealing with notation letters of credit and allows the parties to a letter of credit to determine by contract whether they must follow requirements similar to those contained in that section. This bill also eliminates the current section on indemnity agreements in letter of credit transactions, leaving the parties to rely on existing contract and indemnity law. In addition, this bill eliminates the current section dealing with bank insolvency because insolvency issues are covered by other law.

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***Statute of limitations***

Although the current UCC, article 5, is silent with regard to a statute of limitations for actions brought under that article, the general six year statute of limitations for breach of contract would likely apply. This bill shortens the statute of limitations by requiring a party to commence an action within one year after the later of the date the letter of credit expires or the date the breach occurs.

***Other changes***

This bill makes certain changes to definitions applicable to UCC, article 5, and to the formal requirements of a letter of credit. These changes generally validate current commercial practices and allow for further expansion of the use of letters of credit in commercial transactions.

(INSERT 7A)

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

1           **SECTION 1.** 127.07 (6) (a) 2. of the statutes is amended to read:  
2           127.07 (6) (a) 2. The department receives notice of cancellation of a surety bond,  
3           or notice of nonrenewal of a letter of credit, filed with the department as security or  
4           determines that a letter of credit filed with the department as security has expired.

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

6           401.105 (2) (bm) Section 405.116 on letters of credit.

7           **SECTION 3.** 402.512 (1) (b) of the statutes is amended to read:

8           402.512 (1) (b) Despite tender of the required documents the circumstances  
9           would justify injunction against honor under s. ~~405.114~~ 405.109 (2).

10          **SECTION 4.** Chapter 405 of the statutes is repealed and recreated to read:

**CHAPTER 405**

**UNIFORM COMMERCIAL CODE —**

**LETTERS OF CREDIT**

14          **405.101 Short title.** This chapter may be cited as uniform commercial code  
15          — letters of credit.

16          **405.102 Definitions. (1)** In this chapter:

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1           (a) “Adviser” means a person who, at the request of the issuer, a confirmer, or  
2 another adviser, notifies, or requests another adviser to notify<sup>5</sup> the beneficiary that  
3 a letter of credit has been issued, confirmed, or amended.

4           (b) “Applicant” means a person at whose request or for whose account a letter  
5 of credit is issued. The term includes a person who requests an issuer to issue a letter  
6 of credit on behalf of another if the person making the request undertakes an  
7 obligation to reimburse the issuer.

8           (c) “Beneficiary” means a person who under the terms of a letter of credit is  
9 entitled to have its complying presentation honored. The term includes a person to  
10 whom drawing rights have been transferred under a transferable letter of credit.

11           (d) “Confirmer” means a nominated person who undertakes, at the request or  
12 with the consent of the issuer, to honor a presentation under a letter of credit issued  
13 by another.

14           (e) “Dishonor” of a letter of credit means failure timely to honor or to take an  
15 interim action, such as acceptance of a draft, that may be required by the letter of  
16 credit.

17           (f) “Document” means a draft or other demand, document of title, investment  
18 security, certificate, invoice, or other record, statement, or representation of fact, law,  
19 right, or opinion that is presented in a written or other medium permitted by the  
20 letter of credit or, unless prohibited by the letter of credit, by the standard practice  
21 referred to in s. 405.108 (5) and that is capable of being examined for compliance with  
22 the terms and conditions of the letter of credit. A document may not be oral.

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



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1 (h) "Honor" of a letter of credit means performance of the issuer's undertaking  
2 in the letter of credit to pay or deliver an item of value. Unless the letter of credit  
3 otherwise provides, honor occurs in any of the following circumstances:

4 1. Upon payment.

5 2. If the letter of credit provides for acceptance, upon acceptance of a draft and,  
6 at maturity, its payment.

7 3. If the letter of credit provides for incurring a deferred obligation, upon  
8 incurring the obligation and, at maturity, its performance.

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

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

17 (k) "Nominated person" means a person whom the issuer:

18 1. Designates or authorizes to pay, accept, negotiate, or otherwise give value  
19 under a letter of credit; and

20 2. Undertakes by agreement or custom and practice to reimburse.

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

23 (m) "Presenter" means a person making a presentation as or on behalf of a  
24 beneficiary or nominated person.

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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", s. 403.409.

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

12 (3) Chapter 401 contains certain additional general definitions and principles  
13 of construction and 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), ss. 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.

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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 any of the following methods:

9           **(1)** A signature.

10           **(2)** In accordance with the agreement of the parties or the standard practice  
11 referred to in s. 405.108 (5). ✓

12           **405.105 Consideration.** Consideration is not required to issue, amend,  
13 transfer, or cancel a letter of credit, advice, or confirmation.

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

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

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

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1           (4) A letter of credit that states that it is perpetual expires 5 years after its  
2 stated date of issuance, or if none is stated, after the date on which it is issued.

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

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

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

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

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

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1 the terms and conditions of the letter of credit. Except as otherwise provided in s.  
2 405.113 and unless otherwise agreed with the applicant, an issuer shall dishonor a  
3 presentation that does not appear so to comply.

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

7 (a) To honor.

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

10 (c) To give notice to the presenter of discrepancies in the presentation.

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

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

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

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

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

25 (b) An act or omission of others.

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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 contains nondocumentary  
4 conditions, an issuer shall disregard the nondocumentary conditions and treat them  
5 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) An issuer that has honored a presentation as permitted or required by this  
9 chapter:

10 (a) Is entitled to be reimbursed by the applicant in immediately available funds  
11 not later than the date of its payment of funds;

12 (b) Takes the documents free of claims of the beneficiary or presenter;

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

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

19 (e) Is discharged to the extent of its performance under the letter of credit  
20 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  
25 would facilitate a material fraud by the beneficiary on the issuer or applicant:

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

3 1. A nominated person that has given value in good faith and without notice  
4 of forgery or material fraud.

5 2. A confirmer that has honored its confirmation in good faith.

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

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

11 (b) The issuer, acting in good faith, may honor or dishonor the presentation in  
12 any case not described under par. (a).

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

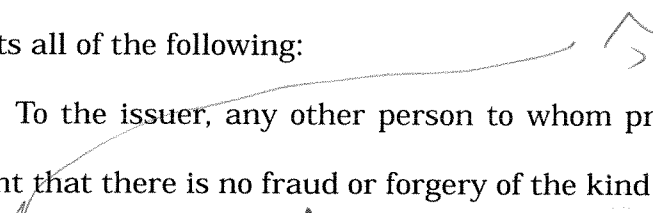
19 (a) The relief is not prohibited under the law applicable to an accepted draft or  
20 deferred obligation incurred by the issuer.

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

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

**SENATE BILL 203**

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

4 **405.110 Warranties. (1)** If its presentation is honored, the beneficiary  
5 warrants all of the following: 

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

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

11 (2) The warranties in sub. (1) are in addition to warranties arising under chs.  
12 403, 404, 407, and 408 because of the presentation or transfer of documents covered  
13 by any of those chapters.

14 **405.111 Remedies. (1)** If an issuer wrongfully dishonors or repudiates its  
15 obligation to pay money under a letter of credit before presentation, the beneficiary,  
16 successor, or nominated person presenting on its own behalf may recover from the  
17 issuer the amount that is the subject of the dishonor or repudiation. If the issuer's  
18 obligation under the letter of credit is not for the payment of money, the claimant may  
19 obtain specific performance or, at the claimant's election, recover an amount equal  
20 to the value of performance from the issuer. In either case, the claimant may also  
21 recover incidental but not consequential damages. The claimant is not obligated to  
22 take action to avoid damages that might be due from the issuer under this  
23 subsection. If, although not obligated to do so, the claimant avoids damages, the  
24 claimant's recovery from the issuer must be reduced by the amount of damages



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1 avoided. The issuer has the burden of proving the amount of damages avoided. In  
2 the case of repudiation the claimant need not present any document.

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

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

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

16 (5) Reasonable attorney's fees and other expenses of litigation <sup>e shall</sup> must be  
17 awarded to the prevailing party in an action in which a remedy is sought under this  
18 chapter.

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

22 **405.112 Transfer of letter of credit.** (1) Except as otherwise provided in  
23 s. 405.113, unless a letter of credit provides that it is transferable, the right of a  
24 beneficiary to draw or otherwise demand performance under a letter of credit may  
25 not be transferred.

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

3           (a) The transfer would violate applicable law.

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

8           **405.113 Transfer by operation of law.** (1) A successor of a beneficiary may  
9 consent to amendments, sign and present documents, and receive payment or other  
10 items of value in the name of the beneficiary without disclosing its status as a  
11 successor.

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

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

23           (4) Honor of a purported successor's apparently complying presentation under  
24 sub. (1) or (2) has the consequences specified in s. 405.108 (9) even if the purported  
25 successor is not the successor of a beneficiary. Documents signed in the name of the

**SENATE BILL 203**

1 beneficiary or of a disclosed successor by a person who is neither the beneficiary nor  
2 the successor of the beneficiary are forged documents for the purposes of s. 405.109.

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

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

8 **405.114 Assignment of proceeds.** (1) In this section, “proceeds of a letter  
9 of credit” means the cash, check, accepted draft, or other item of value paid or  
10 delivered upon honor or giving of value by the issuer or any nominated person under  
11 the letter of credit. The term does not include a beneficiary’s drawing rights or  
12 documents presented by the beneficiary.

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

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

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

23 (5) Rights of a transferee beneficiary or nominated person are independent of  
24 the beneficiary’s assignment of the proceeds of a letter of credit and are superior to  
25 the assignee’s right to the proceeds.

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1           (6) Neither the rights recognized by this section between an assignee and an  
2 issuer, transferee beneficiary, or nominated person nor the issuer's or nominated  
3 person's payment of proceeds to an assignee or a third person affects the rights  
4 between the assignee and any person other than the issuer, transferee beneficiary,  
5 or nominated person. The mode of creating and perfecting a security interest in or  
6 granting an assignment of a beneficiary's rights to proceeds is governed by ch. 409  
7 or other law. Against persons other than the issuer, transferee beneficiary, or  
8 nominated person, the rights and obligations arising upon the creation of a security  
9 interest or other assignment of a beneficiary's right to proceeds and its perfection are  
10 governed by ch. 409 or other law.

11           **405.115 Statute of limitations.** An action to enforce a right or obligation  
12 arising under this chapter must be commenced within one year after the expiration  
13 date of the relevant letter of credit or one year after the date the cause of action  
14 accrues, whichever occurs later. A cause of action accrues when the breach occurs,  
15 regardless of the aggrieved party's lack of knowledge of the breach.

16           **405.116 Choice of law and forum. (1)** The liability of an issuer, nominated  
17 person, or adviser for action or omission is governed by the law of the jurisdiction  
18 chosen by an agreement in the form of a record signed or otherwise authenticated by  
19 the affected parties in the manner provided in s. 405.104 or by a provision in the  
20 person's letter of credit, confirmation, or other undertaking. The jurisdiction whose  
21 law is chosen need not bear any relation to the transaction.

22           (2) Unless sub. (1) applies, the liability of an issuer, nominated person, or  
23 adviser for action or omission is governed by the law of the jurisdiction in which the  
24 person is located. The person is considered to be located at the address indicated in  
25 the person's undertaking. If more than one address is indicated, the person is

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1 considered to be located at the address from which the person's undertaking was  
2 issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch  
3 letters of credit, but not enforcement of a judgment, all branches of a bank are  
4 considered separate juridical entities and a bank is considered to be located at the  
5 place where its relevant branch is considered to be located under this subsection.

6 (3) Except as otherwise provided in this subsection, the liability of an issuer,  
7 nominated person, or adviser is governed by any rules of custom or practice, such as  
8 the Uniform Customs and Practice for Documentary Credits, to which the letter of  
9 credit, confirmation, or other undertaking is expressly made subject. If this chapter  
10 would govern the liability of an issuer, nominated person, or adviser under sub. (1)  
11 or (2), if the relevant undertaking incorporates rules of custom or practice, and if  
12 there is conflict between this chapter and those rules as applied to that undertaking,  
13 those rules govern except to the extent of any conflict with the nonvariable provisions  
14 specified in s. 405.103 (3).

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

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

20 **405.117 Subrogation of issuer, applicant, and nominated person. (1)**

21 An issuer that honors a beneficiary's presentation is subrogated to the rights of the  
22 beneficiary to the same extent as if the issuer were a secondary obligor of the  
23 underlying obligation owed to the beneficiary and of the applicant to the same extent  
24 as if the issuer were the secondary obligor of the underlying obligation owed to the  
25 applicant.

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**SECTION 4**

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

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

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

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

12           (c) The applicant to same extent as if the nominated person were a secondary  
 13 obligor of the underlying obligation owed to the applicant.

14           (4) Notwithstanding any agreement or term to the contrary, the rights of  
 15 subrogation stated in subs. (1) and (2) do not arise until the issuer honors the letter  
 16 of credit or otherwise pays and the rights in sub. (3) do not arise until the nominated  
 17 person pays or otherwise gives value. Until then, the issuer, nominated person, and  
 18 the applicant do not derive under this section present or prospective rights forming  
 19 the basis of a claim, defense, or excuse.

20           **SECTION 5.** 409.103 (1) (title) of the statutes is amended to read:

21           409.103 (1) (title) ~~DOCUMENTS, INSTRUMENTS, LETTERS OF CREDIT, AND ORDINARY~~  
 22 ~~GOODS.~~

23           **SECTION 6.** 409.103 (1) (a) of the statutes is amended to read:

24           409.103 (1) (a) This subsection applies to documents and, instruments, rights  
 25 to proceeds of written letters of credit. and to goods other than those covered by a

INSERT 22-19

## SENATE BILL 203

1 ~~certificate of title described in sub. (2), mobile goods described in sub. (3), and~~  
2 ~~minerals described in sub. (5).~~

3 ~~SECTION 7. 409.104 (13) of the statutes is amended to read:~~

4 ~~409.104 (13) To a transfer of an interest in any deposit account as defined in~~  
5 ~~s. 409.105 (1), except as provided with respect to proceeds under s. 409.306 and~~  
6 ~~priorities in proceeds under s. 409.312.; or~~

7 ~~SECTION 8. 409.104 (14) of the statutes is created to read:~~

8 ~~409.104 (14) To a transfer of an interest in a letter of credit other than the rights~~  
9 ~~to proceeds of a written letter of credit.~~

10 ~~SECTION 9. 409.105 (3) (cm) of the statutes is created to read:~~

11 ~~409.105 (3) (cm) "Letter of credit" — s. 405.102 (1) (j).~~

12 ~~SECTION 10. 409.105 (3) (dm) of the statutes is created to read:~~

13 ~~409.105 (3) (dm) "Proceeds of a letter of credit" — s. 405.114 (1).~~

14 ~~SECTION 11. 409.106 of the statutes is amended to read:~~

15 ~~409.106 Definitions: "account"; "general intangibles". "Account" means~~  
16 ~~any right to payment for goods sold or leased or for services rendered which is not~~  
17 ~~evidenced by an instrument or chattel paper, whether or not it has been earned by~~  
18 ~~performance. "General intangibles" means any personal property (including things~~  
19 ~~in action) other than goods, accounts, chattel paper, documents, instruments,~~  
20 ~~investment property, rights to proceeds of written letters of credit, and money. All~~  
21 ~~rights to payment earned or unearned under a charter or other contract involving the~~  
22 ~~use or hire of a vessel and all rights incident to the charter or contract are accounts.~~

23 ~~SECTION 12. 409.304 (title) of the statutes is amended to read:~~

24 ~~409.304 (title) **Perfection of security interest in instruments,**~~  
25 ~~**documents, proceeds of a written letter of credit, and goods covered by**~~

SENATE BILL 203

1 **documents; perfection by permissive filing; temporary perfection without**  
2 **filing or transfer of possession.**

3 **SECTION 13.** 409.304 (1) of the statutes is amended to read: ✓✓✓

4 409.304 (1) A security interest in chattel paper or negotiable documents may  
5 be perfected by filing. A security interest in the rights to proceeds of a written letter  
6 of credit may be perfected only by the secured party's taking possession of the letter  
7 of credit. A security interest in money or instruments, other than instruments which  
8 constitute part of chattel paper, can be perfected only by the secured party's taking  
9 possession, except as provided in subs. (4) and (5) and s. 409.306 (2) and (3) on  
10 proceeds.

11 **SECTION 14.** 409.305 of the statutes is amended to read: ✓✓✓

12 **409.305 When possession by secured party perfects security interest**  
13 **without filing.** A security interest in ~~letters of credit and advices of credit (s.~~  
14 ~~405.116 (2) (a)),~~ goods, instruments, money, negotiable documents or chattel paper  
15 may be perfected by the secured party's taking possession of the collateral. A security  
16 interest in the right to proceeds of a written letter of credit may be perfected by the  
17 secured party's taking possession of the letter of credit. If such collateral other than  
18 goods covered by a negotiable document is held by a bailee, the secured party is  
19 deemed to have possession from the time the bailee receives notification of the  
20 secured party's interest. A security interest is perfected by possession from the time  
21 possession is taken without relation back and continues only so long as possession  
22 is retained, unless otherwise specified in this chapter. The security interest may be  
23 otherwise perfected as provided in this chapter before or after the period of  
24 possession by the secured party.

25 **SECTION 15.** 440.92 (3) (c) 3. of the statutes is amended to read: ✓✓✓



**SENATE BILL 203**

1           440.92 (3) (c) 3. The preneed seller files with the department a bond furnished  
2 by a surety company authorized to do business in this state or files with the  
3 department and maintains an irrevocable letter of credit from a financial institution  
4 and the amount of the bond or letter of credit is sufficient to secure the cost to the  
5 cemetery authority of constructing the mausoleum.

6           **SECTION 16.** 565.25 (5) (b) 3. of the statutes is amended to read:

7           565.25 (5) (b) 3. The filing with the department and maintenance of an  
8 irrevocable letter of credit payable to and for the benefit of the department, in an  
9 amount required by the department.

10           **SECTION 17.** 707.49 (4) of the statutes is amended to read:

11           707.49 (4) SURETY BOND AND OTHER OPTIONS. Instead of placing deposits in an  
12 escrow account, a developer may obtain a surety bond issued by a company  
13 authorized to do business in this state, or obtain and maintain an irrevocable letter  
14 of credit or a similar arrangement, in an amount which at all times is not less than  
15 the amount of the deposits otherwise subject to the escrow requirements of this  
16 section. The bond, letter of credit or similar arrangement shall be filed with the  
17 department of agriculture, trade and consumer protection and made payable to the  
18 department of agriculture, trade and consumer protection for the benefit of  
19 aggrieved parties.

20           **SECTION 18. Initial applicability.**

21           (1) This act first applies to a letter of credit that is issued on the effective date  
22 of this subsection.

23           (2) This act first applies to a transaction arising out of or associated with a letter  
24 of credit that was issued on the effective date of this subsection and to the rights,  
25 obligations, and interests flowing from such a transaction.



INSERT 7A:

no 9  
The bill does not affect current law regarding the security interests of issuers of letters of credit or nominated persons.

INSERT 22-19:

1           **405.118 Security interest of issuer or nominated person.** (1) An issuer  
2 or nominated person has a security interest in a document presented under a letter  
3 of credit to the extent that the issuer or nominated person honors or gives value for  
4 the presentation.

5           (2) So long as and to the extent that an issuer or nominated person has not been  
6 reimbursed or has not otherwise recovered the value given with respect to a security  
7 interest in a document under sub. (1), the security interest continues and is subject  
8 to ch. 409, but:

9           (a) A security agreement is not necessary to make the security interest  
10 enforceable under s. 409.203 (2) (c);

11           (b) If the document is presented in a medium other than a written or other  
12 tangible medium, the security interest is perfected; and

13           (c) If the document is presented in a written or other tangible medium and is  
14 not a certificated security, <sup>a</sup> chattel paper, a document of title, an instrument, or a  
15 letter of credit, the security interest is perfected and has priority over a conflicting  
16 security interest in the document so long as the debtor does not have possession of  
17 the document.

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

LRB-3528/1dn  
MDK:.....

Rep. Cullen:

This version of the bill is identical to 2001 Senate Bill 203, except for the following: ✓

1. The bill includes proposed s. 405.118, which was not included in 2001 Senate Bill 203. (Proposed s. 405.118 is identical to s. 405.118 under current law.) ✓
2. As requested by Emory Ireland on behalf of the state bar, the bill makes a change to proposed s. 405.108 (5) to provide that the determination of a financial institution's standard practice (rather than the determination of an issuer's observance of a standard practice) is a matter of interpretation for the court. ✓

Mark D. Kunkel  
Senior Legislative Attorney  
Phone: (608) 266-0131  
E-mail: mark.kunkel@legis.state.wi.us

④ 3. The bill eliminates the changes to ch. 409 that were included in 2001 Senate Bill 203 because ch. 409 ~~the~~ was ~~my~~ substantially amended after 2001 Senate Bill 203 was drafted and those changes are no longer relevant.

→ INSERT TO DRAFTER'S NOTE

2005-2006 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-3528/1ins2  
MDK:.....

4.

INSERT TO DRAFTER'S NOTE:

④ 1. 2001 Senate Bill 203 amended s. 127.07 (6) (a) 2., which has been repealed. It appears that the substance of the repealed provision may have been incorporated into the following provisions: ss. 126.16 (4) (d) 4., 126.31 (4) (d) 4., 126.47 (4) (d) 4., and 126.61 (4) (d) 4. Should the foregoing provisions be revised to refer to DATCP's determination that a letter of credit has expired?

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

LRB-3528/1dn  
MDK:cs:jf

February 15, 2006

Rep. Cullen:

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2. As requested by Emory Ireland on behalf of the state bar, the bill makes a change to proposed s. 405.108 (5) to provide that the determination of a financial institution's standard practice (rather than the determination of an issuer's observance of a standard practice) is a matter of interpretation for the court.
3. The bill eliminates the changes to ch. 409 that were included in 2001 Senate Bill 203 because ch. 409 was substantially amended after 2001 Senate Bill 203 was drafted and those changes are no longer relevant.
4. 2001 Senate Bill 203 amended s. 127.07 (6) (a) 2., which has been repealed. It appears that the substance of the repealed provision may have been incorporated into the following provisions: ss. 126.16 (4) (d) 4., 126.31 (4) (d) 4., 126.47 (4) (d) 4., and 126.61 (4) (d) 4. Should the foregoing provisions be revised to refer to DATCP's determination that a letter of credit has expired?

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**Basford, Sarah**

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**From:** Rostan, Jason

**Sent:** Friday, February 17, 2006 1:56 PM

**To:** LRB.Legal

**Subject:** Draft Review: LRB 05-3528/1 Topic: Uniform Commercial Code, Article 5: Letters of Credit

Please Jacket LRB 05-3528/1 for the ASSEMBLY.