



BAFT

GUIDANCE PAPER FOR AUTO EXTENSIONS

Prepared by
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Introduction and Objectives of the Paper

It is critically important for all letters of credit, particularly Standby Letters of Credit and Demand Guarantees (“SLC and DG”), to be structured in a clear and concise manner, thus ensuring the expected outcome. As the Preliminary Considerations section of the ICC publication “International Standard Banking Practice for the Examination of Documents under UCP 600”, which the current revision is 745 (“ISBP 745”), states:

“v. The applicant bears the risk of any ambiguity in its instructions to issue or amend a credit. An issuing bank may, unless the applicant expressly instructs to the contrary, supplement or develop those instructions in a manner necessary or desirable to permit the use of the credit or any amendment thereto. An issuing bank should ensure that any credit or amendment it issues is not ambiguous or conflicting in its terms and conditions.”ⁱⁱ

In November of 2015, initiated by the US members of the BAFT Standby LC committee, BAFT put together a Task Force to study the use of auto-extension clauses in standby letters of credit and demand guarantees in the United States as applicable. The objective was to produce a White Paper to be used as guidance for banks within the United States reflecting Auto Extension Best Practices as it relates to language suggestions, accounting practices and identification of “problem language.” This paper outlines the good, the bad and the ugly as it relates to auto-extension clauses and the challenges faced by banks in managing the associated risks.

Invitations to participate were extended to Issuing Banks in the United States with the largest portfolio (by assets) of Standby LC’s, based on the LC Statistics published in Documentary Credit World ⁱⁱⁱ. Independent undertakings, whether titled as a Letter of Credit or a Demand Guarantee, and whether subjected to the UCP, ISP98 or URDG 758 are reflected as Standby LC’s for this purpose. Both U.S. banks and Foreign Banks U.S. offices were invited to participate. Representatives from 15 of those banks participated and placed a member on the Task Force.

Auto Extension Provision

A SLC/DG may contain an automatic-extension provision (historically known as an Evergreen Clause in the United States and several other countries) stating the SLC/DG will automatically extend for an additional period (commonly one year) unless the Issuing Bank notifies the Beneficiary prior to a certain date (typically a number of days before the current expiration date) that the SLC/DG is not to be further extended for additional periods. This is not an amendment to the credit. If notice of a non-extension is not sent, the SLC/DG is automatically extended by its terms for a specified period. Essentially, a SLC/DG containing an Automatic Extension provision may automatically extend for an indefinite number of periods or, until the stated final maturity date (if used), or until the Issuing Bank--with or without the consent of its customer-- sends a written notification to the Beneficiary (and other parties as defined in the SLC/DG) of its election to not permit extension beyond the current expiration date.

The inclusion of an automatic extension provision increases both operational and credit risk for an Applicant, Beneficiary, Issuing and Confirming Bank of a SLC/DG. For example:

- If the Applicant fails to give timely notice to the Issuing Bank of their desire to not permit the SLC/DG to be extended for an additional period, the Issuing Bank may not give notice to the Beneficiary and the undertaking may be unintentionally extended for an additional period.
- If the Issuing or Confirming Bank does not send timely notice of their election not to extend in accordance with the SLC/DG terms, the bank may be committed for an additional period under the SLC/DG with or without internal credit approval.
- If the Issuing or Confirming Bank removes a SLC/DG from the bank's records without sending a timely notice of their election not to extend in accordance with the SLC/DG terms, the bank may unknowingly understate their exposure.
- All instances may lead to a loss situation if collateral has been released, credit facilities terminated, or the credit worthiness of the Applicant/Guarantor has eroded.

It is recommended any issuer or confirmer of a SLC/DG containing an Automatic Extension provision have an established system / process in place (manual or automated) to track and monitor these instruments to ensure no SLC/DG is removed or extended without proper action and credit approval. Even though not typically managed by the SLC/DG department, controls need to be in place to ensure collateral is not released prior to the termination date as per SLC/DG terms.

1.0 Types of Letters of Credit/Demand Guarantees

1.1 Commercial Letters of Credit

Letters of Credit supporting commercial transactions, typically called commercial credits, are generally characterized as those relating to the movement of merchandise and typically are supported by documents such as invoices, packing lists, bills of lading, inspection certificates and the like. Letters of credit for such purposes usually subject themselves to the rules published by the International Chamber of Commerce (ICC) and are commonly known as the UCP 600 (the *Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("UCP")*). Because the underlying commercial transaction is typically completed in a short period of time--three to four months--commercial letters of credit have a short life cycle and the automatic extension provision is not common to this type of Letter of Credit.

1.2 Standby Letters of Credit and Demand Guarantees

SLC and DG's supporting financial or performance transactions, typically referred to in the United States as standby letters of credit, usually require presentation of a demand and a statement of default or completion of a format quoted within the undertaking. Both SLC and DG's are independent, payable against stipulated documents, limited in scope, in favor of stated Beneficiaries and contain an expiration date. They usually subject themselves to either the UCP 600, the *Uniform Rules for Demand Guarantees (URDG 758)* or the *International Standby Practices ISP98 (ISP98)*. Because both standby letters of credit and demand guarantees are subject to the same accounting, regulatory treatment and law in the United States, they are treated identically for the purposes of this paper. The notable differences in these undertakings come from the rules to which they subject themselves--UCP 600, URDG 758 and ISP98. The United States Law is noted further in Section 4 of this paper.

2.0 History and Intended Function of the Auto Extend Clause

The purpose of an auto-extension clause is to meet the needs of the Applicant, Beneficiary and Issuing Bank to mitigate risk in cases where a SLC/DG is required but the Applicant and Beneficiary do not have an exact expiry date. Because SLC/DG's are used for many purposes, including support for bid bonds, performance bonds, insurance related transactions, commercial leasing, etc., and may support extremely large projects such as the building of an oil refinery or airport, they often have a lengthy life, which makes it necessary for the SLC/DG to contain an automatic extension clause. The automatic extension clause reduces credit risk

for Applicants and banks by permitting the life of the SLC/DG transaction, and the Client's credit, to be reviewed annually prior to the SLC/DG extending.

An auto-extension clause may be useful in cases where credit approval cannot be obtained for a SLC/DG with a lengthy expiry date, or when a date extends beyond the credit facility capacity, or the upfront cost of the exposure for the projected life of the transaction could drive up the cost for the parties involved. The auto-extension clause permits the Issuing Bank to provide the parties with a SLC/DG which meets their underlying contractual obligations while conforming to U.S. law and regulations.

The Auto Extension Clause requires the Issuing Bank to manage the SLC/DG exposure until such time as the SLC/DG expires. In many instances, depending on the size of their portfolio, banks may have an entire department responsible for the management and tracking of SLC/DGs containing such a clause. Independent of size, those departments follow specific processes, procedures and internal guidelines in supporting this activity.

3.0 Renewal versus Extension

The term "renewal" or "non-renewal" should be avoided where possible to reduce misunderstanding. Terminology such as 'extend', 'extension', 'not extended' or non-extension' may be more easily understood. For example:

The terms renew or renewal could be misinterpreted to include the re-creation of an original contract (i.e. an entirely new contract or a contract for an additional period of time with the same terms and obligations as the original contract without containing any amended contract terms, increases or reductions in the amount, etc.) as opposed to an **extension** of a previous contract with all terms in place.

The terms "extend" and "non-extension" clarify this as an extension only to the time period in which a SLC/DG is available for drawing. Under an automatic extension clause, the expiry date is automatically extended unless the non-extension notice is sent in the time period stated--in which case it expires on the applicable then-current or final expiration date.

The Institute for International Banking Law and Practice, creator of the *International Standby Practices (ISP98)* rules, has created model forms for standby letters of credit which themselves are subject to ISP98 rules. The ISP98 Form 2 Model Standby Providing for Extension (<http://iiblp.org/banking-law-resources/isp-forms/>) states: "The words "extend" and "non-extension" are used, rather than "renew" and "non-renewal", to avoid any doubt that the intent is to amend, rather than replace, the standby. ^{iv}

4.0 United States Law, Perpetual and Auto Extension

The law in the United States governing these independent undertakings is revised Article 5 of the UNIFORM COMMERCIAL CODE, typically referenced as UCC 5rev, was formally released in 1995. It has been adopted by the District of Columbia, Puerto Rico and all 50 states, in some cases with local modifications as noted in Section 10.

UCC 5rev Article 5-106 deals with the expiration of the undertaking:

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

(d) A letter of credit that states that it is perpetual expires five years after its stated date of issuance, or if none is stated, after the date on which it is issued.”^v

The Official Commentary to Article 5 explains this:

(4) Although all letters of credit should specify the date on which the issuer’s engagement expires, the failure to specify an expiration date does not invalidate the letter of credit, or diminish or relieve the obligation of any party with respect to the letter of credit. A letter of credit that may be revoked or terminated at the discretion of the issuer by notice to the Beneficiary is not “perpetual.”

It is important to understand that a SLC/DG to be considered perpetual must be stated as such as part of the terms and conditions. Without identifying the SLC/DG as perpetual, under UCC Article 5, it would not be considered perpetual.

5.0 Best Practices to Consider

5.1 Auto Extension Clause – Items to Consider When Drafting

Each SLC/DG can be different and, even those which appear identical on their surface cannot be treated identically due to considerations such as the locations of the Applicant and the Beneficiary and their respective governing laws. It is important for Applicants, Beneficiaries and their respective LC professionals to read a draft of the Letter of Credit language at the time a non-extension notice (“NE Notice”) is being prepared and when received, in order to understand the terms of the auto-extension clause.

The notice should be just that--a notice which informs the Beneficiary that the SLC/DG will no longer be extended and will expire on the date indicated in the notice. **A notice is not an amendment and should not be titled as such. In addition, it should not change any terms of the SLC/DG and should never be subject to the Beneficiary’s consent.**

When drafting an Auto-Extension clause, Applicants, Beneficiaries and banks should consider the following:

1. Does the clause indicate the initial expiry date of the LC?
2. Does the clause allow for single or multiple extensions?
3. Does the clause clearly indicate the length for the automatic extension?
4. When does each extension date take place?
5. Does the time period for sending notice read properly? Is notice required to be received on an exact date?
6. To whom, at what address and by what means must the notice be sent?
7. Does it address responsibility for the Beneficiary to notify the bank of any address changes?
8. Is it clear whether the Beneficiary can present a demand for payment if notice is received? If so, is a separate certification required?
9. Is there an Advising/Confirming Bank? If yes, what is the bank's role in the notice process, and have they been provided with sufficient time?
10. By what date does the notice need to be sent in order to arrive in time?
11. Is a copy of the notice required to be sent to a third party?

If there is an Advising/Confirming Bank, special care needs to be taken as to whom, the date and address notice is to be sent. If the SLC/DG states that the notice is to be sent to the Beneficiary through the Advising/Confirming bank, then ensure the Advising/Confirming Bank agreed to undertake this responsibility and has sufficient time to notify the Beneficiary per the terms of the SLC/DG. *Note:* Reference to Confirming Bank does not apply to DG's since confirmations are not covered under the URDG 758.

Example of a Simple Non-Extension Notice

"In accordance with the terms of this (SLC/DG), you are hereby notified that we do not elect to extend this instrument for any additional period of time. The (SLC/DG) will, therefore, expire at our counters on (insert date)."

The clause could also indicate one of the following:

-
- After that date, this (SLC/DG) will be null and void.
- or
- After that date, no demands for payment will be honored.

A Non-Extension Notice should also include the name and address of the party being notified, the date and other references such as the Letter of Credit Number and the name of the Applicant.

Applicants, Beneficiaries and banks should know the law governing the SLC/DG. In some countries the law requires the original SLC/DG be returned by the Beneficiary before the issuing/confirming Bank can be released from their obligation.

Subject to your bank's policy, the notice of non-extension can be either signed or unsigned.

5.2 Example Auto Extension Clauses

Listed below are examples of Auto Extension clauses for consideration:

Example 1.

"This SLC/DG expires on (Insert Date); however, it is a condition of this SLC/DG that the expiration date may be automatically extended for successive periods of (insert term e.g. one year, six months, 90 days), unless (Insert time period e.g. 30, 60 90) or more days before the then current expiration or future expiration date, Issuer gives notice to Beneficiary by overnight courier service or other receipted means, informing that Issuer elects not to extend the expiration date for any additional period."

Example 2a.

"This SLC/DG expires on (Insert Date); however, it is a condition of this SLC/DG that the expiration date shall be automatically extended for successive periods of (insert term e.g. one year, six months, 90 days), unless, at least (Insert time period e.g. 30, 60 90) days before the then current or future expiration date, Issuer sends written notice to Beneficiary by overnight courier service or other receipted means, informing that Issuer elects not to extend the expiration date for any additional period. Such written notification will be sent to the Beneficiary's address indicated above, unless a change of address is otherwise notified to us by the Beneficiary in writing, quoting our Letter of Credit number."

OR

Example 2b.

“This SLC/DG expires on (Insert Date); however, the expiration date shall be automatically extended for successive periods of (insert term e.g. one year, six months, 90 days), unless, at least (Insert time period e.g. 30, 60 90) or more days before the then current or future expiration date, Issuer sends written notice to Beneficiary by overnight courier service or other receipted means, informing that Issuer elects not to extend the expiration date for any additional period. Such written notification will be sent to the Beneficiary’s address indicated above, or as amended. “

These two examples provide possible language options to address exactly where the notice will be directed and points out to the Beneficiary it is their responsibility to provide the Issuing Bank with a notification if their address changes.

Example 3.

“This SLC/DG expires on (Insert Date); however, it is a condition of this SLC/DG that the expiration date shall be automatically extended for successive periods of (insert term e.g. one-year, six months, 90 days), unless, at least (Insert time period e.g. 30, 60 90) days before the then current or future expiration date, Issuer sends written notice to Beneficiary by overnight courier service or other receipted means, informing that Issuer elects not to extend the expiration date for any additional period. The expiration date is not subject to automatic extension beyond (Insert final expiry date) (“Final Date”) and this SLC/DG will automatically expire on such Final Date without notification to you.”

Example 3 focuses on auto-extensions containing an ultimate or final expiration date. The language provides terms to inform the Beneficiary that the SLC/DG will not be extended beyond the final date and a notification will NOT be sent to the Beneficiary informing them of the ultimate or final expiration date. Each bank needs to determine if notice is to be provided to the Relationship Manager or Client to ensure the Letter of Credit is no longer required.

5.3 Demand for payment and Beneficiary’s signed certification

The above examples do not provide for the Beneficiary’s ability to demand payment upon receipt of a notice. Applicants and Banks need to be aware that once the notice of non-extension is sent to the Beneficiary, a demand for payment may occur if the underlying contractual agreement has not been satisfied between the Applicant and Beneficiary. If it is the intent of the Client to permit the Beneficiary to demand payment if the SLC/DG is not extended, the Client should have discussions with LC Professionals at the time the SLC/DG is being drafted and structured to determine what type of certification is required in the event the SLC/DG is not extended.

Some items to consider include:

-
1. Is a separate, different, or additional signed statement required in the SLC/DG in the event the Issuing Bank elects to send a notice of non-extension?
 2. If the SLC/DG covers non-payment of invoices, would the same certification cover the Beneficiary in the event the Issuing Bank elected to send a notice of non-extension?
 3. Does the SLC/DG require two certifications which can be presented?

The following represents possible ways to address this when drafting the SLC/DG:

Have one section of the SLC/DG cover all documents required, which includes default by the Client and their ability to claim payment if a non-extension notice is sent to the Beneficiary. This ensures all documents required are located in one section of the SL/DG.

This (SLC/DG) is available for payment by means of the Beneficiary's signed statement reading as follows:

"I (insert name), a duly authorized signer for (Beneficiary), hereby certify that the amount of our drawing represents funds due as a result of (Applicant) failure to remit payment for invoices"

or

"I (insert name), a duly authorized signer for (Beneficiary), hereby certify that the amount of our drawing represents funds due as a result of the fact that we have received notice that this (SLC/DG) will not be extended and we have not released (Applicant) of their obligations with us".

1. Instructions regarding a demand for payment triggered by a non-extension can be included with the automatic extension clause:

"This (SLC/DG) expires on (Insert Date); however, it is a condition of this SLC/DG that the expiration date shall be automatically extended for successive periods of (insert term e.g. one-year, six months, 90 days), unless at least (Insert time period e.g. 30, 60 90) or more days before the then current expiration or future expiration date, Issuer sends notice to Beneficiary by overnight courier service or other receipted means, informing that Issuer elects not to extend the expiration date for any additional period." Upon receipt by you of such non-extension notice you may draw hereunder by presentation of a statement on your letterhead purportedly signed by an authorized representative of (name of Beneficiary) as follows:

"I (state name and title) hereby certify that I am a representative of (Name of Beneficiary) authorized to execute this statement and demand payment of \$ (insert amount) under SLC/DG Number (Insert Number) which represents funds due us as we have been notified that (name of

Issuing Bank) has elected not to further extend this (SLC/DG), and we have not released (name of Applicant) from their obligations to us”.

5.4 Retention of Documentation Supporting a Non-Extension/Cancellation

Special record retention consideration must be taken with all SLC/DGs containing an automatic extension provision. Unless a SLC/DG drawn by the Beneficiary contains a Final Expiry Date, there are two possible ways for a SLC/DG containing a typical auto-extension provision to be terminated:

1. The bank sending a non-extend notice
2. Authorization by the Beneficiary to cancel the SLC/DG

5.4.1 Bank Sending a Non-Extend Notice

Proper retention of documentation supporting the sending and delivery to/receipt by the Beneficiary of the non-extend notice is critical in order to prove the Bank’s compliance with the terms of the SLC/DG. This should protect the Bank and the Applicant from any obligation to honor a demand for payment which could occur well after the expiration of the SLC/DG.

It is recommended to permanently retain the following documentation, either in paper format or digital/electronic form:

- Copy of the SLC/DG
- Copy of the Non-Extend Notice addressed to the Beneficiary and any additional parties named in the terms of the SLC/DG
- Copy of all the documents proving notice was sent, such as AWB, Registered/Certified mail receipts addressed to the Beneficiary and any additional parties if required by the SLC/DG
- Copy of the proof of delivery of the Non-Extend Notice.

Banks should have controls in place to manage receipt of the non-extend notice by the Beneficiary on each non-extension notice sent. Prior to shipping any relevant paper file to off-site storage, it is recommended that a review be performed to ensure proper documentation supporting the non-extend notice is being retained in a different physical location from the paper files and in a permanent digital/electronic data base which cannot be altered.

5.4.2 Authorization to cancel an SLC/DG from the Beneficiary

It is recommended to permanently retain the following documentation evidencing the termination of a SLC/DG containing an automatic extension clause, either in paper format or digital/electronic form:

-
- Letter from the Beneficiary on their letterhead authorizing the cancellation. (It is recommended that cancellation of a SLC/DG should always include written authorization from the Beneficiary on their letterhead and not solely the return of the SLC/DG.)
 - Authenticated SWIFT message from an Advising/Confirming Bank indicating the Beneficiary authorized cancellation of the SLC/DG.
 - If cancellation of the SLC/DG was done by amendment, based on your banks practice, retain a copy of the Beneficiary's consent to the amendment or a copy of the Beneficiary's authorization on their letterhead.

5.5 Rescission of a Non-Extension Notice

Occasionally banks are requested to rescind a non-extension notice upon new or updated instructions from the Applicant, or if credit approval was received after the notice was sent to the Beneficiary.

The rescission of a non-extension notice is not considered an amendment unless you are changing the terms of the SLC/DG. It is recommended, however, you obtain written authorization from your Client acknowledging the rescission. During this process, it is important to understand the Client's intention for future extensions and determine if the extension is one-time only or, if the auto-extend clause should remain in place.

During the rescission, unless the automatic extension clause is being deleted/changed or the expiry date is changed in any manner, the SLC/DG will remain subject to automatic extension. Any changes to the automatic extension clause should be processed as an amendment and subject to the Beneficiary's consent.

If the auto-extend provision was removed from your system at the time the non-extend notice was generated, it is important to add this information back into your system at the time the notice is rescinded so the SLC/DG will continue to extend automatically.

The below language is provided for consideration when rescinding a non-extension notice. Based on your banks practice or system restrictions, you may elect to send a rescission letter or amendment:

Example 1 (Rescission letter)

The expiry date is now to read: XX/XX/XXXX.

This notice rescinds our notice of non-extension dated XX/XX/XXXX.

This Letter of Credit will continue to automatically extend as provided for therein.

or

Example 2 (Amendment)

The expiry date is now to read: XX/XX/XXXX.

This amendment rescinds our notice of non-extension dated XX/XX/XXXX.

This Letter of Credit will continue to automatically extend as provided for therein.

All other terms and conditions remain unchanged

5.6 DETRIMENTAL AMENDMENTS PROCESSED DURING THE EXTENSION PROCESS

In some instances, the Client requests a detrimental amendment to the Letter of Credit at the time the SLC/DG is being extended or during a rescission of a non-extension notice. A “detrimental amendment” is banking industry slang describing an amendment which appears on its face to possibly be detrimental to the Beneficiary. For example, 1) a reduction in the stated amount; 2) deletion of the automatic provision and/or 3) a change of expiry date. The bank will be unaware of any discussions between the Applicant and Beneficiary or the terms of their underlying contract.

5.6.1 Processing a Detrimental Amendment during the Rescission Process

If during the rescission process the Client requests a decrease to the amount of the SLC/DG or other changes which are considered detrimental to the Beneficiary, it is recommended to handle this as a two-step process to avoid confusion and subsequent litigation once the SLC/DG expires.

First, the rescission should be processed regardless of whether your bank handles a rescission by letter or amendment. The second step is to process the detrimental amendment and obtain Beneficiary’s consent.

In this scenario, and if the detrimental amendment is for a decreased in the amount, credit approval/line availability at the time of the auto-extension should be for the

higher amount to protect the bank in the event the Beneficiary does not accept a detrimental amendment.

Alternatively, you can process the rescission and detrimental amendment together as one amendment. It is recommended to keep the SLC/DG on your books until such time as you receive the Beneficiary's agreement/non-agreement. Since the Beneficiary can accept the amendment after the expiration date, this protects the bank from releasing collateral/line availability and avoids a situation of being unsecured. The amendment should be clearly written so the Beneficiary understands that if they reject the amendment the SLC/DG expires on the date indicated in the original non-extension notice.

An example of possible language is:

"Upon your acceptance of this amendment, we hereby rescind our non-extension notice. In the event you do not accept this amendment, the (SLC/DG) will expire on (Insert original expiry date) as stated in our notice of non-extension dated (insert date)."

In the second scenario if the Beneficiary does not provide their acceptance/rejection of the amendment, then collateral and/or line availability should remain in place for the higher amount until the current expiration date until the amount can be reduced. The SLC/DG should remain open unless the Beneficiary rejects the amendment, if so it is recommended that the Applicant work with the Beneficiary to resolve the status of the pending amendment.

5.6.2 Processing the Auto-Extension during the Process of a Pending Detrimental Amendment

There are instances when the Auto Extension process occurs while a previous detrimental amendment is pending the Beneficiary's consent. If the detrimental amendment was for a decrease in the amount, it is recommended to process the auto-extension and ensure credit approval is granted for the amount prior to the detrimental amendment. This will ensure proper credit approval and collateral, if necessary, is held to secure the bank, in the event the Beneficiary does not agree to the amendment.

Another scenario to consider is when the pending amendment changes the terms of the auto-extension and/or shorten the expiration date. Until the Beneficiary accepts the amendment, credit approval and the internal extension needs to fall in line with the terms of the SLC/DG prior to the detrimental amendment.

5.7 Transferable Letters of Credit

Although this paper does not provide standard practices for a transferable SLC/DG, it is recommended to reissue your SLC/DG at the time of transfer. This provides an effective means to ensure the Beneficiary's name is updated throughout the text of the SLC/DG.

As part of the transfer process, it is recommended to review the auto-extension clause in order to identify if a third party, other than the Applicant, requires a copy of the notification. Conversations need to take place with the new Beneficiary and the Client/Applicant to determine if the third party is still required or should be removed.

If the transfer is performed as a reissue, the auto-extend clause could be changed to remove/change the third party, provided documentation is on file from the Client indicating the third party can be changed/removed.

Processing the transfer as an endorsement on the SLC/DG requires an amendment to the existing SLC/DG if changes are required to the auto-extend clause.¹

5.8 Independent Undertakings with an Advising/Confirming Bank

Whether you are advising on a SLC/DG or confirming a SLC. or requesting a bank to act as the Advising or Confirming Bank, there are several considerations which need to be reviewed at the time the transaction is processed. References in this section to "independent undertaking" does not include reference to a confirmation on a bank guarantee.

Standard practice recommends that clear definition of all parties be used at the time of issuance. Take care not use words such as "you" and "us." Instead, use terms such as "Advising Bank", "Confirming Bank" or "Beneficiary".

5.8.1 Advising/Confirming Bank to Deliver the Non-Extension Notice

When you act as an Advising Bank, you should consider the following:

1. Do you really want to take responsibility for forwarding a non-extension notice received from the Issuing Bank to the Beneficiary?
2. Is the fee collected for advising a SLC/DG worth the risk to your organization?
3. Do you want the Issuing Bank to notify the Beneficiary directly?

¹ Although not recommended as a best practice and not consistent with ISP Rule 6.02 (b. iii), if you process a partial transfer under a SLC/DG, you need to consider the auto-extension clause and determine if the clause requires amendment to provide notices to the beneficiary and the transferee.

If you have answered “No” to any of these three considerations, you will need to have the SLC/DG amended by the Issuing Bank prior to advising the Beneficiary.

When issuing or advising a SLC/DG, or confirming a standby Letter of Credit, it is important to ensure the terms of the auto-extension clause are clear with regards to responsibility for delivering the notice of non-extension to the Beneficiary.

Consider the risk associated with an Advising/Confirming Bank not providing timely notification to the Beneficiary of the non-extension Standard practice is that the Issuing Bank drafts the SLC/DG to indicate that the notice of non-extension will be sent by the Issuing Bank directly to the Beneficiary with notice to the Advising/Confirming Bank via overnight courier/SWIFT.

If you elect to send notice of non-extension to the Advising/Confirming Bank, and they are to give the notice to the Beneficiary, it is recommended that you follow up with the Advising/Confirming Bank to confirm the notice was delivered, and that a notice of the confirmation from the Advising/Confirming Bank is retained in accordance with the guidance outlined in Section 5.5.

Allow at least an additional 15 to 30 days to provide such notice to the Advising/Confirming Bank so there is sufficient time for the bank to process and deliver the notice of non-extension to the Beneficiary.

5.8.2 Confirmation Instructions to the Beneficiary

When acting as a Confirming Bank, your cover letter to the Beneficiary should state whether your confirmation is subject to auto-extension. If the Confirming Bank chooses to include an automatic extension provision, it is recommended that the Confirming Bank’s “Commitment Date” (Expiry Date less Day Notice) be later than the Issuing Bank’s Commitment Date. This will allow time for the Confirming Bank to verify the Issuing Bank has extended their SLC/DG Items to consider are:

1. Does the SLC/DG permit the Beneficiary to demand payment in the event you elect not to extend the confirmation of the SLC/DG?
2. Must you notify the Issuing Bank prior to giving a notice of non-extension?

Standard practice is if you elect not to extend your confirmation is to send notice to the Issuing Bank at the same time notice is sent to the Beneficiary (and other parties as may be included in the SLC/DG).

If you choose not to extend your confirmation, determine whether you wish to remain the Advising Bank for the SLC/DG. If so, determine whether the SLC/DG terms will need to be amended due to your role change.

Consider adding this language to your cover letter:

“Our confirmation under this SLC expires on (Insert Date). However, such confirmation shall be automatically extended for successive periods of (insert term e.g. one- year, six months, 90 days), unless at least XXX days before the then current expiration or future expiration date we send written notice to you at the address listed in the SLC of our election not to extend our confirmation for an additional period In addition, should the Issuing Bank send notice to you directly or otherwise, that their SLC will not be extended for any additional period, such notice shall be deemed to apply to our confirmation as well and our confirmation will expire upon the expiration of the SLC. “

5.9 Management of the Ultimate (Final) Expiration Date

- When the expiration date of the SLC/DG reaches the final expiration date it should be treated as a fixed maturity date as the Auto Extension clause is no longer applicable. A notice of non-extension is not required for the final expiration date.
- Extensions beyond the final expiration date require an amendment and normal amendment practices should be followed regarding credit approval and the Client’s amendment application. The amendment must address the Final Expiry Date in the auto-extension clause and indicate if the auto-extension clause remains in place or is being deleted.
- Your internal processing system should have controls in place to manage a final expiration date to ensure the SLC/DG is not inadvertently extended after the final expiration date.

5.10 Obtaining the Client’s Agreement to the yearly Auto Extension

Regardless of how your bank communicates with the Client e.g. e-mail, phone call etc., recommended practice is that the Client confirms in writing their agreement to extend the SLC/DG. Based on your bank policy, this can be in the form of a signed dated letter or an email.

6.0 Examples of Problem/Language and Recommended Solutions:

This section provides examples of problem language together with identifying the potential issues and recommendations for banks to consider when drafting and structuring a SLC/DG.

Example Number One (1)		
Auto Extend Clause	Potential Issues	Recommendations
<p>This Letter of Credit is effective as of [date] and shall expire on [date at least one year] but such expiration date shall be automatically extended for a period of [at least one year] on [date] and on each successive expiration date, unless, <i>at least 120 days before the current expiration date, we notify both you and * [owner's or operator's name]</i> by certified mail that we have decided not to extend this Letter of Credit beyond the current expiration date. <i>In the event you are so notified any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by both you and [owner's or operator's name], as shown on the signed return receipts.</i></p> <p><i>* The actual owner or operators name is completed at the time of the issuance of the independent undertaking and is typically the Applicant.</i></p>	<ol style="list-style-type: none"> 1. (a) What happens if you send notice of non-extension early? Does the Letter of Credit expire 120 days after receipt of notice or does the LC expire on the stated expiration date? 1. (b) What if the dated receipt is received later than 120 days prior to the current expiration date? Is the expiration date automatically extended to 120 from the receipt date? 2. What if we never get the receipt back? From an issuer's perspective, you need to track when both owner and/or operator and Beneficiary receive the notice and retain proof of delivery. 3. What if the notice is sent and returned undeliverable to either the owner or operator and/or Beneficiary? As there are no signed receipts can the L/C ever expire? 	<ol style="list-style-type: none"> 1. In the sentence reading: <i>"In the event you are so notified any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by both you and [owner's or operator's name], as shown on the signed return receipts."</i> Change to: <i>"In the event you are so notified any unused portion of the credit shall be available upon presentation of your sight draft prior to the then current expiration date."</i> 2. You could add "Copies of our notice of election not to extend this Letter of Credit shall be sent to [owner's or operator's name]; however, failure to provide copies of such notice does not affect our notice of non-extension to the Beneficiary." 3. You may want to validate with your legal team that your reimbursement agreement or application signed by the Client is

		appropriate to cover this obligation.
Example Number Two (2)		
Auto Extend Clause	Potential Issues	Recommendations
<p>It is a condition of this Letter of Credit that it shall be deemed automatically extended, without amendment, for additional period(s) of one year from the expiry date hereof, or any future expiration date, unless at least (xx) <i>business days</i> prior to any expiration date we notify you by registered mail or by any other receipted means that we elect not to consider this Letter of Credit extended for any such additional period. <i>Such non-extension notice must be considered effective only upon reception by the Beneficiary</i>"</p>	<ol style="list-style-type: none"> 1. The clause refers to "business days" which is not standard and leaves room for interpretation. Using business days for calculating when non-extension notice is to be sent could potentially cause you to miss the window for the non-extension notice as states, governments and countries have different business days due to holidays, etc. 2. The notice of non-extension is considered effective only upon Beneficiary's receipt. This places the risk on the issuer to determine when the Beneficiary received the notice. The issuer is tasked with the responsibility of obtaining proof that the Beneficiary received notice. 3. What if the Beneficiary refuses to accept the notice sent by registered mail or other receipted means? If the notice is refused, would the SLC/DG expire? 	<ol style="list-style-type: none"> 1. With regards to "business days" the word "business" should be deleted and replaced with "days" to align with common practice as it facilitates calculation of the days. 2. If you are unsuccessful in having "business days" removed from the SLC/DG language, it will be very important to ensure your system and supporting processes will support this arrangement. If your system cannot calculate business days, you may need to add a cushion. 3. Business days would need defined in the SLC/DG. 4. It is strongly recommended to remove the following language: "<i>Such non-extension notice must be considered effective only upon reception by the Beneficiary</i>" 4. Auto extension clauses must be precise and

		actionable by the Issuing Bank.
Example Number Three (3)		
Auto Extend Language	Potential Issues	Recommendation
<p>We hereby agree that this Irrevocable Letter of Credit shall expire on _____, 20__ as stated herein above: provided, however, that we shall notify the (named Beneficiary) by Certified Mail, return receipt requested, at least ninety days prior to said expiration date, that said Letter of Credit is about to expire. <i>In no event shall this Irrevocable Letter of Credit or the obligations contained herein expire except upon prior written notice, it being expressly agreed that the above expiration date shall be extended as shall be required to comply with this notice provision.</i></p>	<p>This is not an automatic extension clause as the wording does not indicate the expiration date will automatically extend nor does it provide the time period of any extensions. It merely indicates the LC will expire upon 90-day notification to the Beneficiary.</p> <p>Pre expiry date notice to the Beneficiary.</p> <p>Certified Mail may not provide a return receipt or cumbersome for the Issuing Bank to send a certified letter. The language does require the Issuing Bank to provide notice to the Beneficiary prior to the expiration date. If notice is not sent, the expiration date extends to an unknown date.</p>	<p>Use of this language is strongly discouraged as it is non-confirming with industry practice. As an alternate, request the Beneficiary to accept to a standard automatic extension clause.</p> <p>If you entertain use of this language, consult with your legal and credit risk teams to ensure your reimbursement agreement supports this arrangement.</p> <p>Items to consider to mitigate risk:</p> <ul style="list-style-type: none"> • Do you have the system and processes in place to support such language? • . Delivery and tracking of notices should be treated in the same manner as a standard auto-extension clause. • The notice sent to the Beneficiary may need updated from

		<p>your standard auto-extension language. The notice should just read that the Letter of Credit will expire on (insert date). (Pre-expiration date notice).</p> <p>Wording should change to send notice by overnight courier or certified mail.</p> <p>This is a fixed expiry date and therefore requires amendments to extend. The Beneficiary would be responsible to work with the Applicant if an extension is required. The Issuing Bank is only responsible to send to the pre-expiry date notice.</p> <p>Flag your file and update your system with special comments to ensure staff understand this is not a standard automatic extension provision.</p>
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Example Number Four (4)

Auto Extend Language	Potential Issues	Recommendation
This Letter of Credit shall be automatically extended for one year from the present or any future expiry date without any formal amendment unless at	This wording requires the Issuing Bank to make an automatic payment at the time a non-extension is sent.	Delete the sentence stating " <i>and at the same time forward to the (Named LC Beneficiary) together with such written notice of</i>

<p>least thirty(30) days prior to the present expiry or any such future expiry date as automatically extended we shall notify the (Named Beneficiary) in writing by registered mail or courier that we elect not to extend the Letter of Credit for any further period <i>and at the same time forward to the (Named LC Beneficiary) together with such written notice of election a bank draft payable to the (Named LC Beneficiary) in the amount of (insert amount of the Letter of Credit) less any amount previously paid under this Letter of Credit.</i></p>	<p>Since a SLC/DG is an independent undertaking, the issuing bank should not assume that payment is due. The bank has fulfilled its obligations by sending notice and the Beneficiary must then take what action they deem appropriate.</p> <p>Points to consider:</p> <ol style="list-style-type: none"> 1. Beneficiary may be working with another bank to replace the Letter of Credit. 2. The underlying transaction may have been satisfied. <p>The use of the word “formal” in the phrase “formal amendment” is undefined and may lead to dispute.</p>	<p><i>election a bank draft payable to the (Named LC Beneficiary) in the amount of (insert amount of the Letter of Credit) less any amount previously paid under this Letter of Credit”.</i></p> <p>You may want to consider including a demand for payment from the Beneficiary upon receipt of such non-extend notice.</p> <p>Remove the word “formal” from the auto-extension clause.</p>
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7.0 Credit Approvals and System Functionality

The risks an Automatic Extension provision adds to a SLC/DG are typically operational and/or credit as the issuing or Confirming Bank may not properly send their election not to extend. This could lead to inadvertently committing the bank for an additional period under the SLC/DG and/or understating exposure as the SLC/DG may be incorrectly removed from the bank’s records.

At the time the issuer issues a SLC/DG, a credit decision has been made as to the credit worthiness of the underlying credit party. Therefore, the Issuer/Confirmer should review this credit decision prior to allowing the SLC/DG to extend per its terms. Extending the expiration date or sending a non-extend notice is at the discretion of the Issuing Bank and the Confirming Bank, if any, as it relates to the language of their own undertakings.

Below are suggestions to help mitigate the credit approval risk of SLC/DG's:

- Issuer and Confirmer, if any, must have a system in place (manual or automated) to actively track and monitor these elements.
- Issuer and Confirmer, if any, must be able to make a credit decision for each automatic extension prior to letting the SLC/DG extend for an additional period.
- The automatic extension “Final Notice Date” (also known as the “drop-dead date”, commitment date, action date, etc.) is typically defined as the current Expiry Date less the number of days required to provide notice as defined in the SLC/DG:
 - Automatic Extension requests should be sent for credit approval at least 30 to 45 days prior to the Automatic Extension “Final Notice Date” to allow the credit officers to make a proper decision on the transaction
 - Establish an internal deadline at least 7 to 10 business days prior to the Final Notice Date to allow time for a Notice of Election Not to Extend to be processed and sent to the Beneficiary prior to the Final Notice Date
- Your internal policies and procedures should address whether a non-extension is automatically generated if no response is received from the Credit Officer prior to the Final Notice Date (refer to Section 5.5 on Rescissions). Depending on the language of the SLC/DG, sending a notice of non-extension may trigger a demand for payment from the Beneficiary. However, not sending a notice will commit the bank for an additional period and the SLC/DG cannot be cancelled without the consent of the Beneficiary.
- Once the automatic extension is processed, all flags should be set in the bank's internal systems for the next extension period, unless a final expiration date will occur which would negate another auto-extension.

8.0 Defined Expiration Dates

8.1 Expiration Dates under United States Law

Guidelines issued by the Office of the Comptroller of the Currency (“OCC”) provide that as a matter of safety and soundness, independent undertakings issued by national banks should (a) be “limited in amount” (meaning that the maximum amount that the issuer could be required to pay on a Letter of Credit must be ascertainable), and (b) either (1) be “limited in duration” (meaning that a Letter of Credit must expire) or (2) permit the bank to terminate the undertaking at will or on a periodic basis, or (3) entitle the bank to demand cash collateral from the Applicant. Refer to Section 10 for a link to 12.CFR 7.1016.

Article 5 of the Uniform Commercial Code (“UCC”) provides United States law for Letters of Credit that are not “limited in duration” because they do not include an expiration date. Section 5-106 of the UCC provides that if no expiration date is stated, the Letter of Credit expires one year after its issuance and, in the case of a Letter of Credit that states that it is perpetual, the Letter of Credit expires five years after its issuance.²

Note: While Article 5 does provide United States law on Letters of Credit issued without an expiration date and those issued with the word “perpetual”, legal challenges to the applicability of Section 5-106 (c) and (d) for terminating a LC/DG bank’s liability have had mixed results in the courts due to other conditions specific to SLC/DG language. It is recommended that any SLC/DG issuer consult with their risk and legal areas regarding any questionable language that may have credit and legal implications.

The Official Commentary to this section further states: “Although all Letters of Credit should specify the date on which the issuer’s engagement expires, the failure to specify an expiration date does not invalidate the Letter of Credit, or diminish or relieve the obligation of any party with respect to the Letter of Credit. **A Letter of Credit that may be revoked or terminated at the discretion of the issuer by notice to the Beneficiary is not “perpetual.”**”^{vi}(emphasis added).

When issuing a SLC/DG without a defined expiration date and with clear automatic extension language, banks need to ensure they have proper controls in place to manage the risk of removing the SLC/DG from their system and having collateral released, if applicable, prior to proper release from the Beneficiary.

Below is an example of language that could result in the SLC/DG being issued without a defined expiration date:

Language	Issues	Recommended Solution
SLC/DG does not contain a stated expiration date.	1. It does not have an expiration date. It	<ul style="list-style-type: none">• Insert an expiration date and add clarity

² Alabama and Arkansas

<p>Instead the following is provided:</p> <p>“Cancellation is subject to 90 day written notification. Notification must be mailed to _____ (insert name of Beneficiary).</p>	<p>"violates" the Office of the Comptroller of the Currency (OCC) Regulation 12 CFR 7.1016 "Safety and Soundness" principles as well as contradicting Uniform Commercial Code, Article 5 (Revised), Section 5-106(d).</p> <p>2. . It does not give instruction how the notification is to be sent.</p> <p>3. It lacks language that clearly states when the cancellation is effective.</p>	<p>around sending of the notice.</p> <ul style="list-style-type: none"> • Add a standard automatic extension clause to the SLC/DG <p>Note: If you are obligated to issue an SLC/DG without an expiration date, ensure collateral is in place as outlined under the Guidelines issued by the Office of the Comptroller of the Currency (“OCC”).</p>
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8.2 Perpetual

Is a SLC/DG issued with an automatic extension clause that can only be terminated by an action from the Beneficiary considered to be perpetual? Based on the Circuit Court affirmation of District Court decision based on the case between Golden West Refining Company and Sun Trust Bank ^{vii}, the answer is “No”.

A perpetual SLC/DG must be identified as such in the terms of the SLC/DG. Based on the UCC Article 5-106 “(d): A Letter of Credit that states it is perpetual expires five years after its stated date of issuance, or if none is stated, after the date on which it is issued”. In the above referenced case, the court applied a standard of “plain meaning” to the word “states” in the statute language to mean that the SLC/DG must expressly state the word “perpetual” in its content to be considered perpetual. ^{viii}

An Issuing Bank must recognize that a condition in the SLC/DG which prohibits termination until such time as the Beneficiary takes a certain action with documentation submitted to the Issuing Bank may be in violation of the OCC Safety and Soundness provision, as it is unclear and creates a problematic situation. The conservative approach is this type of clause “trumps” the auto-extension provision and therefore, an Issuing Bank may be obligated to keep the SLC/DC open until such time as the Beneficiary authorizes the cancellation.

During the drafting and structuring of the SLC/DG, an Issuing Bank could add additional language to the auto-extension clause to the effect that the notice of non-extension overrides any other terms within the SLC/DG and that once notice is sent to the Beneficiary, the SLC/DG will expire on the stated expiration date, regardless of whether the Beneficiary has released the Issuing Bank of its obligations. Such language may not be acceptable to the Beneficiary but adding this or similar language may remove the uncertainties created with having both clauses in the SLC/DG.

8.3 Final/Ultimate Expiration Date

When issuing a SLC/DG, the Issuing Bank may wish to consider inserting a final/ultimate (“final”) expiration date into the terms of the auto-extension clause. The final expiration date permits the SLC/DG to continue to automatically extend until such time that as it reaches the final expiration, at which time, the SLC/DG expires without notice to the Beneficiary.

A final expiration date is not always acceptable to the underlying Beneficiary, as it requires them to monitor their collateral (the SLC/DG) to ensure it does not expire without prior written notice from the Issuing and Confirming Bank, if any. In some instances, the terms of the underlying contract may be such that prohibits a final expiration date. However, when it can be added, it provides an end expiration date which can limit the operational and credit risk to the Issuing Bank, Confirming Bank if any, and the Applicant.

Banks need to ensure their processing system can handle a final expiration date in order that the exposure is removed once the final expiration date is reached.

It is important for banks to understand that a non-extend notice is not required once the final expiration date is reached. By its terms, the SLC/DG will automatically terminate once it reaches the final expiration date, without notice or amendment to the Beneficiary. An amendment to the terms of the SLC/DG is required (requiring Beneficiary consent) if the final expiration date needs to be altered.

An important case to mention regarding a final expiration date is JP Morgan Trust CO., NA (hereinafter Morgan) v. US BANK, NA (hereinafter Bank) 381 F. Supp. 2d 865 (E.D. Wis. 2005). In this case, the Beneficiary demanded payment under the Letter of Credit the day before it reached its final expiration date with a statement indicating it had received a non-renewal notice. In this case Morgan argued the Letter of Credit itself--because it stated a final expiry date--was a form of non-renewal notice. The Issuer argued that a notice of non-renewal was not sent, and that the LC reached its final expiration date. The court decided that the Letter of Credit terms, in effect, only stated that the Letter of Credit would not *automatically* extend and therefore, the Letter of Credit itself was not a non-renewal notice. The court concluded; “The Bank did not send Morgan a notice of non-renewal; therefore; Morgan’s certification to the

contrary was fraudulent. As a result, Wis. Stat. § 405.114(2) authorized the Bank to dishonor Morgan's draw.^{ix}

9.0 Legal Issues

9.1 Force Majeure

Force Majeure is covered under ISP98 Rule 3.14, UCP 600 Article 36, and the URDG 758 Article 26. These publications do not address the auto-extension clause with regards to the notification period (i.e. if force majeure is in effect at the time the non-extension notice is to be sent).

As there are no supporting rules, laws, regulations and/or identified court cases addressing this scenario, it is recommended that if a force majeure event takes place prior to the expiration date which impacts the timely sending of a notice of non-extension, the recommended practice is to contact your legal department to determine what steps are to be taken. The recommendation is to maintain the liability on your books and control of the collateral until a final determination has been made. Force Majeure should typically be addressed in the reimbursement agreement.

9.2 Assignment of Proceeds

The addition of an assignment of proceeds in a SLC/DG containing an automatic extension provision will have no added impact on how the bank administers the provision and related expiry date.

9.3 Single or One-Time Extensions

It is common practice for a SLC/DG to include an automatic extension clause which continues to extend the expiration date until such time that either (1) a notice of non-extension is sent; or (2) the final expiration date is reached, if present. However, it is not common to have a SLC/DG automatically expire after one auto-extension has been processed.

Example:

“This SLC/DG expires on (Insert Date); however, it is a condition of this SLC/DG that the expiration date may automatically extend for a one time one-year period, unless (Insert time period e.g. 30, 60 90) or more days before the current expiration date, Issuer gives notice to

Beneficiary by overnight courier service or other receipted means, informing that Issuer elects not to extend the expiration date for any additional period.”

This type of clause increases your operational risk and requires staff to recognize and understand the difference in order to ensure the transaction is set up correctly in your system. Banks need to be careful not to continue to have the SLC/DGs automatically extend beyond the one-time extension. Interpretation by the Beneficiary regarding the language in the SLC/DG needs to be considered as banks may remove the SLC/DG after the one-time extension while the Beneficiary may still believe the expiration date will continue to be automatically extended until such time that notice is sent.

One way to manage operational risk to is to add a final expiration date to the auto-extension clause to ensure clarity regarding the final expiration date.

Example:

“This SLC/DG expires on (Insert Date); however, it is a condition of this Letter of Credit that the expiration date may automatically extend for a one time one-year period, unless (Insert time period e.g. 30, 60 90 days) or more days before the current expiration date, Issuer gives notice to Beneficiary by overnight courier service or other receipted means, informing that Issuer elects not to extend the expiration date for any additional period. However, in no event will the expiration date be extended beyond (Insert the date)”

10. Reference Materials

10.1 Rules:

ISP98 text: <http://iiblp.org/banking-law-resources/isp98/>

UCP 600: <https://www.uscib.org/international-business-bookstore/>

URDG 758: <https://www.uscib.org/international-business-bookstore/>

10.2 United States Law

UCC Article 5rev: Contact counsel or search online using the below hotlink.

As adopted in 50 states plus the District of Columbia and the U.S. Virgin Islands. Not all states adopted the model law in a uniform manner. Hotlinks to the text as adopted in each state are available at <https://www.law.cornell.edu/uniform/ucc#a5>. States adopting in a non-uniform manner include Alabama, Connecticut, New Jersey, New York, Texas and Wyoming. See *Attorney's Fees in Letter of Credit Cases Under U.S. CCC Section 5-111(e)*, By Carter H. Klein, Documentary Credit World, Volume 9, No. 10, Nov/Dec 2005, pp32ff, at <https://shop.iiblp.org/products/documentary-credit-world>

10.3 United States Regulator

Office of the Comptroller of the Currency, Safety and Soundness 12CFR7.1016: Typically referred to as the “safety and soundness” regulation, this states the conditions under which a national bank is permitted to issue letters of credit. http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=a73ff8c17a875f62816dbc436d371c75&mc=true&r=SECTION&n=se12.1.7_11016

10.4 Court Cases Regarding Auto-Extension Credits

Auto Renewal and Transfer

Banca del Sempione v. Provident Bank of Maryland, No. 97-2025, 160 F. 3d 992 (4th Cir.)

Banca del Sempione v. Provident Bank of Maryland, No. 97-2025, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, 160 F.3d 992; 1998 U.S. App.,_UNITED STATES COUNCIL ON INTERNATIONAL BANKING, INCORPORATED, Amicus Curiae.

Auto Reduction

Eastman Software, Inc. v. Texas Commerce Bank, N.A. 28 S.W.3d 79 (Tex. App. 2000) [U.S.A.]

Lincoln National Life Insurance Co. v. TCF National Bank, No. 10 C 6142 2011 U.S. Dist. LEXIS 22598 (N.D. Ill. Mar. 7, 2011) [USA]

Uzinterimpex JSC v. Standard Bank Plc, [2007] 2 Lloyds Rep 187; [2007] EWHC 1151 (Commercial Ct) [England]

Dates

Are there other dates in a credit which should be changed when a credit auto-extends, such as the latest date to present documents.

Cf. Ocean Bank of Miami v. La Esquina Presidential, Inc., 623 So. 2d 520, 20 UCC Rep. Serv.2d 1050 (Fla. App., 3rd Dist. 1993)

“Extend” or “Renew”.

Louisville Mall Associates v. Wood Center Properties, LLC; 361 S.W.3d 323 (2012) [USA].

Old Republic Surety Co. v. Quad City Bank & Trust Co. 681 F. Supp. 2d 970 (C.D. Ill. 2009). <https://www.courtlistener.com/opinion/2527986/old-republic-surety-company-v-quad-city-bank-trust/>. The words “extend” and “renew” were used both in the credit and opinion, apparently interchangeably. The Court found that notice was given by fax on the last permissible day instead of by Certified mail as required by the credit was sufficient as it was received by the Beneficiary timely, however it did not “clearly and unequivocally convey hat Quad City did not intend to renew the ILOC.” (Irrevocable Letter of Credit).

Final Expiration Date

J.P. Morgan Trust Co., N.A. v. U.S. Bank, N.A. (E.D.Wis. 2006) (existence of a final expiration date does not automatically give the Beneficiary a right to demand payment)

Giving Notice (several points):

The Travelers Indemnity Company v U.S. Bank National Association, 2006 WL 1074910, 59UCC Rep.Serv.2d 786 (Conn.Super. 2006). Notice not properly given, addressee not correct.

Nat'l Union Fire Ins. Co. of Pittsburgh v. Manufacturers Hanover Trust Co., 598 N.Y.S.2d 228 (App. Div. 1st Dep't 1993)

International Fidelity Ins. Co. v. State Bank of Commerce, 1988 WL 59853 (E.D. La. 1988). (SBY stated notice to be sent by registered mail, Beneficiary denied receipt of notice sent by certified mail).

Cf. 3Com Corp. v. Banco do Brasil, S.A., 2 F. Supp.2d 452 (S.D.N.Y. 1998), *aff'd*, 171 F.3d 739 (1999) (notice was unclear whether a request or a notice of non-extension)

Royal American Bank v. LaSalle National Bank, Case No. 1-04-0234 (Ill. App. Ct., 1st Div., March 2005) (Notice referred to a bank newly assigned LC number and mentioned the former LC number in passing)

Perpetual or Not?

GOLDEN WEST REFINING COMPANY v SunTrust Bank (No. 06-56006) D.C. No. CV-05-01550-FM. Appeal from the United States District Court for the Central District of California. (A Letter of Credit must state that it is “perpetual” to qualify as a perpetual Letter of Credit). See also: Abstract of this case and commentary in the 2009 ANNUAL REVIEW OF INTERNATIONAL BANKING LAW & PRACTICE, p. 428ff, *Golden West Refining Co. v. SunTrust Bank* 538 F.3d 1233, 66 UCC Rep. Serv. 2d 867 (9th Cir. 2008), *aff'g* 61 UCC Rep. Serv. 2d 1011 (C.D. Cal. 2006) [USA], www.iiblp.org. See also *Contracting out of*

Revised UCC Article 5, Loyola of Los Angeles Law Review, [Vol. 40:297], p 338ff

Michigan Commerce Bank v. TDY Industries, Inc., No. 1:11-CV-235, 2011 WL 6009882 (W.D. Mich. 2011). (Letter of credit must state it is 'perpetual' to be so)
LEARY v. McDOWELL COUNTY NATIONAL BANK, *Supreme Court of Appeals of West Virginia*, No. 29001. Decided: June 29, 2001. <https://caselaw.findlaw.com/wv-supreme-court-of-appeals/1231215.html> (Perpetual may not mean Perpetual in West Virginia Labor Law cases)

Bd. of Supervisors of Fairfax County, Va. v. Burke & Herbert Bank & Trust Co., No. CL-2008-9338, 2009 WL 1269388 (Va. Cir. Ct. Mar. 25, 2009). The Letter of Credit allowed automatic extensions without an end date. The underlying project was completed and several years later a demand was made. The court held Virginia's general statute of limitations applied. Under former UCC 5.

10.5 Other Important Resources

Model Forms ISP98

[ISP98 Form 2](#) In addition to a Model Form for ISP98 standbys, this form also includes information on retracting a non-extension notice and on standby substitution, see ISP98 Form 2 nn.6, 14 and ISP98 Form 11.1 nn.19, 37

State of New York, Department of Financial Services:
<https://www.dfs.ny.gov/search/site?search=letter+of+credit>

[UCC Article 5rev Official Commentary](#) – Hotlink not available due to copyright.

ENDNOTES

ⁱ 1996 – 2016 *Annual Review of International Banking Law & Practice, Cumulative Index*, © 2016 Institute for International Banking Law and Practice, <http://iiblp.org/banking-law-resources/isp-forms/>

ⁱⁱ *International Standard Banking Practice for the Examination of Documents under UCP 600*, copyright © 2013, International Chamber of Commerce (ICC), Paris, all rights reserved. ICC Publication No. 745.

ⁱⁱⁱ *Documentary Credit World*, October 2015 page 30 and September 2015 page 37, © 2015 by Documentary Credit World, Inc.

^v *Uniform Commercial Code, Article 5 Revised, State of New York*, <https://codes.findlaw.com/ny/uniform-commercial-code/ucc-sect-5-106.html>

^{vi} *UNIFORM COMMERCIAL CODE REVISED UCC ARTICLE 5. LETTERS OF CREDIT, 1995 Official Text with Comments*, © 1995 The American Law Institute and National Conference of Commissioners on Uniform State Laws.

^{vii} *GOLDEN WEST REFINING COMPANY v SunTrust Bank (No. 06-56006) D.C. No. CV-05-01550-FM. Appeal from the United States District Court for the Central District of California.*

^{viii} *Michigan Commerce Bank (“Michigan) v TDY Industries*, Case No. 1:11-cv-235, 2011 WL 6009882 (W.D. Mich. Dec 1, 2011) [USA] Michigan

^{ix} *JP Morgan Trust Co., NA v. US BANK, NA*, 381 F. Supp. 2d 865 (E.D. Wis. 2005)