

Fifty-fifth  
Legislative Assembly  
of North Dakota

**SENATE BILL NO. 2098**

Introduced by

Judiciary Committee

(At the request of the Commission on Uniform State Laws)

1 A BILL for an Act to create and enact chapter 41-05 and a new subsection to section 41-09-04  
2 of the North Dakota Century Code, relating to the Uniform Commercial Code revised article 5  
3 pertaining to letters of credit; to amend and reenact subsection 2 of section 41-01-05,  
4 subsection 1 of section 41-02-60, subsection 1 of section 41-09-03, subsection 3 of section  
5 41-09-05, section 41-09-06, and section 41-09-25 of the North Dakota Century Code, relating to  
6 adoption of the revised article 5; and to repeal the present chapter 41-05 of the North Dakota  
7 Century Code, relating to the Uniform Commercial Code revised article 5 pertaining to letters of  
8 credit.

9 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

10 **SECTION 1. AMENDMENT.** Subsection 2 of section 41-01-05 of the 1995 Supplement  
11 to the North Dakota Century Code is amended and reenacted as follows:

- 12 2. Where one of the following provisions of this title specifies the applicable law, that  
13 provision governs and a contrary agreement is effective only to the extent  
14 permitted by the law (including the conflict of laws rules) so specified:
- 15 a. Rights of creditors against sold goods. Section 41-02-47.
  - 16 b. Applicability of the chapter on leases. Sections 41-02.1-05 and 41-02.1-06.
  - 17 c. Applicability of the chapter on bank deposits and collections. Section  
18 41-04-02.
  - 19 d. Governing law in the chapter on funds transfers. Section 41-04.1-38.
  - 20 e. Letters of credit. Section 41-05-16.
  - 21 f. Applicability of the chapter on investment securities. Section 41-08-06.
  - 22 g. Perfection provisions of the chapter on secured transactions. Section  
23 41-09-03.

1           **SECTION 2. AMENDMENT.** Subsection 1 of section 41-02-60 of the North Dakota  
2 Century Code is amended and reenacted as follows:

- 3           1. Where the contract requires payment before inspection nonconformity of the goods  
4 does not excuse the buyer from so making payment unless:
- 5           a. The nonconformity appears without inspection; or
  - 6           b. Despite tender of the required documents the circumstances would justify  
7 injunction against honor under ~~the provisions of this title (section 41-05-14~~  
8 41-05-09).

9           **SECTION 3.** Chapter 41-05 of the North Dakota Century Code is created and enacted  
10 as follows:

11           **41-05-01. (5-101) Short title.** This chapter may be cited as the Uniform Commercial  
12 Code - Letters of Credit.

13           **41-05-02. (5-102) Definitions.**

- 14           1. In this chapter:
- 15           a. "Adviser" means a person who, at the request of the issuer, a confirmer, or  
16 another adviser, notifies or requests another adviser to notify the beneficiary  
17 that a letter of credit has been issued, confirmed, or amended.
  - 18           b. "Applicant" means a person at whose request or for whose account a letter of  
19 credit is issued. The term includes a person who requests an issuer to issue  
20 a letter of credit on behalf of another if the person making the request  
21 undertakes an obligation to reimburse the issuer.
  - 22           c. "Beneficiary" means a person who under the terms of a letter of credit is  
23 entitled to have its complying presentation honored. The term includes a  
24 person to whom drawing rights have been transferred under a transferable  
25 letter of credit.
  - 26           d. "Confirmer" means a nominated person who undertakes, at the request or  
27 with the consent of the issuer, to honor a presentation under a letter of credit  
28 issued by another.
  - 29           e. "Dishonor" of a letter of credit means failure timely to honor or to take an  
30 interim action, such as acceptance of a draft, that may be required by the  
31 letter of credit.

- 1           f. "Document" means a draft or other demand, document of title, investment  
2           security, certificate, invoice, or other record, statement, or representation of  
3           fact, law, right, or opinion:
- 4           (1) Which is presented in a written or other medium permitted by the letter  
5           of credit or, unless prohibited by the letter of credit, by the standard  
6           practice referred to in subsection 1 of section 41-05-08; and
- 7           (2) Which is capable of being examined for compliance with the terms and  
8           conditions of the letter of credit. A document may not be oral.
- 9           g. "Good faith" means honesty in fact in the conduct or transaction concerned.
- 10          h. "Honor" of a letter of credit means performance of the issuer's undertaking in  
11          the letter of credit to pay or deliver an item of value. Unless the letter of credit  
12          otherwise provides, "honor" occurs:
- 13          (1) Upon payment;
- 14          (2) If the letter of credit provides for acceptance, upon acceptance of a  
15          draft and, at maturity, its payment; or
- 16          (3) If the letter of credit provides for incurring a deferred obligation, upon  
17          incurring the obligation and, at maturity, its performance.
- 18          i. "Issuer" means a bank or other person that issues a letter of credit, but does  
19          not include an individual who makes an engagement for personal, family, or  
20          household purposes.
- 21          j. "Letter of credit" means a definite undertaking that satisfies the requirements  
22          of section 41-05-04 by an issuer to a beneficiary at the request or for the  
23          account of an applicant or, in the case of a financial institution, to itself or for  
24          its own account, to honor a documentary presentation by payment or delivery  
25          of an item of value.
- 26          k. "Nominated person" means a person whom the issuer:
- 27          (1) Designates or authorizes to pay, accept, negotiate, or otherwise give  
28          value under a letter of credit; and
- 29          (2) Undertakes by agreement or custom and practice to reimburse.
- 30          l. "Presentation" means delivery of a document to an issuer or nominated  
31          person for honor or giving of value under a letter of credit.

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

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

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

2. Definitions in other chapters applying to this chapter and the sections in which they appear are:

a. "Accept" or "Acceptance". Section 41-03-46.

b. "Value". Sections 41-03-29 and 41-04-23.

3. Chapter 41-01 contains certain additional general definitions and principles of construction and interpretation applicable throughout this chapter.

**41-05-03. (5-103) Scope.**

1. This chapter applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.

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

3. With the exception of this subsection, subsections 1 and 4 of this section, subdivisions i and j of subsection 1 of section 41-05-02, subsection 4 of section 41-05-06, and subsection 4 of section 41-05-14, and except to the extent prohibited in subsection 3 of section 41-01-02 and subsection 4 of section 41-05-17, the effect of this chapter may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this chapter.

4. Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance

1 of a contract or arrangement out of which the letter of credit arises or which  
2 underlies it, including contracts or arrangements between the issuer and the  
3 applicant and between the applicant and the beneficiary.

4 **41-05-04. (5-104) Formal requirements.** A letter of credit, confirmation, advice,  
5 transfer, amendment, or cancellation may be issued in any form that is a record and is  
6 authenticated:

- 7 1. By a signature; or  
8 2. In accordance with the agreement of the parties or the standard practice referred to  
9 in subsection 5 of section 41-05-08.

10 **41-05-05. (5-105) Consideration.** Consideration is not required to issue, amend,  
11 transfer, or cancel a letter of credit, advice, or confirmation.

12 **41-05-06. (5-106) Issuance - Amendment - Cancellation - Duration.**

- 13 1. A letter of credit is issued and becomes enforceable according to its terms against  
14 the issuer when the issuer sends or otherwise transmits it to the person requested  
15 to advise or to the beneficiary. A letter of credit is revocable only if it so provides.  
16 2. After a letter of credit is issued, rights and obligations of a beneficiary, applicant,  
17 confirmer, and issuer are not affected by an amendment or cancellation to which  
18 that person has not consented except to the extent the letter of credit provides that  
19 it is revocable or that the issuer may amend or cancel the letter of credit without  
20 that consent.  
21 3. If there is no stated expiration date or other provision that determines its duration, a  
22 letter of credit expires one year after its stated date of issuance or, if none is  
23 stated, after the date on which it is issued.  
24 4. A letter of credit that states that it is perpetual expires five years after its stated  
25 date of issuance, or if none is stated, after the date on which it is issued.

26 **41-05-07. (5-107) Confirmer - Nominated person - Adviser.**

- 27 1. A confirmer is directly obligated on a letter of credit and has the rights and  
28 obligations of an issuer to the extent of its confirmation. The confirmer also has  
29 rights against and obligations to the issuer as if the issuer were an applicant and  
30 the confirmer had issued the letter of credit at the request and for the account of  
31 the issuer.

- 1           2. A nominated person who is not a confirmer is not obligated to honor or otherwise  
2           give value for a presentation.
- 3           3. A person requested to advise may decline to act as an adviser. An adviser that is  
4           not a confirmer is not obligated to honor or give value for a presentation. An  
5           adviser undertakes to the issuer and to the beneficiary accurately to advise the  
6           terms of the letter of credit, confirmation, amendment, or advice received by that  
7           person and undertakes to the beneficiary to check the apparent authenticity of the  
8           request to advise. Even if the advice is inaccurate, the letter of credit, confirmation,  
9           or amendment is enforceable as issued.
- 10          4. A person who notifies a transferee beneficiary of the terms of a letter of credit,  
11          confirmation, amendment, or advice has the rights and obligations of an adviser  
12          under subsection 3. The terms in the notice to the transferee beneficiary may differ  
13          from the terms in any notice to the transferor beneficiary to the extent permitted by  
14          the letter of credit, confirmation, amendment, or advice received by the person who  
15          so notifies.

16          **41-05-08. (5-108) Issuer's rights and obligations.**

- 17          1. Except as otherwise provided in section 41-05-09, an issuer shall honor a  
18          presentation that, as determined by the standard practice referred to in  
19          subsection 5, appears on its face strictly to comply with the terms and conditions of  
20          the letter of credit. Except as otherwise provided in section 41-05-13 and unless  
21          otherwise agreed with the applicant, an issuer shall dishonor a presentation that  
22          does not appear so to comply.
- 23          2. An issuer has a reasonable time after presentation, but not beyond the end of the  
24          seventh business day of the issuer after the day of its receipt of documents:
- 25              a. To honor;
- 26              b. If the letter of credit provides for honor to be completed more than seven  
27              business days after presentation, to accept a draft or incur a deferred  
28              obligation; or
- 29              c. To give notice to the presenter of discrepancies in the presentation.

- 1        3. Except as otherwise provided in subsection 4, an issuer is precluded from  
2        asserting as a basis for dishonor any discrepancy if timely notice is not given, or  
3        any discrepancy not stated in the notice if timely notice is given.
- 4        4. Failure to give the notice specified in subsection 2 or to mention fraud, forgery, or  
5        expiration in the notice does not preclude the issuer from asserting as a basis for  
6        dishonor fraud or forgery as described in subsection 1 of section 41-05-09 or  
7        expiration of the letter of credit before presentation.
- 8        5. An issuer shall observe the standard practice of financial institutions that regularly  
9        issue letters of credit. Determination of the issuer's observance of the standard  
10       practice is a matter of interpretation for the court. The court shall offer the parties a  
11       reasonable opportunity to present evidence of the standard practice.
- 12       6. An issuer is not responsible for:
  - 13       a. The performance or nonperformance of the underlying contract, arrangement,  
14       or transaction;
  - 15       b. An act or omission of others; or
  - 16       c. Observance or knowledge of the usage of a particular trade other than the  
17       standard practice referred to in subsection 5.
- 18       7. If an undertaking constituting a letter of credit under subdivision j of subsection 1 of  
19       section 41-05-02 contains nondocumentary conditions, an issuer shall disregard  
20       the nondocumentary conditions and treat them as if they were not stated.
- 21       8. An issuer that has dishonored a presentation shall return the documents or hold  
22       them at the disposal of, and send advice to that effect to, the presenter.
- 23       9. An issuer that has honored a presentation as permitted or required by this chapter:
  - 24       a. Is entitled to be reimbursed by the applicant in immediately available funds  
25       not later than the date of its payment of funds;
  - 26       b. Takes the documents free of claims of the beneficiary or presenter;
  - 27       c. Is precluded from asserting a right of recourse on a draft under sections  
28       41-03-51 and 41-03-52;
  - 29       d. Except as otherwise provided in sections 41-05-10 and 41-05-17, is precluded  
30       from restitution of money paid or other value given by mistake to the extent

1                   the mistake concerns discrepancies in the documents or tender which are  
2                   apparent on the face of the presentation; and

- 3           e.   Is discharged to the extent of its performance under the letter of credit unless  
4           the issuer honored a presentation in which a required signature of a  
5           beneficiary was forged.

6           **41-05-09. (5-109) Fraud - Forgery.**

- 7           1.   If a presentation is made that appears on its face strictly to comply with the terms  
8           and conditions of the letter of credit, but a required document is forged or materially  
9           fraudulent, or honor of the presentation would facilitate a material fraud by the  
10           beneficiary on the issuer or applicant:

- 11           a.   The issuer shall honor the presentation, if honor is demanded by:

- 12                   (1)   A nominated person who has given value in good faith and without  
13                   notice of forgery or material fraud;  
14                   (2)   A confirmer who has honored its confirmation in good faith;  
15                   (3)   A holder in due course of a draft drawn under the letter of credit which  
16                   was taken after acceptance by the issuer or nominated person; or  
17                   (4)   An assignee of the issuer's or nominated person's deferred obligation  
18                   that was taken for value and without notice of forgery or material fraud  
19                   after the obligation was incurred by the issuer or nominated person; and

- 20           b.   The issuer, acting in good faith, may honor or dishonor the presentation in any  
21           other case.

- 22           2.   If an applicant claims that a required document is forged or materially fraudulent or  
23           that honor of the presentation would facilitate a material fraud by the beneficiary on  
24           the issuer or applicant, a court of competent jurisdiction, temporarily or  
25           permanently, may enjoin the issuer from honoring a presentation or may grant  
26           similar relief against the issuer or other persons only if the court finds that:

- 27           a.   The relief is not prohibited under the law applicable to an accepted draft or  
28           deferred obligation incurred by the issuer;

- 29           b.   A beneficiary, issuer, or nominated person who may be adversely affected is  
30           adequately protected against loss that it may suffer because the relief is  
31           granted;



- 1           c. All of the conditions to entitle a person to the relief under the law of this state  
2           have been met; and  
3           d. On the basis of the information submitted to the court, the applicant is more  
4           likely than not to succeed under its claim of forgery or material fraud and the  
5           person demanding honor does not qualify for protection under subdivision a of  
6           subsection 1.

7           **41-05-10. (5-110) Warranties.**

- 8           1. If its presentation is honored, the beneficiary warrants:  
9           a. To the issuer, any other person to whom presentation is made, and the  
10           applicant that there is no fraud or forgery of the kind described in subsection 1  
11           of section 41-05-09; and  
12           b. To the applicant that the drawing does not violate any agreement between the  
13           applicant and beneficiary or any other agreement intended by them to be  
14           augmented by the letter of credit.  
15           2. The warranties in subsection 1 are in addition to warranties arising under chapters  
16           41-03, 41-04, 41-07, and 41-08 because of the presentation or transfer of  
17           documents covered by any of those chapters.

18           **41-05-11. (5-111) Remedies.**

- 19           1. If an issuer wrongfully dishonors or repudiates its obligation to pay money under a  
20           letter of credit before presentation, the beneficiary, successor, or nominated person  
21           presenting on its own behalf may recover from the issuer the amount that is the  
22           subject of the dishonor or repudiation. If the issuer's obligation under the letter of  
23           credit is not for the payment of money, the claimant may obtain specific  
24           performance or, at the claimant's election, recover an amount equal to the value of  
25           performance from the issuer. In either case, the claimant may also recover  
26           incidental but not consequential damages. The claimant is not obligated to take  
27           action to avoid damages that might be due from the issuer under this subsection.  
28           If, although not obligated to do so, the claimant avoids damages, the claimant's  
29           recovery from the issuer must be reduced by the amount of damages avoided.  
30           The issuer has the burden of proving the amount of damages avoided. In the case  
31           of repudiation the claimant need not present any document.

2. If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.
3. If an adviser or nominated person other than a confirmer breaches an obligation under this chapter or an issuer breaches an obligation not covered in subsection 1 or 2, a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection and subsections 1 and 2.
4. An issuer, nominated person, or adviser who is found liable under subsection 1, 2, or 3 shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.
5. Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this chapter.
6. Damages that would otherwise be payable by a party for breach of an obligation under this chapter may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

**41-05-12. (5-112) Transfer of letter of credit.**

1. Except as otherwise provided in section 41-05-13, unless a letter of credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.
2. Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:
  - a. The transfer would violate applicable law; or
  - b. The transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in subsection 5 of section 41-05-08 or is otherwise reasonable under the circumstances.

**41-05-13. (5-113) Transfer by operation of law.**

- 1        1. A successor of a beneficiary may consent to amendments, sign and present  
2        documents, and receive payment or other items of value in the name of the  
3        beneficiary without disclosing its status as a successor.
- 4        2. A successor of a beneficiary may consent to amendments, sign and present  
5        documents, and receive payment or other items of value in its own name as the  
6        disclosed successor of the beneficiary. Except as otherwise provided in  
7        subsection 5, an issuer shall recognize a disclosed successor of a beneficiary as  
8        beneficiary in full substitution for its predecessor upon compliance with the  
9        requirements for recognition by the issuer of a transfer of drawing rights by  
10       operation of law under the standard practice referred to in subsection 5 of section  
11       41-05-08 or, in the absence of such a practice, compliance with other reasonable  
12       procedures sufficient to protect the issuer.
- 13       3. An issuer is not obliged to determine whether a purported successor is a successor  
14       of a beneficiary or whether the signature of a purported successor is genuine or  
15       authorized.
- 16       4. Honor of a purported successor's apparently complying presentation under  
17       subsection 1 or 2 has the consequences specified in subsection 9 of section  
18       41-05-08 even if the purported successor is not the successor of a beneficiary.  
19       Documents signed in the name of the beneficiary or of a disclosed successor by a  
20       person who is neither the beneficiary nor the successor of the beneficiary are  
21       forged documents for the purposes of section 41-05-09.
- 22       5. An issuer whose rights of reimbursement are not covered by subsection 4 or  
23       substantially similar law and any confirmer or nominated person may decline to  
24       recognize a presentation under subsection 2.
- 25       6. A beneficiary whose name is changed after the issuance of a letter of credit has  
26       the same rights and obligations as a successor of a beneficiary under this section.

27       **41-05-14. (5-114) Assignment of proceeds.**

- 28       1. In this section, "proceeds of a letter of credit" means the cash, check, accepted  
29       draft, or other item of value paid or delivered upon honor or giving of value by the  
30       issuer or any nominated person under the letter of credit. The term does not  
31       include a beneficiary's drawing rights or documents presented by the beneficiary.

1        2. A beneficiary may assign its right to part or all of the proceeds of a letter of credit.  
2        The beneficiary may do so before presentation as a present assignment of its right  
3        to receive proceeds contingent upon its compliance with the terms and conditions  
4        of the letter of credit.

5        3. An issuer or nominated person need not recognize an assignment of proceeds of a  
6        letter of credit until it consents to the assignment.

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

11       5. Rights of a transferee beneficiary or nominated person are independent of the  
12       beneficiary's assignment of the proceeds of a letter of credit and are superior to the  
13       assignee's right to the proceeds.

14       6. Neither the rights recognized by this section between an assignee and an issuer,  
15       transferee beneficiary, or nominated person nor the issuer's or nominated person's  
16       payment of proceeds to an assignee or a third person affect the rights between the  
17       assignee and any person other than the issuer, transferee beneficiary, or  
18       nominated person. The mode of creating and perfecting a security interest in or  
19       granting an assignment of a beneficiary's rights to proceeds is governed by chapter  
20       41-09 or other law. Against persons other than the issuer, transferee beneficiary,  
21       or nominated person, the rights and obligations arising upon the creation of a  
22       security interest or other assignment of a beneficiary's right to proceeds and its  
23       perfection are governed by chapter 41-09 or other law.

24       **41-05-15. (5-115) Statute of limitations.** An action to enforce a right or obligation  
25       arising under this chapter must be commenced within one year after the expiration date of the  
26       relevant letter of credit or one year after the claim for relief accrues, whichever occurs later. A  
27       claim for relief accrues when the breach occurs, regardless of the aggrieved party's lack of  
28       knowledge of the breach.

29       **41-05-16. (5-116) Choice of law and forum.**

30       1. The liability of an issuer, nominated person, or adviser for action or omission is  
31       governed by the law of the jurisdiction chosen by an agreement in the form of a

record signed or otherwise authenticated by the affected parties in the manner provided in section 41-05-04 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

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

3. Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the uniform customs and practice for documentary credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If:

- a. This chapter would govern the liability of an issuer, nominated person, or adviser under subsection 1 or 2;
- b. The relevant undertaking incorporates rules of custom or practice; and
- c. There is conflict between this chapter and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in subsection 3 of section 41-05-03.

4. If there is conflict between this chapter and chapter 41-03, 41-04, 41-04.1, or 41-09, this chapter governs.

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

**41-05-17. (5-117) Subrogation of issuer, applicant, and nominated person.**

- 1        1. An issuer that honors a beneficiary's presentation is subrogated to the rights of the  
2        beneficiary to the same extent as if the issuer were a secondary obligor of the  
3        underlying obligation owed to the beneficiary and of the applicant to the same  
4        extent as if the issuer were the secondary obligor of the underlying obligation owed  
5        to the applicant.
- 6        2. An applicant that reimburses an issuer is subrogated to the rights of the issuer  
7        against any beneficiary, presenter, or nominated person to the same extent as if  
8        the applicant were the secondary obligor of the obligations owed to the issuer and  
9        has the rights of subrogation of the issuer to the rights of the beneficiary stated in  
10       subsection 1.
- 11       3. A nominated person who pays or gives value against a draft or demand presented  
12       under a letter of credit is subrogated to the rights of:
  - 13       a. The issuer against the applicant to the same extent as if the nominated  
14       person were a secondary obligor of the obligation owed to the issuer by the  
15       applicant;
  - 16       b. The beneficiary to the same extent as if the nominated person were a  
17       secondary obligor of the underlying obligation owed to the beneficiary; and
  - 18       c. The applicant to the same extent as if the nominated person were a  
19       secondary obligor of the underlying obligation owed to the applicant.
- 20       4. Notwithstanding any agreement or term to the contrary, the rights of subrogation  
21       stated in subsections 1 and 2 do not arise until the issuer honors the letter of credit  
22       or otherwise pays and the rights in subsection 3 do not arise until the nominated  
23       person pays or otherwise gives value. Until then, the issuer, nominated person,  
24       and the applicant do not derive under this section present or prospective rights  
25       forming the basis of a claim, defense, or excuse.

26        **SECTION 4. AMENDMENT.** Subsection 1 of section 41-09-03 of the 1995 Supplement  
27        to the North Dakota Century Code is amended and reenacted as follows:

- 28        1. Documents, instruments, letters of credit, and ordinary goods:
  - 29        a. This subsection applies to documents ~~and~~, instruments, rights to proceeds of  
30        written letters of credit, and ~~to~~ goods other than those covered by a certificate

of title described in subsection 2, mobile goods described in subsection 3, and minerals described in subsection 5.

b. Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

c. If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or nonperfection of the security interest from the time it attaches until thirty days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the thirty-day period.

d. When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by part 3 of this chapter to perfect the security interest:

(1) If the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal.

(2) If the action is taken before the expiration of the period specified in paragraph 1, the security interest continues perfected thereafter.

(3) For the purpose of priority over a buyer of consumer goods (subsection 2 of section 41-09-28), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in paragraphs 1 and 2.

1           **SECTION 5.** A new subsection to section 41-09-04 of the 1995 Supplement to the  
2 North Dakota Century Code is created and enacted as follows:

3           To a transfer of an interest in a letter of credit other than the rights to proceeds of a  
4           written letter of credit.

5           **SECTION 6. AMENDMENT.** Subsection 3 of section 41-09-05 of the 1995 Supplement  
6 to the North Dakota Century Code is amended and reenacted as follows:

7           3. The following definitions in other chapters apply to this chapter:

8           a. "Check". Section 41-03-04.

9           b. "Contract for sale". Section 41-02-06.

10          c. "Holder in due course". Section 41-03-28.

11          d. "Letter of credit". Section 41-05-02.

12          e. "Note". Section 41-03-04.

13          ~~e.~~ f. "Sale". Section 41-02-06.

14           **SECTION 7. AMENDMENT.** Section 41-09-06 of the North Dakota Century Code is  
15 amended and reenacted as follows:

16           **41-09-06. (9-106) "Account" and "general intangibles" defined.** "Account" means  
17 any right to payment for goods sold or leased or for services rendered which is not evidenced  
18 by an instrument or chattel paper whether or not it has been earned by performance. "General  
19 intangibles" means any personal property (including things in action) other than goods,  
20 accounts, chattel paper, documents, instruments, rights to proceeds of written letters of credit,  
21 and money. All rights to payment earned or unearned under a charter or other contract  
22 involving the use or hire of a vessel and all rights incident to the charter or contract are  
23 accounts.

24           **SECTION 8. AMENDMENT.** Section 41-09-25 of the 1995 Supplement to the North  
25 Dakota Century Code is amended and reenacted as follows:

26           **41-09-25. (9-304) Perfection of security interest in instruments, documents,**  
27 **proceeds of a written letter of credit, and goods covered by documents - Perfection by**  
28 **permissive filing - Temporary perfection without filing or transfer of possession.**

29           1. A security interest in chattel paper or negotiable documents may be perfected by  
30           filing. A security interest in the rights to proceeds of a written letter of credit can be  
31           perfected only by the secured party's taking possession of the letter of credit. A



security interest in money or instruments, other than certificated securities or instruments that constitute part of chattel paper, can be perfected only by the secured party's taking possession, except as provided in subsections 4 and 5 of this section and subsections 2 and 3 of section 41-09-27.

2. During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during that period is subject thereto.
3. A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.
4. A security interest in a negotiable document or an instrument other than a certificated security is perfected without filing or the taking of possession for a period of twenty-one days after it attaches to the extent that it arises for new value given under a written security agreement.
5. A security interest remains perfected for a period of twenty-one days without filing if a secured party having a perfected security interest in a negotiable document, an instrument other than a certificated security, or goods in possession of a bailee other than one who has issued a negotiable document therefor:
  - a. Makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to subsection 3 of section 41-09-33; or
  - b. Delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal, or registration of transfer.
6. After the twenty-one-day period in subsections 4 and 5, perfection depends upon compliance with applicable provisions of this chapter.

1           **SECTION 9. AMENDMENT.** Section 41-09-26 of the 1995 Supplement to the North  
2 Dakota Century Code is amended and reenacted as follows:

3           **41-09-26. (9-305) When possession by secured party perfects security interest**  
4 **without filing.** A security interest in ~~letters of credit and advices of credit (subdivision a of~~  
5 ~~subsection 2 of section 41-05-16)~~, goods, instruments other than certificated securities, money,  
6 negotiable documents, or chattel paper may be perfected by the secured party's taking  
7 possession of the collateral. A security interest in the right to proceeds of a written letter of  
8 credit may be perfected by the secured party's taking possession of the letter of credit. If the  
9 collateral other than goods covered by a negotiable document is held by a bailee, the secured  
10 party is deemed to have possession from the time the bailee receives notification of the secured  
11 party's interest. A security interest is perfected by possession from the time possession is  
12 taken without relation back and continues only so long as possession is retained, unless  
13 otherwise specified in this chapter. The security interest may be otherwise perfected as  
14 provided in this chapter before or after the period of possession by the secured party.

15           **SECTION 10. REPEAL.** Chapter 41-05 of the North Dakota Century Code is repealed.