

**STORAGE NAME:** h0515a.fs

**DATE:** March 18, 1999

**HOUSE OF REPRESENTATIVES  
AS REVISED BY THE COMMITTEE ON  
FINANCIAL SERVICES  
ANALYSIS**

**BILL #:** HB 515

**RELATING TO:** Uniform Commercial Code

**SPONSOR(S):** Rep. C. Green

**COMPANION BILL(S):** SB 0740(c)

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) JUDICIARY YEAS 9 NAYS 0
  - (2) FINANCIAL SERVICES YEAS 8 NAYS 0
  - (3)
  - (4)
  - (5)
- 

**I. SUMMARY:**

Article 5 of the Uniform Commercial Code concerns letters of credit (LOC). A LOC is an instrument that participates in the payment system along with drafts, checks, electronic transfers, and money, but it expresses a unique creditor-debtor relationship that distinguishes it from other methods of payment codified under other Articles of the Uniform Commercial Code. The LOC has distinct uses in the extension of credit not shared with other kinds of payments.

The original Article 5 was drafted in the 1950's, and it was enacted into Florida law in 1965 as Chapter 675, and has remained in substantially the same form since its original enactment. The revision of Article 5 was completed in 1995 and has been adopted by a number of states. The revisions include:

- authorizing the use of electronic technology;
- expressly permitting deferred payment letters of credit;
- expressly permitting two-party letters of credit;
- providing rules for unstated expiry dates;
- providing for perpetual letters of credit;
- providing rules for nondocumentary conditions;
- clarifying and establishing rules for successors by operation of law;
- conforming the code to existing practice for assignment of proceeds; and
- clarifying the rules where court decisions have been in conflict.

Letters of credit are used to obtain payment as a backup to other kinds of credit extension and are important in international trade. The revisions explicitly recognize standards of practice, including the Uniform Customs and Practices for Documentary Credits (UCP) which governs many of the particulars of letters of credit.

The bill provides an effective date of July 1, 1999.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Today, electronic and other media are used extensively in the place of the paper transactions originally contemplated by Article 5. Since the 1950's, the standby LOC has developed and now nearly \$500 billion in standby letters of credit are issued worldwide, of which \$250 billion are issued in the United States. The use of the deferred payment LOC has also greatly increased. The industry's customs and practices for LOCs have evolved and are reflected in the Uniform Customs and Practice (UCP), usually incorporated into LOCs. Notwithstanding this compilation of industry practices and customs, in a number of areas, court decisions have resulted in conflicting rules.

**Chapter 675, Florida Statutes**

In 1965, Chapter 675, F.S., was enacted to mirror Article 5 of the Uniform Commercial Code (UCC) on LOCs. Article 5 and Chapter 675, F.S., define *letter of credit* and other key terms, set forth rules for establishing a LOC, provide some basic rules prescribing the obligations of parties to a LOC, and establish basic remedies for the breach of these obligations. Article 5 also indicates that the rules are not intended to be exhaustive of the law applicable to LOCs. For instance, federal bankruptcy law applies to applicants and beneficiaries that are in bankruptcy; regulations of the Federal Reserve Board and the Comptroller of the Currency formulate requirements for banks that issue letters of credit and describe how LOCs are to be treated for calculating asset risk and for the purpose of loan limitations.

**UCC Article 5**

The original Article 5 was promulgated in the late 1950's by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) as part of the original Uniform Commercial Code. The original Article 5 was the first codification of the treatment of LOCs. Since then, the use of LOCs -- particularly standby LOCs -- in domestic and international commerce has grown exponentially. The enormous increase in LOC usage, as well as increased litigation over LOCs and dramatic changes in technology, have exposed weaknesses in the original Article 5.

In 1986, the American Bar Association and the U.S. Council on International Banking, Inc. appointed a task force to study Article 5. The task force identified problems with the original Article 5 and reported possible solutions. In 1990, NCCUSL and ALI appointed drafting committees, which produced a revised Article 5 in 1995, after over 4 years of meetings, deliberations, and proposed drafts. Revised Article 5 has already been enacted in at least 37 states and the District of Columbia.

The Bankruptcy/Uniform Commercial Code Committee and the Financial Institutions Committee of the Florida Bar Business Law Section also studied and reviewed Florida's UCC and issued a report.

**Uniform Customs and Practice**

In 1951, the International Chamber of Commerce adopted a document titled: *Uniform Customs and Practices for Commercial Documentary Credits*, more commonly referred to as the Uniform Customs and Practice or the UCP. The UCP is an international body of trade practice that is commonly adopted by international and domestic LOCs. This compilation of customs and practices has no independent legal force other than as a source of evidence of custom. The UCP is updated every decade and is much relied upon in international trade. Provisions of the UCP may be specifically incorporated into LOCs, and as such they constitute the "law of transaction" by agreement of the parties. The most current version (UCP 500) became effective in 1994.

### **Letters of Credit**

A LOC is an engagement by a bank or other person made at the request of a customer and of a kind that the issuer will honor drafts or other demands of payment upon compliance with the conditions specified in the LOC. These letters may be divided into two types: (1) the commercial letter (also known as the documentary letter); and (2) the standby letter (also known as the guaranty letter).

#### Commercial Letter of Credit

The commercial LOC is widely used as a means of payment for merchandise imported into and exported from the country. The commercial letter is one issued by a bank at the request of a customer who is usually a purchaser of goods in an underlying sales transaction. The letter obligates the bank to pay the seller (identified in the LOC as the beneficiary) upon the presentation of the draft drawn in accordance with terms of the credit and documents complying with the specifications in the credit. The LOC operates as a substitution of the bank's credit or reputation for the credit or reputation of the customer. In a documentary LOC, it is the bank's expectation that a drawing will be made against it.

The bank's obligation to pay the beneficiary arises from the presentment of the drafts and documents complying with the terms of the LOC. Disputes between a seller and a buyer concerning the underlying contract for the goods or services themselves are rarely, if ever, the subject of a dispute with the issuer.

#### Standby Letter of Credit

The primary difference between a documentary LOC and a standby LOC is the issuer's expectation. The function of a standby LOC is to provide a financial resource to the beneficiary in the event that the other party to the underlying contract does not perform the contract. It is the bank's expectation that the standby LOC will not be drawn upon, but that the customer will perform the underlying contract and avoid the necessity of a draw by the beneficiary.

### **B. EFFECT OF PROPOSED CHANGES:**

See, Part E. SECTION-BY-SECTION ANALYSIS, for a detailed explanation.

### **C. APPLICATION OF PRINCIPLES:**

#### **1. Less Government:**

##### **a. Does the bill create, increase or reduce, either directly or indirectly:**

##### **(1) any authority to make rules or adjudicate disputes?**

By resolving a number of the case conflicts which have emerged since the original draft of Article 5, the revised Article 5 may result in less litigation.

##### **(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?**

N/A

##### **(3) any entitlement to a government service or benefit?**

N/A

##### **b. If an agency or program is eliminated or reduced:**

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

- (3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

- b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The revisions in Article 5 are designed to accommodate new forms of payment technology and this will result in more options of businesses in payment and in international trade.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

All current Sections of Chapter 675, F.S., Section 671.105(2)(d), F.S., Section 672.512, F.S., Section 679.103, F.S., Section 679.104, F.S., Section 679.105, F.S., Section 679.106, F.S., Section 679.304, F.S., Section 679.305, F.S.

E. SECTION-BY-SECTION ANALYSIS:

**Section 1.** Substantially amends Sections 675.101 through 675.117, F.S.

- Revised Section 675.101, F.S. provides a short title.
- Revised Section 675.102, F.S. limits the scope of Chapter 675, F.S., to LOCs and certain rights and obligations arising out of transactions involving LOCs. The definition of "Letter of Credit" in s. 675.103, F.S., and this s. 675.102, F.S. are the principal limits on the rights and obligations

conferred by Article 5 of the UCC. The revised Article 5 applies to LOCs only and not to a secondary or accessory guarantee, as in a suretyship transaction, in which the guarantor is only secondarily liable and has the right to assert the underlying debtor's defenses. (It is often a defense to a secondary guarantor's liability that the underlying debt has been discharged.) The independence principle, or the fact that the issuer's liability is independent of the underlying obligation, is continued from the current Article 5. This revised section indicates that the rules of Article 5 may be varied by agreement or incorporated by reference in an undertaking, which is a direct reference to the UCP, unless otherwise prohibited. The disclaimer limitation of the last sentence provides that what the issuer could achieve by an explicit agreement with its applicant, or by a term that explicitly defines its duty, it cannot accomplish by a general disclaimer.

- Revised Section 675.103, F.S., provides definitions. Certain definitions in existing Florida law have been revised, and definitions of terms that are commonly used by the industry but not defined in Florida Statutes are created. The revised definition of "**document**" contemplates and facilitates the growing recognition of electronic and other nonpaper media as "documents," however, for the time being, data in those media constitute documents only in certain circumstances. For example, a facsimile received by an issuer would be a document only if the LOC explicitly authorized it, if the standard practice did not prohibit it and the LOC did not prohibit it, or the agreement of the parties permitted it.

The exclusion of consumers from the revised definition of "**issuer**" is intended to keep creditors from using a LOC in consumer transactions in which the consumer might be made the issuer and the creditor would be the beneficiary. If that transaction were recognized under Article 5, the effect would be to leave the consumer without a defense against the creditor. That outcome would violate the policy behind the Federal Trade Commission Rule in 16 CFR Part 433.

Other revised definitions include "**beneficiary**," "**document**," "**letter of credit**," and "**presenter**"

"**Good faith**" is defined as "honesty in fact." The narrower definition (as contrasted with the contemplated change to "observance of reasonable standards of fair dealing") reinforces the "independence principle" in the treatment of "fraud," "strict compliance," "preclusion" and other tests affecting the performance of obligations that are unique to a LOC. This narrower definition -- which does not include fair dealing -- is appropriate to the decision to honor or dishonor a presentation of documents specified in a LOC. The narrower definition is also appropriate for other parts of Article 5 where greater certainty of obligations is necessary and is consistent with the goals of speed and low cost. It is important that United States' LOCs have continuing vitality and competitiveness in international transactions.

"**Nominated Person**" is defined as the one whom the issuer authorizes to pay, accept, negotiate, or otherwise give value under a LOC (the beneficiary is authorized to make presentation to the nominated person). A nominated person that gives value in good faith has a right to payment from the issuer despite fraud.

There are several legal consequences that may attach to the status of nominated person. First, when the issuer nominates a person, it is authorizing that person to pay or give value and is authorizing the beneficiary to make presentation to that person. Unless the LOC provides otherwise, the beneficiary need not present the documents to the issuer before the LOC expires; it need only present those documents to the nominated person. Secondly, a nominated person that gives value in good faith has a right to payment from the issuer despite fraud. See, the revised s. 675.109(1)(a)1., F.S.

Other new definitions include "**adviser**," "**applicant**," "**confirmer**," "**dishonor**," "**honor**," "**nominated person**," "**presentation**," "**record**," and "**successor of a beneficiary**."

- Revised Section 675.104, F.S., provides the formal requirements for an LOC. The current law requires the LOC to be "in writing" and "signed by the issuer," however, the revised section provides that the LOC must be a "record" and must be authenticated either by a signature or in accordance with the agreement of the parties or standard practice. A "record" is a much broader term than a "writing" and is crafted to leave more room for technological changes that may affect LOC transactions in the future. The term "standard practice" should afford the flexibility to accommodate future developments in the UCP and other practice rules.

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- Revised Section 675.105, F.S., provides that consideration is not required to issue, amend, transfer, or cancel an LOC, advice of credit, or confirmation of an LOC. This section is consistent with current Florida law and with long standing precedent established by Lord Mansfield in *Pillans v. Van Mierop*, 97 Eng.Rep. 1035 (K.B. 1765) declaring consideration irrelevant.
- Revised Section 675.106, F.S., concerns the issuance, amendment, cancellation, and duration of LOCs, and provides that LOC's are enforceable when transmitted by the issuer to the beneficiary or person requested to advise. Parties to an LOC that do not consent to its amendment are not bound by the amendment, except to the extent that the LOC provides that it is revocable or that the issuer may amend or cancel the LOC without the parties' consent. This revised section also codifies the rulings of several courts, namely that letters of credit that are silent as to revocability are irrevocable. See *Weyerhaeuser Co. v. First Nat. Bank*, 27 UCC Rep, Serv. 777 (S.D. Iowa 1979); *West Va. Hous. Dev. Fund v. Sroka*, 415 F. Supp 1107 (W.D. Pa. 1976). This is consistent with the position of the current UCP (500). If there is no stated date of expiration, an LOC expires one year after its stated or actual date of issuance; if the LOC states that it is perpetual, it expires 5 years after its stated or actual date of issuance.
- Revised Section 675.107, F.S., provides for the rights and responsibilities of the confirmer, the nominated person, and the adviser.

A confirmer has the rights and obligations identified in the revised s. 675.108, F.S. Accordingly, unless the context otherwise requires, the terms "confirmer" and "confirmation" should be read into this article wherever the terms "issuer" and "letter of credit" appear.

A confirmer that has paid in accordance with the terms and conditions of an LOC is entitled to reimbursement by the issuer even if the beneficiary committed fraud (See, revised s. 675.109(1)(a)2., F.S.) and, in that sense, has greater rights against the issuer than the beneficiary has against the issuer. To be entitled to reimbursement from the issuer under the typical confirmed LOC, the confirmer's presentation to the issuer need not be made before the expiration date of the LOC.

No one has a duty to advise until that person agrees to be an advisor or undertakes to act in accordance with the instructions of the issuer. Since there is no duty to advise a LOC in the absence of a prior agreement, there can be no duty to advise it timely or at any particular time. When the adviser manifests its agreement to advise by actually doing so (as is normally the case), the adviser cannot have violated any duty to advise in a timely way. The court in *Sound of Market Street v. Continental Bank International*, 819 F.2d 384 (3d Cir. 1987) held that there is no such duty. This revised section does not overrule the result. By advising or agreeing to advise a LOC, the adviser assumes a duty to the issuer and to the beneficiary accurately to report what it has received from the issuer, but, beyond determining the apparent authenticity of the letter, an adviser has no duty to investigate the accuracy of the message it has received from the issuer.

When the issuer nominates another person to “pay,” “negotiate,” or otherwise to take up the documents and give value, there may be confusion about the legal status of the nominated person. In most cases the nominated person is not an agent of the issuer and has no authority to act on the issuer’s behalf. Its “nomination” allows the beneficiary to present to it and earns it certain rights to payment under the revised s. 675.109, F.S., that others do not enjoy.

- Revised Section 675.108, F.S., provides for the issuer’s rights and obligations, and combines some of the duties previously included in current law, s. 675.114 and s. 675.109, F.S. Due to the fact that a confirmer has the rights and duties of an issuer, this revised section applies equally to a confirmer and an issuer.

The standard of strict compliance governs the issuer’s obligation to the beneficiary and to the applicant. By requiring that a “presentation” appear strictly to comply, this revised section requires not only that the documents themselves appear on their face strictly to comply, but also that the other terms of the letter of credit such as those dealing with the time and place of presentation are strictly followed.

Strict compliance does not mean slavish conformity to the terms of the LOC. For example, standard practice (what issuers do) may recognize certain presentations as complying that an unschooled layman would regard as discrepant. By adopting standard practice as a way of measuring strict compliance, this revised section endorses the ruling of the court in *New Braunfels Nat. Bank v. Odiome*, 780 S.W.2d 313 (Tex.Ct.App. 1989) (beneficiary could collect when draft requested payment on ‘Letter of Credit No. 86-122-5’ and, the LOC specified in “Letter of Credit No. 86-122-S,” holding that strict compliance does not demand oppressive perfectionism).

The revised s. 675.108, F.S., balances the need of the issuer for time to examine the documents against the possibility that the examiner (at the urging of the applicant or for fear that it will not be reimbursed) will take excessive time to search for defects.

Under both the UCC and the UCP the issuer has a reasonable time to honor or give notice. That is measured in seven business days under the UCC and in banking days under the UCP, a difference that will rarely be significant. The seven-day period is not a safe harbor, and the time within which the issuer must give notice is the lesser of a reasonable time or seven business days. Where there are few documents the reasonable time could be less than seven days. If more than a reasonable time is consumed in examination, no timely notice is possible. What is a “reasonable time” is to be determined by examining the behavior of those in the business of examining documents, mostly banks.

The issuer’s time to inspect runs from the time of its “receipt of documents.” Documents are considered to be received only when they are received at the place specified for presentation by the issuer or other party to whom presentation is made.

Failure by the issuer to act within the time permitted by subsection (2) constitutes dishonor. Because of the preclusion in subsection (3) from asserting as a basis for dishonor any discrepancy if timely notice is not given, and the liability that the issuer may incur under the revised s. 675.111, F.S., for wrongful dishonor, the effect of such a silent dishonor may ultimately be the same as though the issuer had honored, i.e., it may owe damages in the amount drawn but unpaid under the letter of credit.

The requirement that the issuer send notice of the discrepancies or be precluded from asserting discrepancies is new to Article 5. It is taken from the similar provision in the UCP and is intended to promote certainty and finality. The section thus substitutes a strict preclusion principle for the doctrines of waiver and estoppel that might otherwise apply.

To act within a reasonable time, the issuer must normally give notice without delay after the examining party makes its decision. If the examiner decides to dishonor on the first day, it would be obliged to notify the beneficiary shortly thereafter, perhaps on the same business day. This rule accepts the reasoning in cases such as *Datapoint Corp. v. M&I Bank*, 665 F. Supp. 722 (W.D. Wis. 1987) and *Esso Petroleum Canada, Div. of Imperial Oil, Ltd. v. Security Pacific Bank*, 710 F. Supp. 275 (D. Ore. 1989).



This revised section serves to deprive the examining party of the right simply to sit on a presentation that is made within seven days of expiration. The section requires the examiner to examine the documents and make a decision and, having made a decision to dishonor, to communicate promptly with the presenter.

Confirmers, other nominated persons, and collecting banks acting for beneficiaries can be presenters and, when so, are entitled to the notice provided in subsection (2).

In many cases a LOC authorizes presentation by the beneficiary to someone other than the issuer. Sometimes that person is identified as a "payor" or "paying bank," or as an "acceptor" or "accepting bank," or in other cases as a "negotiating bank." The section does not impose any duties on a person other than the issuer or confirmer.

The issuer's obligation to honor runs not only to the beneficiary but also to the applicant. A good faith extension of the time by agreement between the issuer and beneficiary would bind the applicant even if the applicant is not consulted or does not consent to the extension.

The issuer's obligation to dishonor when there is no apparent compliance with the LOC runs only to the applicant. Except as otherwise agreed with the applicant, an issuer may dishonor a noncomplying presentation despite an applicant's waiver.

Waiver of discrepancies by an issuer or an applicant in one or more presentations does not waive similar discrepancies in a future presentation, a concept accepted with the federal Fourth Circuit Court of Appeal ruling in *Courtaulds of North America Inc. v. North Carolina Nat. Bank*, 528 F.2d 802 (4th Cir. 1975).

The standard practice referred to in subsection (5) includes:

- the international practice set forth in or referenced by the UCP;
- other practice rules published by associations of financial institutions; and,
- local and regional practice.

A practice may be overridden by agreement or course of dealing.

Subsection (7) recognizes that LOCs sometimes contain nondocumentary terms or conditions. Conditions such as a term prohibiting "shipment on vessels more than 15 years old," are to be disregarded and treated as surplusage. The subsection would not permit the beneficiary or the issuer to disregard terms in the letter of credit such as place, time, and mode of presentation.

An issuer is entitled to reimbursement from the applicant after honor of a forged or fraudulent drawing if honor was permitted under the revised s. 675.108(1), F.S.

The last clause of the revised s. 675(9)(e), F.S., deals with a special case in which the fraud is not committed by the beneficiary, but is committed by a stranger to the transaction who forges the beneficiary's signature. If the issuer pays against documents on which a required signature of the beneficiary is forged, it remains liable to the true beneficiary.

- Revised Section 675.109, F.S. governs fraud and forgery, and provides circumstances in which an issuer must honor or dishonor a presentation when a required document is forged or materially fraudulent or if honoring the presentation would then facilitate a material fraud. This revised section restates Florida law and further states that, in order to be applicable to this section, the beneficiary must have committed the fraud on the issuer or the applicant and that the fraud must be "material."

This recodification makes clear that fraud must be found either in the documents or must have been committed by the beneficiary on the issuer or applicant. See *Cromwell v. Commerce & Energy Bank*, 464 So.2d 721 (La. 1985). Secondly, it makes clear that fraud must be material, which is usually an issue for the trier of fact.

Material fraud by the beneficiary occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor.

The revised s. 675.109(1)(b), F.S., makes clear that the issuer may honor in the face of the applicant's claim of fraud. The subsection also makes clear what was not stated in former Section 675.114, F.S., that the issuer may dishonor and defend that dishonor by showing fraud or forgery of the kind stated in subsection (1).

The revised s. 675.109(1)(a), F.S., also protects specified third parties against the risk of frauds by:

- a nominated person who has given value in good faith and without notice of forgery or material fraud;
- a confirmer who has honored its confirmation in good faith;
- a holder in due course of a draft drawn under the LOC which was taken after acceptance by the issuer or nominated person; or
- an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person.

In all other cases, the issuer in good faith may honor or dishonor the presentation.

Current section 675.114(2)(b), F.S., provides that a court of competent jurisdiction may enjoin the honor of a forged or fraudulent letter of credit, but the section does not impose thresholds for the issuance of an injunction. The revised section, however, sets forth thresholds that must be met before a court may impose a temporary or permanent injunction:

- the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;
- a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss it may suffer because the relief is granted;
- all of the conditions to entitle a person to the relief under the law of Florida have been met; and
- on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (1)(a) of this part.

Some courts may decline to issue an injunction against a draw on a LOC because the party seeking the injunction has an adequate remedy at law - a claim for money damages. This revised section provides that a party seeking an injunction has other thresholds to cross but does not need to prove the lack of an adequate remedy at law.

- Revised Section 675.110, F.S., enumerates a beneficiary's warranties relating to LOCs. Warranties apply only when the presentation is honored. Current law in s. 675.111, F.S., provides that the beneficiary warrants "to all interested parties that the necessary conditions of credit have been complied with" (emphasis added). This revised section, however, limits the persons to whom the beneficiary provides warranties and the types of warranties provided. In the revised section, the beneficiary warrants to the issuer, the applicant, and any other person to whom presentation is made, that there is no fraud or forgery.

Under current Florida law, the beneficiary warrants that "the necessary conditions of credit will be complied with," and the current law incorporates warranties in chapters 673, F.S. (*Negotiable Instruments*), 674, F.S. (*Bank Deposits and Collections*), 677, F.S. (*Documents of Title*), and 678, F.S. (*Investment Securities*) (UCC Articles 3, 4, 7, and 8). The revised section's warranty is narrower, encompassing only fraud and forgery, drawings that violate agreements secured by the LOC, and other warranties in Articles 2 (*Sales*), 3, 4, 7, and 8.

Since the warranties in subsection (1) are not given unless a letter of credit has been honored, no breach of warranty under this subsection can be a defense to dishonor by the issuer. Any defense must be based on s. 675.108, or s. 675.109, F.S., and not on this section. Also, breach of the warranties by the beneficiary in subsection (1) cannot excuse the applicant's duty to reimburse.

The warranty in the revised s. 675.110(1)(b), F.S., assumes that payment under the letter of credit is final. It does not run to the issuer, only to the applicant. In most cases the applicant will

have a direct cause of action for breach of the underlying contract. This warranty has primary application in standby letters of credit or other circumstances where the applicant is not a party to an underlying contract with the beneficiary.

The damages for breach of warranty are not specified in the revised s. 675.111, F.S., however, courts may find analogous damage applications in s. 672.714, F.S. (Sales), and in warranty decisions under Chapter 673, F.S. (Negotiable instruments), and Chapter 674, F.S. (Bank deposits and collections).

Unlike wrongful dishonor cases -- where the damages usually equal the amount of the draw -- the damages for breach of warranty will often be much less than the amount of the draw, sometimes zero. The applicant's damages for breach of the warranty in subsection (1)(b) may be limited to the damages it could recover for breach of the contract of sale.

- Revised Section 675.111, F.S., describes the remedies available for wrongful dishonor or repudiation relating to a LOC. This revised section is a recodification, with some additions, to present s. 675.115, F.S.

Existing law allows for the recovery of the face value of the draft "... together with incidental damages..." The revised section offers 6 subparts which clearly defines remedies:

- (1) the issuer may be responsible for either money damages or specific performance (when the issuer's obligation is not the payment of money) in an action for wrongful dishonor or repudiation of the issuer's obligation under a LOC;
- (2) the issuer may be responsible for damages to the applicant resulting from the wrongful dishonor or honor of a draft or demand presented under a LOC;
- (3) provides a catch-all provision for an issuer's breach of obligations not covered in paragraphs (1) or (2), and creates liability for an advisor or nominated person other than a confirmer that breaches an obligation;
- (4) an issuer, nominated person, or an adviser found liable under paragraphs (1), (2), or (3) must pay interest on the amount owed from the date of the dishonor;
- (5) requires the court to award attorneys fees and costs to the prevailing party; and
- (6) provides for liquidation of damages pursuant to an undertaking, "but only in an amount or by a formula that is reasonable in light of the harm anticipated."

The right to specific performance is new. The express limitation on the duty of the beneficiary to mitigate damages adopts the position of certain courts and commentators. Because the letter of credit depends upon speed and certainty of payment, it is important that the issuer not be given an incentive to dishonor. The issuer might have an incentive to dishonor if it could rely on the burden of mitigation falling on the beneficiary.

Almost all letters of credit, including those that call for an acceptance, are "obligations to pay money" as that term is used in subsection (1).

Consequential damages for breach of obligations under this article are excluded in the belief that these damages can best be avoided by the beneficiary or the applicant and out of the fear that imposing consequential damages on issuers would raise the cost of the letter of credit to a level that might render it uneconomic.

The section does not specify a rate of interest, but leaves that to the court's discretion.

The court must award attorney's fees to the prevailing party, whether that party is an applicant, a beneficiary, an issuer, a nominated person, or advisor. Since the issuer may be entitled to recover its legal fees and costs from the applicant under the reimbursement agreement, allowing the issuer to recover those fees from a losing beneficiary may also protect the applicant against undeserved losses. Determining which is the prevailing party is in the discretion of the court.

- Revised Section 675.112, F.S., concerns the transfer of a LOC. In order to protect the applicant's reliance on the designated beneficiary, LOC law traditionally has forbidden the beneficiary to convey to third parties its right to draw or demand payment under the LOC. Subsection (1) codifies that rule and is consistent with language found in current law, s. 675.116, F.S. The term "transfer" refers to the beneficiary's conveyance of that right. Absent incorporation of the UCP

(which make elaborate provision for partial transfer of a commercial LOC) or similar trade practice and absent other express indication in the LOC that the term is used to mean something else, a term in the LOC indicating that the beneficiary has the right to transfer should be taken to mean that the beneficiary may convey to a third party its right to draw or demand payment. Even in that case, the issuer or other person controlling the transfer may make the beneficiary's right to transfer subject to conditions, such as timely notification, payment of a fee, delivery of the LOC to the issuer or other person controlling the transfer, or execution of appropriate forms to document the transfer. A nominated person who is not a confirmer has no obligation to recognize a transfer.

The issuance of a transferable LOC with the concurrence of the applicant is an agreement by the issuer and applicant to permit a beneficiary to transfer its drawing right and permit a nominated person to recognize and carry out that transfer without further notice to them.

By agreeing to the issuance of a transferable LOC, which is not qualified or limited, the applicant may lose control over the identity of the person whose performance will earn payment under the LOC.

- Revised Section 675.113, F.S., concerns a transfer of a LOC by operation of law. This section recognizes the rights of successors to beneficiaries by operation of law to make presentation and receive payment or acceptance of a LOC. Current Florida law neither requires an issuer to recognize a successor's interest nor provides a manner in which a successor may exercise its rights as a beneficiary. The revised section, however, provides that successors by operation of law (e.g., presentation of a certificate of merger, a court order appointing a bankruptcy trustee or receiver, or a certificate of appointment as bankruptcy trustee) enjoy all the protections of the beneficiary and may exercise all of the rights of the beneficiary either in their own name or in the name of the beneficiary, subject only to reasonable requirements imposed for the protection of the issuer.

This revised section affirms the result in *Pastor v. Nat. Republic Bank of Chicago*, 76 Ill.2d 139, 390 N.E.2d 894 (Ill. 1979) and *Federal Deposit Insurance Co. v. Bank of Boulder*, 911 F.2d 1466 (10th Cir. 1990).

An issuer's requirements for recognition of a successor's status might include presentation of a certificate of merger, a court order appointing a bankruptcy trustee or receiver, a certificate of appointment as bankruptcy trustee, or the like. The issuer is entitled to rely upon such documents which on their face demonstrate that presentation is made by a successor of a beneficiary. It is not obliged to make an independent investigation to determine the fact of succession.

- Revised Section 675.114, F.S., governs the assignment of proceeds and provides for the beneficiary's right to the proceeds of an LOC. According to the comments for section 14 in the Bar Report, the revised section does not appear to alter existing Florida law, "although it clarifies the rights of the beneficiary to assign its interest in the proceeds."

The revised section expressly validates the beneficiary's present assignment of LOC proceeds if made after the credit is established but before the proceeds are realized. The section governs the priority of the assignee's rights against a nominated person or a transferee beneficiary, as well as the assignee's rights to enforce the assignment.

The issuer or nominated person is required to consent to the assignment of proceeds of a LOC. This requirement recognizes national and international LOC practices, more so than did prior law. Because the issuer retains the right to require exhibition of the original LOC, it is advisable for the assignee to secure the consent of the issuer in order to better safeguard its rights to the proceeds.

The mode of creating or perfecting a security interest in or granting an assignment of a beneficiary's rights to proceed continues to be governed by Chapter 679, F.S. (Secured Transactions) and Article 9 of the UCC.

- Revised Section 675.115, F.S., provides for a one year statute of limitations for legal actions brought under Chapter 675, F.S.

An aggrieved party must commence a suit to enforce a right or obligation arising under this chapter within one year after the expiration date of the subject LOC or within one year after the cause of action accrues, whichever is later. The accrual date for the cause of action is defined as the date on which the breach occurred, regardless of the aggrieved party's lack of knowledge of the breach. According to the Bar Report, this provision expressly rejects the "discovery rule" for purposes of determining when the statute of limitations begins to run, which is applicable in Florida with respect to certain causes of action.

- Revised Section 675.116, F.S., provides that the parties to an LOC may, in the terms of the LOC, a confirmation, or other undertaking or agreement, with respect to the liability of an issuer, nominated person, or adviser, choose the law of any jurisdiction as controlling.

If the parties have not chosen a controlling legal jurisdiction in the terms of the LOC, the confirmation, or other undertaking or agreement, the liability of an issuer, nominated person or adviser would be governed by the law of the jurisdiction where the person is located. Each branch of a bank would be deemed a separate juridical entity and the relevant branch would be considered to be the location of the bank.

If the parties expressly incorporate rules of custom and practice (UCP), those rules would govern, except to the extent the rules conflict with the "non-variable" provisions specified in the revised s. 675.103(3), F.S.

The revised section also validates a forum selection provision in the parties' agreement in the same manner as the choice of law section.

- Revised Section 675.117, F.S., concerns subrogation of the issuer, the applicant, and the nominated person and outlines the rights of these parties in a completed LOC transaction. The revised section provides that an issuer which has honored a draw would be subrogated (or substituted) to the beneficiary's or applicant's rights to the same extent as if the issuer were a secondary obligor of the underlying obligation owed. According to the Official Comments section to 5-117, this section does not grant any right of subrogation, but grants the right that would exist if the person seeking subrogation were a secondary obligor (which refers to a surety). If the secondary obligor would not have a right to subrogation (because its payment did not fully satisfy the underlying obligation, for instance), none is granted by this section.

An applicant which reimburses the issuer would be subrogated to the issuer's rights against the beneficiary, presenter or nominated person as if the applicant were a secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary as provided in the immediate subsection.

A nominated person who pays or gives value would be subrogated to the rights of (1) the issuer against the applicant, (2) the beneficiary, and (3) the applicant, as if the nominated person were a secondary obligor.

The revised section provides that only the person who has completed its performance in a LOC transaction can exercise a right to subrogation. According to the Official Comments section to UCC 5-117, this section was added to preserve the independence of the LOC obligation and to insure that subrogation not be used as an offensive weapon by an issuer or others. For example, an issuer may not dishonor and then defends its dishonor or assert a set-off on the ground that it is subrogated to another's rights.

**Section 2.** Amends s. 671.105, F.S. (1998 Supp.)(General Provisions of the UCC), providing that in matters concerning LOCs the territorial application of the UCC shall be governed by Section 675.116, F.S.

**Section 3.** Amends s. 672.512, F.S. (Sales), conforming the injunction reference to former s. 675.114, F.S., to the revised s. 675.109 (2), F.S.

**Section 4.** Amends s. 679.103, F.S. (1998 Supp.)(Secured transactions), adding the rights to proceeds of written letters of credit to the perfection of security interests in multiple state transactions.

**Section 5.** Amends s. 679.104, F.S., excluding a transfer of an interest in a LOC other than the rights to the proceeds of the written letter of credit from the provisions of Chapter 679, F.S.

**Section 6.** Amends Section 679.105, F.S. (1998 Supp.), adding the definition of Letter of Credit and Proceeds of Letter of Credit, both as defined in Chapter 675, F.S., to the index of definitions for this chapter.

**Section 7.** Amends Section 679.106, F.S. (1998 Supp.), adding the rights to the proceeds of written letters of credit to the definition of "general intangibles" in this chapter.

**Section 8.** Amends Section 679.304, F.S. (1998 Supp.), adds LOCs to the section addressing the perfection of security interests and also provides that a security interest in the rights to proceeds of a written LOC may be perfected only by the secured party's taking possession of the LOC.

**Section 9.** Amends Section 679.305, F.S. (1998 Supp.), deleting a reference to current s. 675.116, F.S., and providing that a security interest in the rights to proceeds of a written LOC may be perfected by the secured party's taking possession of the LOC.

**Section 10.** Provides that the bill applies to any LOC issued after July 1, 1999, and specifically stating that legal actions arising under LOCs dated before July 1 are not meant to be included.

**Section 11.** Provides that transactions arising out of LOC issued before July 1, 1999, are governed by the existing law as if it had not been amended.

**Section 12.** Provides an effective date of July 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

This bill conforms Florida law to the current UCC in the area of letters of credit. Modern language contained in the revised Article 5 conforms Florida law with international law and practice, which may help facilitate international trade. The precise impact on the private sector cannot be determined.

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

**Summary published by the National Conference of Commissioners on Uniform State Laws**  
(<http://www.nccusl.org/summary/ucc5.html>)<sup>1</sup>

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<sup>1</sup> Founded in 1892, the National Conference of Commissioners on Uniform State Laws is a private confederation of state commissioners on uniform laws. Its membership is comprised of more than 300 practicing attorneys, judges, and law professors, who are appointed by each of the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, to draft uniform and model state laws and work toward their enactment in legislatures. Since its inception in 1892, the group has promulgated more than 200 acts, among them such bulwarks of state statutory law as the Uniform Commercial Code, the Uniform Probate Code, and the Uniform Partnership Act.

The State of Florida in s. 13.10, F.S., provides for the appointment of three commissioners to the National Conference of Commissioners on Uniform State Laws. The Commissioners are appointed by the Governor and confirmed by the Senate. They are typically professors or other experts in the areas of law in which the Conference is most active.

UNIFORM COMMERCIAL CODE  
REVISED ARTICLE 5. LETTERS OF CREDIT

- A Summary -

A "letter of credit" is an instrument that participates in the payment system along with drafts, checks, electronic fund transfers, and money. But it expresses a unique creditor-debtor relationship that distinguishes it from the other methods of payment that are codified under the Uniform Commercial Code, and has distinct uses in the extension of credit not shared with other kinds of payment. It is specifically defined in Revised Article 5 as an undertaking by an "issuer" of the credit to a "beneficiary," the individual who gets paid, on behalf of an "applicant," the individual to whom credit is extended by the "issuer." As defined, payment requires the presentation of a document, usually a draft on behalf of the beneficiary to the issuer.

Commonly, the issuer is (but not necessarily) a bank or similar financial institution. Commonly, the applicant is a customer of that bank, and the beneficiary is somebody with whom the applicant is doing business and who wants assurance that he or she will be paid.

A typical example of a letter of credit involves an American company intending to buy goods from a European manufacturer. The European manufacturer is willing to do business providing that it has assurances of payment for the goods that are to be purchased. The American company applies to its bank, with which it has accounts and lines of credit, for a letter of credit. The bank issues a document that is in actual letter form. In that letter it guarantees to the manufacturer that it will pay money up to a certain amount, upon receipt of an appropriate document, usually a draft, on behalf of the manufacturer. The letter contains any other documentary conditions agreed upon.

The applicant then takes the letter to the manufacturer while negotiating the purchase of the goods. The letter provides guarantee of payment, facilitating the transaction. At the appropriate time in the transaction, the manufacturer is paid upon presentation of the draft to the bank. Then the bank debits the appropriate account of the American company or establishes whatever creditor-debtor relationship is contemplated between it and the American company. Ultimately the bank is paid.

It is possible that there will be other parties to the transaction recognized by law. There may be a "confirmer" on the letter. The confirmer may be another institution or individual obligated to pay on the letter when the appropriate document is presented by the beneficiary. In the example, to facilitate payment, the American bank engages a European bank as a confirmer so the foreign manufacturer will actually present the required draft for payment to the foreign bank. A confirmer is always liable on a letter of credit.

There may also be an "advisor" on a letter of credit. The advisor is a third party who facilitates the transaction by advising the beneficiary either directly or through another advisor that the letter of credit has been issued, confirmed, or amended. Institutions or individuals acting as advisors give beneficiaries an added assurance that a letter of credit is valid. In the example, the American bank can employ the services of another foreign bank to notify the foreign manufacturer that the letter of credit has been issued in the name of the manufacturer. An advisor does not have direct liability on the letter of credit.

The letter of credit is of particular importance in international trade. With different payment systems in different countries, different laws governing fundamental transactions, business deals that must be transacted between strangers who are domiciled in different countries and who speak different languages, the letter of credit has become a common and accepted method of guaranteeing and obtaining payment.

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Uniformity is best achieved through substantial uniformity of both drafting and construction of the laws of the various states and territories. As practices develop over time and new challenges confront existing law, the various committees of the National Conference promulgates draft Codes for consideration by the National Conference and the various states. The goal of uniformity is reached when legislatures adopt identical codes, and when the state judiciaries honor the intent that the uniform codes be interpreted in a uniform way.

The "official comments" published with the draft laws official proposed by the Conference constitute a primary source of the drafters' intent and a guide to interpreting the complex areas covered by the uniform laws promulgated by the Conference. The Conference also published summaries and historical information to assist practitioners and students of the law. The Conference has an Internet web site at [www.nccusl.org](http://www.nccusl.org).



The foreign company has the comfort of the credit of the large, well-known financial institution when doing business with the domestic company.

The expansion of foreign trade is partly responsible for the large increase in the use of letters of credit in the United States. But there are other factors that have increased the use. Letters of credit generally are either ordinary commercial credits or standby letters of credit. The transaction used to illustrate typical use above involves an ordinary commercial credit. Standby letters of credit are used to back-up other primary creditor-debtor relationships, and in that sense are widely used in financing real estate development. What kind of large increase in use has occurred in the United States? In 1950 there were an estimated one-half billion dollars in outstanding credits. In 1989, the figure was \$200 billion. Thus the need to revise Uniform Commercial Code Article 5 - Letters of Credit. That job is now complete.

The basic scheme of Article 5 does not change in the revision. The drafters' original intent was to provide a theoretical framework which would accommodate business practices however they would evolve. Original Article 5 defines the letter of credit and key terms, sets rules for establishing a letter of credit, provides some very basic rules prescribing the obligations of parties to a letter, including the obligations of confirmers and advisors, and establishes basic remedies for breach of these obligations. Revised Article 5 continues these objectives.

But Revised Article 5 leaves larger room for the evolution of business practices. Revised Article 5 does not change this basic orientation of the original drafters, except it considerably simplifies the rules.

For example, original Article 5 has rules for "notation credits" which are defined as credits that are payable only upon a notation of the amount of the payment on the actual letter. Honor of the draft or demand for payment requires the notation. This concept is not continued in Revised Article 5. It is one of those formal requirements with legal effect that results in dishonor of otherwise perfectly presented drafts or documents, impeding legitimate transactions.

Original Article 5 permits beneficiaries to use portions of a credit unless otherwise specified. Revised Article 5 simply leaves the issue to existing standards of practice. This is another example of simplification in the Revised Article 5.

The primary reason for such simplifications is the specific inclusion of standards of practice in Revised Article 5. It provides that "An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of that standard practice is a matter of interpretation for the court." The original Article 5 assumes that standards of practice are assumable as a matter of contract between the parties to a letter of credit. In Revised Article 5, the standards apply unless the contract otherwise specifies.

Standards of practice for letters of credit are very well formalized. First and foremost are the Uniform Customs and Practices for Documentary Credits (UCP), ICC Publication No. 500, which are promulgated by the International Chamber of Commerce. The UCP is updated on a decadal basis, and is much relied upon in international trade as a common language of letter of credit transactions. The simplification in revised Article 5 suggests a clear recognition of the UCP as the source for many of the formal requirements and details of letters of credit. This permits business practices to govern the evolution of letters of credit within the aforementioned basic framework that Article 5 intends to provide.

Since almost the entirety of Article 5 in revised or original form is variable by agreement, specific provisions of the UCP may also become part of the agreement between the parties, or its provisions may be waived by agreement as well.

Between the expanded reliance upon existing standards of business practices as a default rule in Revised Article 5 and the ordinary ability to vary the default rules in Revised Article 5, people and institutions are given maximum flexibility in the tailoring of their relationships under letters of credit.

The standard of practice provision in Revised Article 5 is undoubtedly the most significant part of these revisions. There are some other significant changes, however.

One of the stated purposes for these revisions is to update Article 5 for the age of electronic communications. (This is an important objective with almost all the revisions and amendments to the Uniform Commercial Code in the decades of the 1980s and 1990s.) Original Article 5's statute of fraud requirements -- calling for writings for enforcement -- are abolished. Under Revised Article 5, "A letter of

credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a record and is authenticated (i) by a signature or (ii) in accordance with the agreement of the parties or the standard practice . . ."

The way to interpret this language is, simply, to say that a written document is no longer absolutely necessary to establish the existence of a valid letter of credit or of any other associated obligation. All that is required is an authenticated "record." A properly preserved computer record will suffice.

Another of the important changes concerns fraud and forgery in presentation for payment. As noted above, a letter of credit requires the presentation of a document, commonly a draft, for payment. What if the draft is fraudulent in some aspect or is forged? What is the issuer required to do? In certain instances under original Article 5, the issuer is required to honor such a draft, and in other cases may honor the draft. The issuer is not required under original Article 5 to police the process by which payment is obtained. However, in those situations in which the issuer has the discretion to honor the draft, the customer may petition the appropriate court to enjoin honoring the draft.

Original Article 5 uses the terminology of fraud in the transaction, and provides no guidelines with respect to which a court may consider the level of fraud that triggers the issuance of an injunction. In Revised Article 5, the terminology of fraud in the transaction is eliminated. A fraud that affects an injunction must be a "material" fraud. Further, Revised Article 5 establishes standards that the court must apply in determining whether to enjoin the issuer from honoring the draft. Included are factors of prohibition of injunction by other law, adverse effect upon the beneficiary, and availability of a remedy for fraud or forgery against the responsible individual or institution.

The remedies against an issuer for wrongful repudiation or dishonor of a letter of credit become more consistent under Revised Article 5 for letter of credit transactions. An issuer is bound to honor a proper documentary presentation. Repudiation occurs when the issuer communicates that a presentation will not be honored. A dishonor occurs when the issuer does not pay when the appropriate document is presented. Like any other legal obligation, the issuer is liable for wrongful repudiation or dishonor.

In original Article 5, the injured party can obtain the amount of the dishonored document plus incidental damages less the amount realized on the underlying transaction. If goods or documents of value as a result of the transaction are not sold to cover the losses, the issuer is entitled to them upon payment of judgment.

In Revised Article 5, the beneficiary or appropriate nominee is entitled to "the amount that is the subject of the dishonor or repudiation." If the obligation is not for payment of money, the injured party may have specific performance in lieu of damages, at the option of the injured person. Incidental damages are allowed, but not consequential damages. There is no obligation to cover the losses. If there is cover, the savings must be deducted from the recovered damages.

The applicant has a remedy for damages "resulting from breach," including incidental but not consequential damages. A breach by a confirmer or advisor gives rise to actual damages plus incidentals. Interest is due for any damages from the date of breach or dishonor. The prevailing party has a right to attorney's fees. There is a specific authority for prior agreement to liquidate damages. These provisions vastly improve and make more specific, the remedies available under Article 5.

A subject not specifically addressed in original Article 5 is the subject of subrogation of one party to another party to a letter of credit, upon payment of the other party's obligations. Subrogation rights are available by contract under original Article 5. The courts have not agreed upon their availability, otherwise, giving rise to confusion in the law.

Revised Article 5 provides specific rules. For example, if the issuer pays the beneficiary, the issuer is subrogated to the rights of the beneficiary and the applicant to the same extent as if the issuer were a secondary obligor of the underlying obligation. Subrogation rights do not arise until there has been an actual payment to the party whose rights are subrogated.

Subrogation puts the person with the subrogation right in the shoes of the person who benefited by the payment that triggers the subrogation right. Subrogation rights balance equities between parties in complex transactions like letters of credit. Revised Article 5 solves the judicial quandary under original Article 5 as to whether automatic rights of subrogation exist.

**STORAGE NAME:** h0515a.fs

**DATE:** March 18, 1999

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It is not possible to list entirely in a short summary all of the problems under original Article 5 that are solved in Revised Article 5. For example, it was not clear under original Article 5 whether a letter of credit had to be a documentary letter of credit. It is not entirely clear under original Article 5 that a letter of credit is different from a guarantee. Revised Article 5 erases these ambiguities.

Letters of credit are an important part of the credit granting and payment system, and the commercial law. Revised Article 5 should carry letters of credit into the 21st Century with the clarity and flexibility necessary for successful governance of letter of credit transactions. All states should act to adopt these important revisions as soon as possible.

*Founded in 1892, the National Conference of Commissioners on Uniform State Laws is a confederation of state commissioners on uniform laws. Its membership comprises more than 300 attorneys, judges, and law professors, who are appointed by each of the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, to draft uniform and model state laws and work toward their enactment.*

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee adopted an amendment which inserts into Chapter 95, F.S. , Limitations on Actions; Adverse Possession, the one year statute of limitations provided for Letters of Credit in HB 515 and eliminated a reference to Bulk Transfers which is no longer necessary.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Jo Ann Levin

Staff Director:

Don Rubottom

AS REVISED BY THE COMMITTEE ON FINANCIAL SERVICES:

Prepared by:

Michael A. Kliner

Staff Director:

Susan L. Cutchins