LETTER OF CREDIT PRACTICE TIPS FOR STANDBY LETTERS OF CREDIT SUBJECT TO ISP98 (I.E., INTERNATIONAL CHAMBER OF COMMERCE INTERNATIONAL STANDBY PRACTICES (ICC PUBLICATION NO. 590, 1998))

Tips Primarily for the Beneficiary of the Letter of Credit:

1. In any contract supported by a letter of credit that would be subject to an automatic stay upon the counterparty's bankruptcy, avoid referencing in the letter of credit draw trigger: (i) any notice that must be provided to counterparty under the contract supported by such letter of credit or (ii) presentation of an invoice or demand that must be made to counterparty under the contract supported by such letter of credit or (iii) other action that must be taken with respect to such counterparty, in order to avert potentially being prohibited by the automatic stay from being able to certify that draw trigger following a counterparty's bankruptcy filing.

2. Seek to include a provision in the letter of credit requiring the issuer to replace such letter of credit under specified circumstances, such as receipt of an affidavit from an officer of beneficiary certifying that the original letter of credit has been lost, stolen or mutilated. Consider including as an annex to such letter of credit the form of any affidavit or indemnity required by the issuer to issue a replacement letter of credit in such circumstances (e.g., an INDEMNITY FOR CANCELLATION OF LETTER OF CREDIT WITHOUT ORIGINAL LETTER OF CREDIT). *See* ISP98 Rule 3.12 which states: "If an original standby is lost, stolen, mutilated, or destroyed, the issuer need not replace it or waive any requirement that the original be presented under the standby." *See* UCP600 (2007 Version) Article 17 and *Grunwald v. Wells Fargo Bank*, N.A, 725 N.W.2d 324 (Iowa Ct. App. 2005) upholding Wells Fargo's dishonor of a letter of credit demand using a photocopied letter of credit even though accompanied by an affidavit certifying that the original letter of credit was never produced and that beneficiary had searched diligently but not found the same where the letter of credit itself required that the draft (demand for payment) be accompanied by the original letter of credit.

3. Always seek to include in the letter of credit a provision permitting facsimile presentation as an acceptable means of presentation in order to avoid the time and expense (and potential issues presenting in person prior to the letter of credit's expiry) of having to make a physical

presentation. Also consider seeking to include in the letter of credit a provision permitting electronic presentation as an acceptable means of presentation for the same reasons.

4. In order to be able to draw under a facsimile or electronic copy of the letter of credit prior to waiting for receipt of the original letter of credit by mail or other physical delivery method, consider inserting in the letter of credit a provision such as “This [facsimile] [electronic] copy shall be the operative instrument[until such time as the original is received].”

5. If you desire for the letter of credit to be transferable, remember to state that it is transferable by including a statement that the letter of credit is transferable and stating the conditions under which it is so transferable. This is because under ISP98 Rule 6.02(a), a “standby is not transferable unless it so states.”

6. If you desire for the letter of credit to be transferable, include as part of the letter of credit exhibits the issuer’s pre-agreed form for effecting such transfer. This will mechanically make it easier to effect such transfer if and when the conditions are met for such transfer and the beneficiary desires to effect such transfer.

7. If you desire for the proceeds of a letter of credit to be assignable, seek and obtain issuer’s acknowledgment to the desired assignment of proceeds (e.g., in financings) upfront. Note that assignment of the proceeds of a letter of credit (for example, for financing purposes), is a totally different concept than transferring a letter of credit (which effects a transfer of beneficiary’s rights to draw under the letter of credit). Under ISP98 Rule 6.07(a): “Unless applicable law otherwise requires, an issuer or nominated person (i) is not obligated to give effect to an assignment of proceeds which it has not acknowledged; and (ii) is not obligated to acknowledge the assignment.”

8. Prepare in advance when you anticipate making a draw or even contemplate the possibility of making a draw under a letter of credit. From a legal perspective, among the items to confirm are: (i) that your company/client would have the right to draw under the both the letter of credit and the contract secured thereby, (ii) that your company/client would be able to satisfy each relevant condition to draw (including availability of any original documentation that must be submitted) and (iii) that you have readily available or prepared, as applicable, all documentation, sight drafts, drawing certificates, etc. that would have to be submitted in connection with such presentation (including if to be presented by facsimile, the facsimile cover sheet for such presentation).

9. Once you have determined that you will be making a drawing under a letter of credit, consider calling the issuer in advance as a courtesy and as a heads-up in order to facilitate the issuer’s expeditious review and processing of such letter of credit.

10. As a beneficiary whose demand has been denied due to a stated discrepancy, remedy such discrepancy as soon as possible and re-present in accordance with the terms of the letter of credit. In the event that the issuer attempts to assert a different discrepancy in your re-presentment that it failed to assert in your original presentation, do not accept such discrepancy as a valid basis for rejection of your re-presentation. *See* ISP98 Rule 5.02, which requires a

notice of dishonor to state "all discrepancies upon which dishonor is based." *See also* ISP Rule 5.03(a), which states that "[f]ailure to give notice of a discrepancy in a notice of dishonor within the time and by the means specified in the standby or these rules precludes assertion of that discrepancy in any document containing the discrepancy that is retained or re-presented, but does not preclude assertion of that discrepancy in any different presentation under the same or a separated standby." *See also Export-Import Bank of the U.S. v. United Cal. Discount Corp.*, 738 F. Supp. 2d 1047 (C.D. Cal. 2010) finding that because the issuer omitted beneficiary's failure to present the original letters of credit as a basis for dishonor in its original notices of discrepancies, it waived the defect as a grounds for dishonor.

11. As beneficiary, always engage your legal department to read over any proposed letter of credit or letter of credit amendment for substantive issues as well as to perform a word-for-word read against the agreed form of any letter of credit or letter of credit amendment.

12. In order to avoid gaps with respect to back-to-back letters of credit, from a beneficiary's standpoint seek the ability to draw under the letter of credit in your favor (LC1) in the event of any draw under the letter of credit under which you are (or your affiliate is) the applicant (LC2) by making LC1's drawing trigger literally be any drawing under LC2.

13. Avoid letter of credit coverage of individual transactions that are subject to a master agreement. If a transaction is governed by a master agreement, the letter of credit should include draw triggers tied to the master agreement rather than the individual transaction. For example, if a party has two long form confirmations with the same counterparty (where each confirmation provides that all transactions of the type described in the confirmations constitute a single agreement) but only one of the transactions includes provisions for a letter of credit, the beneficiary could be prevented from drawing on the letter of credit if the need to draw is triggered by the transaction that has no letter of credit provisions. Additionally, if the transaction that is covered by the letter of credit is terminated due to an event of default, typically (e.g., under ISDA and other standard terms) the amount owed under the terminated transaction is extinguished and replaced with a single net payment obligation related to all terminated transactions under the master agreement. In such a case, where a letter of credit was drafted to apply to amounts owed under a specific transaction, it would be hard to argue that such letter of credit had any application once such transaction had been terminated. If the terms of the letter of credit are drafted more broadly to apply to the master agreement (and where both transactions are deemed to be governed by the same master), one should be able to avoid the potential gap in letter of credit coverage.

14. If you as beneficiary desire that the letter of credit remain at the stated amount despite any drawing thereunder (for example, to require replenishment to the original stated amount in the event of a drawing for liquidated damages assessed mid-way through a construction project), include a replenishment obligation in the contract tied to such letter of credit which obligates the posting party to either cause the maximum amount available to be drawn under such letter of credit to be increased by the amount of such drawing or cause a replacement letter of credit meeting the same requirements as the drawn letter of credit to be issued to you as beneficiary in a maximum amount equal to the amount drawn under the first letter of credit. It is not typical to include a replenishment obligation in the letter of credit itself.

15. Store the original letter of credit and all amendments thereto and all related correspondence (including notices of changes in address) in one safe place (e.g., a fireproof vault or locked fireproof cabinet) to eliminate/minimize the chances of their being lost, stolen or destroyed.

16. Avoid accepting sanctions clauses in letters of credit that contain language which enables the issuer to avoid performance based on discretionary interpretations of sanctions or compliance with an internal policy of such issuer. Keep in mind that any internal bank policy may be broader than applicable law and subject to change more quickly and arbitrarily than applicable law. These clauses can in effect serve to undermine the irrevocable nature of letters of credit, and it is difficult to assess and foresee the effect of these clauses under letters of credit. Such advice is consistent with guidance from the ICC published on August 20, 2014 (Doc# 470/1238, which is available at http://www.iccwbo.org/Advocacy-Codes-and-Rules/Guidance-Paper-on-The-Use-Of-Sanctions-Clauses-In-Trade-Finance-Related-Instruments-Subject-To-ICC-Rules/).

17. Seek to including language specifying the precise period during which a complying presentation must be honored (for example, if a conforming presentation is received not later than 11:00 a.m. New York time that issuer will honor such presentation not later than 3 p.m. New York time on the business day following the date of such presentation and if a conforming presentation is received later than 11:00 a.m. New York time, on the second business day following the date of such presentation). Otherwise, the issuer has a 3 business day safe harbor during which it "is deemed to be not unreasonable" for honoring a complying presentation under ISP98 Rule 5.01(a).

Tips Primarily for the Applicant with respect to the Letter of Credit:

1. It is generally advisable to run the proposed letter of credit draft or proposed letter of credit amendment draft by the beneficiary before issuing it. Unfortunately, there are errors in such drafts more often than one might expect, and having the letter of credit or letter of credit amendment in correct form upon issuance is far preferable to amending it post-issuance.

2. If as an applicant you intend to use a letter of credit for pre-bid credit support for periodic bids and you desire to minimize administrative hassle and avoid multiple issuance fees, consider maintaining a letter of credit in effect at all times (reducing it to $1 when it is not required to be in effect for purposes of any pre-bid credit support) and increasing it by simple amendment when necessary for usage as pre-bid credit support (thereafter reducing it by amendment to $1 when no longer required to be in effect).

3. Where it is possible to pre-agree on how a letter of credit will adjust in amount over time, build such provisions and mechanics into the letter of credit in order to avoid the time and expense (including payment of amendment fees and legal fees) of having to amend the letter of credit later. For example, a form of reduction certificate may be pre-agreed and included as a letter of credit exhibit permitting reduction of the maximum amount available to be drawn under the letter of credit upon issuer's receipt of a signed reduction certificate from beneficiary.

4. In order to minimize chances for error and to streamline the process, request the beneficiary to directly insert into the draft letter of credit all required information relating to the beneficiary (e.g., its mailing address, fax number and e-mail address, if applicable).

Tips for both Beneficiaries and Applicants:

1. For an in-house letter of credit template, consider for efficiency including in the draw triggers references to "Applicant or an affiliate of Applicant" in referring to Beneficiary's counterparty under the contract covered by the letter of credit in case Beneficiary's counterparty under the contract supported by the letter of credit is an affiliate of Applicant rather than the Applicant itself (i.e., the entity that applied for the issuance of the letter of credit pursuant to the letter of credit application). Alternatively, consider including bracketed references to "[Applicant]" and "[if other than Applicant, insert name of counterparty]" in such draw triggers. These template drafting tips will help to avoid inadvertently referencing the wrong counterparty in the draw trigger where the Applicant is different from the counterparty.

2. As beneficiary, make sure that any auto-renew provisions of the letter of credit provide sufficient time (for example, 30 or 60 days prior to the letter of credit's expiry date) for the beneficiary to be able to draw (with cushion for unforeseen contingencies) in the event that issuer notifies beneficiary that it issuer elects not to extend the letter of credit beyond its then current expiry date. This period should be consistent with counterparty's contractual deadline for renewal of such letter of credit under the agreement secured by such letter of credit. From the perspective of the applicant, it is desirable to build in a suitable cushion in the timetables such that, if issuer notifies beneficiary that the letter of credit will not be renewing, applicant has sufficient time to procure another letter of credit before counterparty will be in default under the agreement secured by such letter of credit.

3. Make sure that the draw triggers in the letter of credit are consistent with the beneficiary's rights under the agreement secured by such letter of credit. From the beneficiary's perspective, an easy way to do this and to mitigate exposure for wrongful draws is to include a provision in the underlying agreement expressly permitting beneficiary to draw under a letter of credit in accordance with the terms of the letter of credit.

4. Do not use the words "approximately" or "about" in a letter of credit unless you are deliberately using such words for purposes of permitting a tolerance not to exceed 10% more of 10% less than the amount to which such word refers.