IMPLEMENTATION GUIDE
and
COMMENTARY
to the
MODEL TRIBAL SECURED TRANSACTIONS ACT

National Conference of Commissioners on Uniform State Laws

The ideas, concepts and conclusions set forth in this Implementation Guide and Commentary to the Model Tribal Secured Transaction Act have not been reviewed, debated or approved by the National Conference of Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Conference and its Commissioners, or the Drafting Committee and its Members.

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INTRODUCTION

This Implementation Guide and Commentary to the Model Tribal Secured Transactions Act (hereinafter "Act" or "MTA") drafted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the Federal Reserve Bank of Minneapolis was developed for three purposes: (1) to assist tribal legislatures in their review, adaptation and enactment of the Act; (2) to facilitate the use and understanding of the Act by tribal judges, legal counsel and individuals promoting business development in Indian Country; and (3) to assist non-tribal lenders and businesses in understanding the similarities and differences between the Act and corresponding provisions of the Uniform Commercial Code ("UCC").

The Act is derived in large part from Revised Article 9 of the UCC[1] as well as some sections of UCC Articles 1, 2 and 8 to ensure a material degree of harmonization between the law of different tribes, and between tribes and states. In order to accommodate tribal business, legal and cultural environments, the Act differs from UCC Article 9 in a number of respects. However, the core principles, terminology and processes that inform the Act are sufficiently similar to the UCC to ensure that tribal and non-tribal practitioners will feel at ease working within both tribal and state jurisdictions.

Section I of this Implementation Guide discusses secured transactions law generally, and provides background about the NCCUSL Model Tribal Secured Transactions Act initiative. Section II contains a list of special considerations and recommendations for tribal legislatures, tribal courts and legal practitioners, including section subheadings and numbering; the use of references to the Official Text and Commentary of the UCC and other state law; other tribal laws to be considered when adopting the Act, and the role of tribal customs and traditions. Section III contains a section-by-section commentary of the Act's provisions. Section IV discusses filing systems and options for tribes to consider. Section V discusses the importance of making tribal laws and court decisions readily accessible to the public. Section VI contains suggestions for transitional rules, including options depending on the tribal jurisdiction's current laws. Finally, Section VII contains a model joint powers filing system agreement, and a model tribal filing system regulation.

[1] All references to the various Articles and provisions thereof of the Uniform Commercial Code hereafter refer to the 2003 Official Text unless otherwise specified.

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I. BACKGROUND AND PURPOSE

Many American Indian tribes, tribal entities, tribal member-owned businesses and Indian consumers have encountered significant barriers when seeking loans or other financing from off-reservation sources. While the causes are varied and tend to be many-faceted, one reason frequently cited is the lack or insufficiency of tribal commercial law to guide the parties in a business transaction that would fall within a tribe's jurisdiction. Access to affordable credit is a fundamental component of sustainable economic development in all modern private market economies. When the rules governing lender/borrower relationships are uncertain or nonexistent, the risks to the lender increase. When the risk of a transaction increases, the lender may either refuse to lend or may increase the interest rate and other costs of the transaction to offset the risks. Therefore, to effectively enable access to credit by businesses and individuals at affordable rates and on competitive terms, rules are needed to govern lender/borrower or other creditor/debtor relationships.

Secured transaction laws provide these rules. Secured transactions are agreements entered into between the parties that involve the giving of property, other than real estate, as collateral for loans or other financing arrangements. The kinds of transactions that come within the scope of secured transactions law are as varied as bank loans for business startups, consumer or business revolving lines of credit, auto loan financing, and installment loan purchases of home appliances, to name but a few.

Modern market economies around the world have secured transaction systems that enable this kind of business to take place within defined and predictable legal frameworks. Developing countries and nations in transition from centrally-controlled to free market economies have almost uniformly made the adoption of secured transaction laws a priority in order to jumpstart their economies. More importantly, these nations are modeling their secured transaction laws and systems on those of their primary international trading partners in order to eliminate to the extent possible any barriers to doing business across borders.

Secured transaction laws in the United States generally fall within the jurisdiction of the states and not the federal government, and are encompassed in the UCC Article 9, entitled *Secured Transactions*. The UCC was drafted in the 1940s by the NCCUSL and the American Law Institute for the purpose of establishing a reasonably consistent legal environment for commercial transactions between parties located in different states. Every state as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands, have adopted the UCC, although most have modified the various articles in some

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respects to accommodate issues and needs specific to their respective business, legal and cultural environments. While there are variations among the states' versions of the UCC, they are uniform with respect to their core principles. The benefit of uniformity, or harmonization, is that business can be transacted across state or other borders with relative ease, thus encouraging and enabling economic growth and development.

Like other sovereign nations around the world, tribes and their members are increasingly interacting commercially with lenders and other businesses located outside of Indian Country. And like the in-transition and developing nations noted above, many tribes are seeking ways to build sound legal and business infrastructure to accommodate their growing cross-border commercial activity. Over the last several years, the NCCUSL has recognized there may be a need to harmonize secured transaction laws among tribes and between tribes and states for the reasons discussed above to aid tribal economic development. Toward this end, the Executive Committee of the NCCUSL charged the Committee on Liaison with Native American Tribes (the "Committee") to first determine the extent to which tribes have adopted uniform and model secured transaction laws and second, to determine the obstacles faced by tribes in doing so. Based on input from tribes and other interested parties, the Committee determined that while a number of tribes had adopted various versions of Article 9, few had amended their versions to incorporate the revisions made to UCC Article 9 in 1999. The majority of tribes, to the extent the Committee was able to determine, had not adopted any type of secured transactions law or commercial code.

Against this background, the Committee began drafting a model tribal secured transactions law in 2001. Several tribes participated in the drafting efforts over the three-year process including representatives of and/or legal counsel for the Sac and Fox Nation, the Cherokee Nation, the Navajo Nation, the Chitimacha Nation, the Oneida Nation, the Crow Nation, the Confederated Tribes of Warm Springs, the Chickasaw Nation, the Little Traverse Bay Bands of Odawa Indians, and several California rancherias.

The Committee's objectives were threefold, the first being to create a uniform tribal secured transactions law that is, to the extent reasonable, consistent with the core principles of UCC Article 9. The Committee recognized, however, that concerns of tribal sovereignty and immunity as well as tribal customs and traditions required modifications to the uniform version of UCC Article 9. The Committee also recognized that many provisions of Article 9 were unlikely to be appropriate or relevant in Indian Country, at least in the near future, and if included would add unneeded complexity

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to a tribal secured transactions law. The second objective, therefore, was to draft a shorter and less complex law that will facilitate the enactment process in the immediate future, but will allow for amendments as needed as a tribe's business environment develops. The third objective was to create a model tribal commercial law that readily accommodates differing approaches to various issues and situations addressed by the Act, recognizing that the legal, business and cultural environments of tribes differ from region to region and from tribe to tribe. The Committee believes it has achieved these objectives and, by doing so, developed a model tribal secured transactions act that will meet the legal, business and cultural needs of many tribes.

The Committee intends to work to facilitate enactment of the Act by hosting training sessions and setting up a process to answer questions that may arise in the implementation of the Act. It also intends to adapt other uniform laws for possible use by tribes that desire legislation to harmonize their laws with those of other tribes and states in the areas of business associations, inheritance, family law, civil procedure and perhaps other areas. Finally, the Committee will continue to monitor the uniform laws that are the basis of the model laws adapted for tribal use and, if those laws are revised by the NCCUSL, the Committee will adapt those changes for tribal use.

The Committee hopes this Guide will be useful both to tribal legislatures in their consideration and adoption of the Act, to tribal judiciaries for interpretive guidance, and to tribal members and others who engage in transactions subject to the Act once adopted.

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II. SPECIAL CONSIDERATIONS

Adapting the Act to Accommodate Tribal Environment

The Act is intended to serve as a "template" or model law for tribes. A Tribe should carefully consider each provision of the Act, and modify or amend provisions as necessary to accommodate its specific business, legal and cultural environments.

Reference to Model Tribal Secured Transaction Act Sections

Specific reference to the Model Tribal Secured Transactions Act sections will be cited herein using the acronym "MTA."

> ***Example***: Section 9-102 of the Model Tribal Secured Transactions Act will be cited as follows: **MTA 9-102**

Numbering

The Committee recommends that a Tribe retain or incorporate the section and subsection numbering contained in the Act. The numbering provided is consistent with the numbering in this Guide and is generally consistent with that of UCC Article 9, and thus will facilitate the use of the Act. This could be done in a number of ways, such as in the examples below.

> ***Example 1***: Tribe's current Business Code is Part 21 of Tribe's Law and Order Code. The Act could be incorporated into the Tribe's Business Code as Title 21-9. The corresponding Business Code section of MTA 9-102, for example, could be numbered as Section 21-9-102.
>
> ***Example 2*****:** Tribe's current Business Code is Part 205. The Act could be incorporated as Chapter 205.9. The corresponding Business Code section of MTA 9-102 could be numbered as Section 205.9.102.

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Section Headings and Subheadings

The Committee recommends that an enacting Tribe retain the Act's section headings and subheadings in its enacted version of the Act. The headings and subheadings will assist readers in identifying the subject matter of each section as well as corresponding sections in the various UCC articles.

Example 1 **(Section heading)*:***

MTA 9-308 WHEN SECURITY INTEREST IS PERFECTED;
CONTINUITY OF PERFECTION

Example 2 **(Subheading**):

MTA 9-308(a) [Perfection of security interest.]

References to Official Text and Commentary of UCC

Each section of the MTA Commentary set forth in Part III of this Guide provides the section numbers for the corresponding or complementary sections in the UCC for reference purposes. For example, for UCC Article 9 sections carried over into the Act, the Official Comments to UCC Article 9 sections contain explanations and illustrations that help in understanding the application of the various sections and thus may be useful in understanding and interpreting corresponding sections in the Act.

In addition, the Committee has deleted certain provisions of UCC Article 9 where there appeared to be no or limited applicability for Tribes, and modified some provisions to reduce complexity, making the Act easier to use. If issues should arise that are not covered by the Act, reference may be made to the official text of and commentary to UCC Article 9 or other UCC articles for interpretive guidance. To facilitate this use, the Guide may include comments with applicable references for MTA sections notated as "*Reserved*."

Example: Comment to MTA 9-308 (See UCC 9-308).

References to State and Federal Court Decisions

There exists an extensive body of state and federal court decisions interpreting various provisions of the UCC articles as well as significant scholarly commentary. These may provide a useful source of information when attempting to interpret or apply the Act.

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References to and Coordination with other UCC Articles

UCC Article 9 exists as part of the entire Uniform Commercial Code and is interrelated with the remainder of the UCC. The Committee has attempted to draft the Act as a stand-alone statute that can be adopted by a Tribe whether or not it has a tribal counterpart to the rest of the UCC. To accomplish this, the Committee has incorporated the necessary provisions from other articles of the UCC into the Act. Reference may be made to the official text of and comments to the other articles of the UCC to assist in interpreting this Act. Applicable references to UCC provisions and Official Commentary will be noted in Part III of this Guide.

> ***Example***: MTA 9-107, entitled "Notice; Knowledge," is substantially modeled after UCC 1-202. For additional assistance in interpreting MTA 9-107, the Official Commentary for UCC 1-202 may be referenced.

Related Tribal Codified Law

A significant issue related to the adoption of the Act is whether the Tribe has other laws or ordinances that affect the operation or adoption of the Act. While the Act is written so that it can be adopted on a stand-alone basis, it may impact other laws or ordinances previously adopted by the Tribe. It may be necessary to repeal or amend certain tribal laws or provisions of laws, or modify sections of the Act, to ensure consistency.

For example, if the Tribe has consumer credit laws or consumer protection laws, those laws should be reviewed for consistency with the Act and incorporated into or referenced by the Act where appropriate. Similarly, if the Tribe has a certificate of title law that requires notation on the title document to indicate a security interest, reference to that law should be incorporated into the Act where appropriate.

If the Tribe has adopted a version of the UCC or articles of that Code that are not consistent with the current version of the UCC as promulgated by NCCUSL and adopted by the various states, a review of those provisions should be made to be sure that they are consistent with the Act.

> ***Example 1***: Tribe has a collection code that governs the rights, responsibilities and actions of a creditor and debtor upon a debtor's default, such as repossession of collateral. Because the Act governs some of these issues when collateral subject to the Act secures the obligation, the Tribe should consider repealing or amending applicable sections of the collection code to avoid redundancy and/or possible inconsistencies.

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Example 2: Tribe has a certificate of title law that requires vehicles owned by persons residing within the Tribes' jurisdiction to be registered with the Tribe and to carry Tribal license plates. If any security interest in a such a vehicle is required by Tribal law to be noted on the certificate of title to be good as against a trustee in bankruptcy, the security interest must be perfected in that manner and that Tribal law should be referenced in MTA 9-311.

Tribal Customs and Traditions

In drafting the Act, the Committee has recognized the importance of customs and traditions. The Act attempts to accommodate both the goal of a consistent and clear law of secured transactions and the important role tribal customs and traditions play. The Committee recommends that in adopting, interpreting and applying the Act, due consideration be given to those customs and traditions. Where and to the extent a provision in the Act conflicts or is inconsistent with a tribal custom or tradition, an enacting Tribe should consider whether the custom or tradition will take precedence over conflicting rights and priorities established by the Act. For the benefit of outside parties, and to further promote the objective of ensuring certainty in the law, if such a custom or tradition would preempt a conflicting provision of the Act, the Tribe should consider incorporating or otherwise identifying the custom or tradition in its adopted version of the Act.

Example: Tribe has a custom that prohibits the transference of certain religious artifacts or sacred objects for monetary or business purposes. In such a case, the Tribe should consider adding a provision to the Act that prohibits the creation of a security interest in those types of religious artifacts or sacred items.

Example: Tribe upholds the custom of give-aways on certain important events in which Tribal members give away items of personal property. If property that might be given away is made collateral subject to a security interest, the security agreement should provide that the donees take the property free of the security interests and, if necessary, afford some other type of protection for the secured party for the loss of the collateral.

"Reserved" Sections in the Act

Certain section numbers in the Act have been designated "Reserved." The reasons for doing so are to allow for future expansion if the Tribe wishes to expand the scope of the Act in the future, and to facilitate use of the Act by potential lenders and other parties by having the Act's numbering system reasonably correspond to that of the UCC as adopted in the states.

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III. COMMENTARY

This section provides comments to each section of the Act. All references herein to "the Tribe" mean an enacting Tribe. The Official Commentary to UCC Article 9 or other UCC Articles may also be referenced as additional guidance. All references to "he," "his," or other similar terms are for convenience only and shall be deemed gender-neutral.

PART 1. General Provisions

The Tribe should specify the name of its adopted version of the Act in this section.

Example: " The "x" Nation Secured Transaction Act.

MTA 9-102 makes clear that without an express, written waiver of the Tribe's sovereign immunity (or the sovereign immunity of a tribal instrumentality or tribal agency), the sovereign immunity of the Tribe, tribal instrumentality or tribal agency will not be waived with respect to any transaction or provision of a transaction that is subject to the Act. Such waiver must be approved by an authorized representative or governing body of the Tribe and appropriately recorded.

The principal purpose of the Act is to promote economic development by encouraging and supporting business dealings between tribal entities, tribal member-owned businesses and tribal consumers, and financial institutions and other businesses outside of a Tribe's jurisdiction. Accordingly, MTA 9-103 states that the Act should be interpreted and applied in a manner that best supports this purpose.

MTA 9-104 makes clear that the Act does not apply to security interests created in property that cannot be freely sold or otherwise transferred - in other words, property that is *not alienable*. Property

is considered alienable only if the debtor has a right to freely sell or otherwise transfer his interest in the property. The Act generally applies to a security interest in *personal* property that can be used by a creditor to satisfy a debt or other obligation upon a debtor's defaults. *Personal* property is anything other than *real* property. Real property is land and things attached to the land. Fixtures are a type of "hybrid" property that have characteristics of both real and personal property. Fixtures are covered by the Act. For example, a furnace installed in a home is a fixture and generally comes within the scope of the Act. This provision clarifies, however, that the Act will not apply to a fixture or other property, such as the furnace in our example above, if the real property to which it is attached, for example a home located on trust land, is not alienable.

UCC 9-105 deals with control of electronic chattel paper, such as an electronic version of a lease of personal property or a note and security interest. For purposes of the Act, the drafters believe that many tribes and their members will not be dealing with electronic chattel paper in their business transactions, and that provisions addressing electronic chattel paper would add unnecessary complexity to the Act at this time. If the Tribe, privately owned tribal businesses or tribal consumers will be engaged in business transactions involving electronic chattel paper, however, the Tribe may want to consider adding a provision similar to UCC 9-105.

The following comments to the definitions set forth in MTA 9-106 do not follow the alphabetical listing of terms as in the Act. Rather, the following comments are grouped according to definitional category.

Definitions related to Parties to Secured Transactions

"Secured Party" is the party to whom a security interest in collateral is given under the terms of a security agreement. The term includes a consignor and a buyer of accounts, chattel paper, payment intangibles or promissory notes.

"Debtor," "Obligor," "Secondary Obligor." The Act defines three classes of persons, other than a creditor, that may have an interest in a secured transaction. A **debtor** is typically the party that

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provides the collateral. The term includes any party with an ownership or other non-lien interest in the collateral, such as a joint tenant, or subsequent transferee of the collateral or of an interest in the collateral. The debtor may or may not be the borrower. **Debtor** includes a consignee as well as a seller of accounts, chattel paper, payment intangibles or promissory notes. An **obligor** is the party that principally owes payment or performance, typically the borrower, and may or may not be the owner of the collateral. A **secondary obligor** is generally a surety or accommodation party.

> ***Example 1*:** A borrows money and uses his trailer as collateral. A is both the "obligor" (the borrower) and the "debtor" (owner of the collateral).
>
> ***Example 2*:** A borrows money but has no collateral to secure the loan. B allows A to use his trailer as collateral for the loan. If A defaults, the lender may take B's trailer to satisfy the debt even though B was not the borrower. However, in such a case, if the value of the trailer does not cover the entire debt, B will not be personally liable for any deficiency the value of the trailer does not cover. In this example, A is the "obligor" (borrower), and B is the "debtor" (owner of the collateral).
>
> ***Example 3*:** A borrows money. B allows A to use his trailer as collateral. C co-signs A's promissory (loan) note as a surety agreeing to be personally liable for the debt. In this case, A is the "obligor," B is the "debtor," and C is the "secondary obligor."
>
> ***Example 4*:** A borrows money using his own trailer as collateral. C co-signs the promissory note as a surety agreeing to be personally liable for the debt. A is the "debtor" and "obligor," and C is the "secondary obligor."

"Buyer in ordinary course of business." A person may be a buyer in ordinary course of business even though the person knows that the goods being purchased are subject to a security interest; however, a person may not have that status with knowledge that the sale violates the rights of the secured party. The penultimate sentence prevents a buyer that does not have the right to possession as against the seller from being a buyer in ordinary course of business.

"Lien creditor" means a person that acquires a lien through a judicial process and includes a levying creditor and a bankruptcy trustee. A lien creditor's interest arises involuntarily and thus a lien creditor is not a purchaser (including a secured party). The basic test of perfection under the Act is whether the secured party has priority over a lien creditor.

"Organization" means any person other than an individual.

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"Purchaser." A purchaser is any person that acquires an interest in property in a voluntary transaction. The term includes a secured party but does not include a lien creditor.

Definitions related to Creation of Security Interests.

"Agreement" includes full recognition not only of the expressions of the parties but also of the surrounding circumstances including usage of trade, course of dealing and course of performance (see MTA 9-114). Whether an agreement has legal consequences is determined by applicable provisions of the Act and general contract law. To the extent that an agreement has legal consequences, it is a **"contract."**

"Collateral." Collateral is property that is subject to a security interest.

"Security Agreement." A security agreement is a contract between a secured party and a debtor that creates a security interest in the debtor's designated property in favor of the secured party. Although there are no formal requirements, the agreement must be signed or otherwise authenticated by the debtor (the party with rights in the collateral) and must describe the collateral. A lease agreement may actually be a security agreement, even if the parties' intention is that the transaction be treated as a lease, if the interest created by the agreement meets the definition of a security interest. For example, if at the end of the lease the lessee can acquire the property for $1.00, it is, in fact, a secured sale and not a lease.

Definitions related to Goods

"Goods" fall into four basic categories: (1) consumer goods, (2) equipment, (3) farm products, and (4) inventory. Property that is goods may only fit into one of these categories at any given time, and that category will be determined by its principal use. Two items are of note here. First, the category of a *good* may change depending on use. For example, a hairdryer on a shop shelf may be *inventory* but after purchase, may be a *consumer good.* Second, sometimes the use of a good will be "mixed." For example, a vehicle that is used both for business and personal use could be either equipment or a consumer good. In these mixed-use cases, the primary use will determine which category the goods fit into. In this example, if the vehicle is used primarily for business purposes and only occasionally for personal use, the vehicle will be "equipment."

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"Consumer," "Consumer Goods," "Consumer Transaction," "Consumer Goods Transaction." A **consumer** is a person who enters into a transaction for a personal, family or household purpose. Goods are **consumer goods** if they are used or bought primarily for personal, family, or household purposes. Actual use controls. A **consumer transaction** is a transaction in which a person borrows or otherwise incurs a debt or other obligation for consumer purposes and holds the collateral for consumer purposes. A **consumer goods transaction** is similar but more narrow in the sense that the collateral is consumer goods. For example, a transaction will be a **consumer goods transaction** if the debtor takes out a loan to pay personal medical bills, and secures the loan with his personal automobile. If the debtor were to instead secure the loan by granting the lender a security interest in shares of stock held to someday fund his children's education, the transaction would be a **consumer transaction** since the collateral is investment property and not goods. Note, however, that the stock, nevertheless, is held for a consumer purpose. These distinctions are important for purposes of a number of protective rules that may apply. See MTA 9-203(b)(1), MTA 9-612(b)(i), MTA 9-625(c)(2), MTA 9-626(b), and MTA 9-201(b).

"Farm Products." Goods such as crops, livestock, and their products and supplies, are farm products if they are used, acquired or produced by the debtor in farming operations, and if they have not been subjected to a manufacturing process. If the debtor is not engaged in farming operations, the goods will not be farm products. For example, a fruit grower is engaged in farming operations if he cultivates orange groves in the ordinary course of business. The oranges he produces will be farm products. If the fruit grower is also an orange juice producer, the oranges cease to be farm products after they undergo the juice manufacturing process. At this point, the goods become inventory. If the oranges are purchased by another orange juice processor as raw materials, they become inventory in the processor's possession even before they are actually processed.

"Fixture." A security interest in fixtures may arise under the Act or under real estate law. The definition of the term is left to real estate law, but generally means personal property that is attached to real property. Whether a good is determined to be a fixture will determine how and where to file, and the priority and other rights of competing creditors

"Inventory." Goods are inventory if they are held for sale or for lease, or are actually leased by a debtor to others, in the ordinary course of business. Inventory also includes items that are raw materials to be used in production, that are furnished or are to be furnished under a service contract, or that are consumed in a short period of time in producing a product, for example, fuel.

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"Equipment." Goods are equipment if they do not fall into another category. For example, if a vehicle is not a *consumer good* (*i.e.*, is not used primarily for personal, family or household purposes), and is not *inventory* (*i.e.*, is not being held for lease or sale), then the vehicle will be *equipment*. Generally, goods used in business are equipment if they are fixed assets or have a relatively long period of use (as opposed to inventory).

"Accession" is a good that is attached or united with another good; it retains its individual identity and can be removed from the other good without causing damage to the other good, for example, a hard drive in a computer.

"Manufactured Home;" "Manufactured Home Transaction." A manufactured home is a specialized *good* in that the rules pertaining to a "manufactured home transaction" permit a financing statement to be effective for thirty years rather than the general rule of five years. See MTA 9-502(c)(1).

"As-extracted Collateral." Prior to extraction from the ground, oil, gas and other minerals are real property, and interests in them will be subject to real property law. Upon extraction, however, oil, gas and minerals become goods that are eligible to be collateral under this Act. See MTA 9-301(3) (regarding the law governing perfection and priority) and MTA 9-502(a) (regarding filing requirements). The terms "at the wellhead" or "at the minehead" referenced in MTA 9-106(a)(6)(B) apply to financing and/or sale account arrangements made prior to extraction. Under the Act, if Debtor owns an interest in oil that is to be extracted, and has contracted to sell the oil to Buyer at the wellhead, *i.e.*, upon extraction, the Debtor may sell its right to the payments to Lender. This right to payment in these types of arrangements is an account that, under MTA 9-106 (a)(6)(B), constitutes "as- extracted collateral."

Definitions related to Receivables and Other Non-Goods Collateral

"Account." An account, generally**,** means a right to payment whether or not earned by performance. "Whether or not earned by performance" means that the right to payment may be for future performance, for example, under a contract. MTA 9-106(a)(2)(A) lists the types of rights to payment that fall within the definition of *account*. MTA 9-106(a)(2)(B) includes in the definition a special subset of accounts called health-care-insurance receivables. MTA 9-106(a)(2)(C) lists a number of payment rights that are excluded from the definition of *account*. The distinction is important. If a payment right is an *account*, a purchaser of the *account* must file a financing statement in order to

perfect its interest. The payment rights excluded from the definition may have different rules that apply to perfection.

"Account Debtor." An account debtor is a person obligated on an account, chattel paper or a general intangible. The account debtor's obligation is often, but not necessarily, monetary. For example, a franchisee may use its franchise agreement rights as collateral. A franchise agreement is a general intangible. In this case, the franchisee under the franchise agreement would be the account debtor. The term "account debtor" excludes persons obligated on a negotiable instrument even if it constitutes part of chattel paper. The effect of this exclusion is that the rights of an assignee and duties of an account holder set forth in MTA 9-403 and MTA 9-404 will not apply to an assignment of chattel paper in which the obligation to pay is evidenced by a negotiable instrument.

"Health-care Insurance Receivable." A health care insurance receivable is a subset of accounts, but is not subject generally to the rules governing the rights of account debtors to assert claims and defenses against assignees. For example, under most circumstances, if goods or services are supplied creating an obligation to pay for them, and they are subsequently determined to be defective, the person owing the money can refuse to pay even if the right to payment has been transferred to another party. However, because of the health care system's structure, this is not a workable rule.

"Chattel Paper." Chattel paper is a record or group of records that include a monetary obligation as part of or together with a security agreement or lease. For example, a buyer purchases a home appliance from a seller on an installment plan. This transaction is effected by one record which combines both a promissory note and a security interest. The promissory note is the "loan" agreement, whereby the buyer agrees to the purchase price and the installment payment plan arrangement. Title to the appliance passes to the buyer, but the seller retains a security interest in the appliance that the seller can foreclose on if the buyer defaults. The record evidences both the monetary obligation of the buyer to pay the seller, and the security interest that the seller retains in the appliance until full payment has been made. The record is chattel paper. This chattel paper can itself be used as collateral. For example, the seller in this case may use the chattel paper as collateral to secure a loan from its bank. If the seller defaults on its obligation to the bank, the bank can foreclose on the chattel paper and enforce the rights that seller has against the buyer.

"Instrument." The term "instrument" includes both negotiable instruments and nonnegotiable writings that evidence a right to be paid money and which, in the ordinary course of business, are

transferred by delivery with an indorsement or assignment. The most common forms of negotiable instruments are checks, promissory notes, and certificates of deposit. What constitutes a nonnegotiable instrument is not so clear, but courts have qualified nonnegotiable mortgage notes, nonnegotiable promissory notes and nonnegotiable certificates of deposit as instruments.

"Promissory Note." A promissory note is an instrument that evidences a promise to pay, *e.g.*, a loan document. It is unique in that the Act governs sales of promissory notes but not other types of instruments.

"General Intangible." General intangibles are personal property that do not fall within any other defined type of collateral. In other words, it is a residual category of personal property, and includes things such as patent rights, trademark rights, rights to tax refunds, claims for breach of contract, liquor licenses and water permits, to name but a few. These have value and can be used as collateral. Software (MTA 9-106(a)(57) and payment intangibles (MTA 9-106(a)(42) are subsets of general intangibles.

"Payment Intangible." Payment intangibles are a subset of general intangibles where the principle obligation is to pay money – for example, the right to repayment of a loan that is not evidenced by chattel paper or an instrument.

"Document." A document is either a document of title or a record that, in the ordinary course of business, shows that the person in possession or control of the record has the right to receive, control, hold or dispose of the goods that the record covers. The most common forms of documents are bills of lading and warehouse receipts. Documents may be tangible (in paper form) or electronic, and may be negotiable or non-negotiable.

Definitions related to Filing

"Financing Statement." A financing statement is a form that a creditor files in an appropriate public filing office that constitutes notice to other interested parties about security interests in the personal property of a debtor. The filing of a financing statement is the method to *perfect* (make the interest good against third parties) a creditor's security interest in most types of personal property. Exceptions to perfection by filing a financing statement are explicitly addressed in this Act. A financing statement lapses, or ceases to be effective, after five years unless it is continued by the filing of a continuation statement, or terminated sooner by a termination statement. See Appendix 1 to Exhibit B.

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"Continuation Statement." The duration of the effectiveness of a financing statement is five years unless explicitly stated otherwise in the Act. Some secured transactions will extend beyond five years. To continue perfection beyond the original period of five years or subsequent periods of effective perfection, the filing of a continuation statement enables a secured party to amend a financing statement to extend its effectiveness. See Appendix 3 to Exhibit B.

"Termination Statement." If a debtor's obligation secured by collateral and covered by a financing statement ceases to exist, *i.e*., the debt has been paid, the debtor can make an authenticated demand on the secured party to provide a termination statement. The termination statement may be filed by the secured party or the debtor, and will end the effectiveness of a financing statement sooner than would occur if the financing statement were to lapse after five years. This is important because unless the filing is removed, it could be used again for a later transaction and afford that transaction priority. Or, it could prevent the debtor from getting a later loan from another creditor because it appears the first transaction is still a valid claim. See Appendix 3 to Exhibit B.

"Fixture Filing." A fixture is a good that has characteristics of both real and personal property (see definition above). Because of potential conflicts between secured parties that may have an interest in fixtures as personal property and secured parties that may have an interest in the same goods as a part of real property, a special type of filing is required which satisfies the general requirements for financing statements as well as real estate filings. Fixture filings are made in the office in which a mortgage on the underlying land would be recorded.

Definitions related to Media

"Record." A record includes information in both tangible form (written on paper) and intangible form (*e.g*., electronically stored). It does not include information that is communicated orally and not stored or preserved on paper or some other medium.

"Send." Send means to transmit notice, or tangible and intangible records, by methods of transmission typically used to transmit the type of record or notice at issue.

"Conspicuous." Conspicuous means that a term contained in a security agreement, contract or other writing would be noticed by a reasonable person. It describes the general standard that attention could reasonably be expected to be called to the item.

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"Sign," "Signed." **"**Sign" or "signed" refers to a signature or any symbol – printed, stamped, or written (including, for example, initials or manual thumbprints) – that was executed or adopted to show intent to adopt or accept a writing. This definition clarifies that a complete signature is not necessary to establish such an intention.

Definitions related to Scope

"Consignment," "Consignee," and "Consignor." A **consignment** exists where the owner of property (the **consignor**) delivers it a merchant (the **consignee**) for purpose of sale. Subject to certain exceptions, consignments are governed by the Act. Other bailment transactions in which goods are delivered by their owner to another person such as for storage or repair are not consignments as that term is used in the Act.

Notice, and when notice is considered to have occurred, is important for many purposes under the Act. For example, under MTA 9-611, a secured party must give *notice* to a debtor before selling or otherwise disposing of collateral. Similarly, under MTA 9-318(h)(2), a holder of a purchase money security interest in inventory or livestock will have priority over a conflicting security interest only if, among other things, it gives timely and appropriate notice to the other secured creditor or creditors. This section also clarifies that "notifies" or "notification" refers to when and how notice is sent, and is not conditioned on actual receipt of the notice by the debtor unless the time of receipt is specifically required by the Act. In addition, this section states that a person has notice when he receives notice or, under the circumstances, reasonably should have received notice. See UCC 1-202.

When and if "value" is given is important as one of three prerequisites that must be satisfied for the creation of an enforceable security interest. The three prerequisites in general are: (1) authorized security agreement, (2) *value* given by the secured party (creditor), and (3) the debtor having rights in the collateral, typically an ownership interest. When these three are met, the security interest is deemed to have "attached," which means it is enforceable.

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MTA 9-108 describes four situations in which a person is considered to have *given value* in exchange for a security interest in collateral. (1) Value is considered to have been given where a person makes a commitment to extend credit such as by a written agreement to make a loan; or a person actually grants a line of credit even if the debtor does not draw on it and even if the creditor can charge back if the debtor defaults. For example, value is deemed to be given where a bank gives a revolving line of credit to the debtor even if the debtor has not yet borrowed against that loan. (2) A person gives value when he acquires rights in property as collateral to secure a pre-existing claim or to satisfy a pre-existing claim. For example, a debtor gives the bank a security interest in its inventory, including after-acquired inventory, to secure a loan. The debtor then acquires new inventory. Under the terms of the security agreement, the security interest attaches to the new, or "after-acquired" inventory. The value that is deemed to be given is the pre-existing claim (the loan). (3) Value is given by a seller when a buyer takes delivery of a purchased item under a pre-existing purchase contract. (4) Finally, value is any consideration given, such as money, goods or service, that under contract law would make a contract valid or enforceable. See UCC 1-204.

Leases, sometimes, are actually sales of goods in disguise where the "lessor" is in fact a "seller" that retains a security interest in the goods sold, or "leased." The distinction is important because the rights and remedies of the various parties to the transaction as well as third parties will differ depending on whether a transaction creates a lease or security interest. MTA 9-109 states these distinctions for purposes of the Act. For example, the parties may enter into an agreement whereby a "lessor" leases goods to a "lessee", but the arrangement is in fact a sale of the goods on an installment payment plan where the lessor is a *seller (*and *creditor)* who retains a security interest in the goods (but not ownership or title) sold to the "lessee" who is a buyer (and *debtor*). In a true lease, the lessor would retain title, or ownership, to the goods. The rights and responsibilities of a lessor and a creditor differ significantly upon default. To determine whether a lease is actually a secured transaction, MTA 9-109 generally provides that a transaction creates a security interest (and is therefore not a lease) if: (1) the person who acquires the goods must continue to make payments for the term of the lease (*i.e.*, installment payments), and (2) if at the end of the lease there is no meaningful residual (*i.e*., value left in the goods). This may occur if the lessee can retain the goods for minimal payment, the goods have no remaining useful life, or it makes no economic sense for the lessee not to keep the goods as may occur near the end of a so-called "rent-to-own" transaction. See UCC 1-203.

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MTA 9-110(a) lists the types of transactions that are covered by the Act. The Act does not attempt to define, however, the Tribe's jurisdiction with respect to such transactions. Jurisdictional issues are left to other law. MTA 9-110(a)(4) applies the Act to other transactions that can be involved in a secured transaction and that are dealt with in other parts of the Official Text of the UCC but not in any detail in this Act. MTA 9-110(b), in these cases, refers to the general principles of those parts for the applicable rules. Finally, MTA 9-110(c) makes clear that the Act will apply to a security interest in an obligation that is itself secured under other law. For example, a mortgage loan is a secured transaction in which the loan to purchase land and/or a home is secured by the land and/or home. Mortgage loans, which are real estate-secured transactions, do not fall within the scope of the Act. However, the Act will apply to a security interest in a promissory note that is secured by a real estate mortgage. In this case, the collateral is the promissory note itself.

In certain instances, some components or provisions of a given transaction may not be subject to the Act. For example, a creditor may acquire a security interest in a debtor's vehicle as collateral to secure a loan. While this transaction will be subject to the Act for most purposes (such as attachment, priority, and rights upon default), the perfection of the security interest may be governed by applicable title law, such as a state or tribal certificate of title law that requires notation of a security interest in a vehicle on its title document. In such a case, the provision of the transaction regarding perfection will not be subject to the Act but rather to the applicable title law. In these types of instances, this section makes clear that it applies only to those components of secured transactions that are subject to the Act. With regard to components of secured transactions that are not subject to the Act, other law, contract provisions or the like may apply.

The scope of the Act is deliberately broad (see MTA 9-110), so that all transactions that create a security interest in personal property are included, as well as certain sales of personal property that operate like a secured transaction, no matter what their form. To make an inclusive list would risk an omission. Rather, the purpose of MTA 9-111 is to narrow that scope by describing transactions that clearly should not be covered and thus excluded. These include, for example, liens created by statute

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or common law (*i.e.*, tribal liens), certain contractual assignments that are not secured transactions as defined in the Act or which are regulated specifically by other law, and mortgages or similar liens on real property. See UCC 9-109(d).

Technical details of some components of the Act are best left to regulation, and MTA 9-112 authorizes regulatory treatment if a Tribe or consortium of tribes adopts its own filing system. The Act also omits transaction details in order to reduce complexity. The Act does not include many types of transactions or collateral that may otherwise relate to a secured transaction such as a letter of credit (governed by Article 5 of the UCC) or a lease of goods (governed by Article 2A of the UCC).

For these reasons, broad authority is granted in this section to a Tribal agency to promulgate regulations to fill gaps in the Act or provide interpretations necessary to carry out its operation.

The Act gives the parties to a transaction wide leeway to modify by agreement the effect of an applicable existing legal rule in order to suit their transaction. However, that freedom can lead to abuse if one party has superior bargaining power. The obligation of good faith, that is, to act honestly and in conformity to reasonable standards of fair dealing in carrying out the transaction, limits the potential of abuse. For example, where a creditor has orally agreed to a workout plan with a debtor that is behind in payment, but abruptly begins to enforce the security interest without giving the debtor a reasonable time to make payment under the plan (assuming adequate proof of the oral agreement), the creditor's action could be construed by a court as a breach of good faith and thus the agreement, leading to an award of damages or other appropriate remedy. See UCC 1-304 and 1-201(b)(20).

If the parties to a transaction have historically dealt with each other in business or with each other in the transaction over a period of time, or if there is a recognized practice among parties in like transactions or in the locality, or the tribe has an applicable recognized custom or tradition related to

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the transaction, the parties can reasonably expect in their course of dealing or performance, that prior dealings, trade usage, custom or tradition is reflected as part of the agreement and will be observed even if they do not explicitly state as such in their agreement. MTA 9-114 recognizes this standard unless the parties have agreed it should not be. It also sets up a priority as to which factor is controlling if more than one such factor exists. See UCC 1-303.

A "purchase money security interest" is one taken by a seller to secure the purchase price of goods or by a third party lender who has loaned money to a buyer to purchase particular goods. Purchase money security interests often are more favorably treated by the law as to priority. However, questions may arise where the property of a borrower is subject to a purchase money security interest but later is used by the borrower as collateral for a subsequent debt to fund the purchase of other property, and the debts are combined for payment purposes. Under such circumstances, does the original security interest retain its priority as a purchase money security interest on that property, or does its later status as a non-purchase money security interest on the subsequent debt prevail? Moreover, how are the payments allocated between the two debts? MTA 9-115 answers those questions.

> ***Example:*** Company (a non-consumer) buys a TV set on an installment payment plan and gives a purchase-money security interest for its price. Later, Company purchases a couch, and the purchase price is secured by both the couch and the TV. Several payments are made. MTA 9-115 provides that the TV transaction continues to evidence a purchase-money security interest, and would allocate the payments as an agreement provides or, if not, the payments would be allocated first to the debt funding the TV.

See UCC 9-103.

To have a valid security interest, a security agreement must describe the property that is collateral so that it can be identified from other property in which there is no security interest. A financing statement must also describe the property so a person examining public records is reasonably put on notice that property of a debtor and of the type described may be subject to a security interest. This section details the requirements for those descriptions. To illustrate, if the description is “inventory,” that will suffice for a financing statement but, if the security agreement provides that only part of a

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debtor's inventory be used as collateral, the general definition of "inventory" would not suffice under the security agreement as it does not specify or identify what part of inventory constitutes collateral. See UCC 9-108.

Suppose a transaction involves a loan to a Tribe by a state chartered bank. In this circumstance, without an agreement, a court might apply either the law of the Tribe or of the state, the selection of which can be complicated. As a result, the security agreement will commonly cite the applicable law as a matter of negotiation. MTA 9-117 validates that sort of agreement as long as the transaction has a reasonable relation to the law of the jurisdiction chosen, such as the jurisdiction in which the bank is located, and so long as the matter does not concern perfection where the Act provides mandatory rules. If the Act would otherwise apply to a consumer transaction, however, the parties may not opt out of its application by agreement. See previous Official Text to UCC 1-105.

PART 2. Effectiveness, Attachment, and Rights of Parties

MTA 9-201 provides as a general rule that the parties are free to agree concerning their secured transaction however they would like. Thus, except as stated otherwise in the Act or any other applicable law, the security agreement is effective according to its terms between the debtor and the secured party and as against third parties, such as creditors or purchasers.

MTA 9-201(b) recognizes the Tribe or other law may provide certain consumer protections to its members in addition to those in the Act. MTA 9-201(c) makes clear that in the event of a conflict between the Act and a consumer protection law, the consumer protection law will prevail. In short, while freedom of contract regarding secured transactions will generally be the norm, consumer protective laws or regulations will remain available to the secured debtor, subject to certain laws regulating lending practices.

See UCC 9-201(a), (b) and (c).

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MTA 9-202(a) states the general rule governing the attachment of a security interest. The idea is that the security interest held by the secured party "latches onto" the collateral given by the debtor to ensure that the debt will be repaid. The secured party's interest, once it has attached, becomes an enforceable interest against the debtor and in favor of the secured party. See UCC 9-203(a).

MTA 9-202(b) explains that enforceability occurs, generally speaking, when the security interest has attached. There are three requirements for enforceability and attachment of a security interest. The three requirements may occur in any order. First, value must be given by the secured party. Second, the debtor must have rights in, or the power to transfer rights in, the collateral. Third, the debtor must have signed a security agreement with a sufficient description of the collateral, or the collateral must be in the possession of the secured party pursuant to the debtor's agreement, or if the collateral is an investment account, the secured party must have control of the account. With regard to the third requirement, the notions of possession and control simply replace the requirement of a signed agreement. See UCC 9-203(b).

A simple example illustrates the "value" requirement:

> ***Example:*** Debtor applies to Bank for a loan, to be secured by a security interest in Debtor's equipment in favor of Bank. Bank's loan of money to Debtor is value, and if the other requirements mandated by this section are met, as soon as they are met, the security interest in favor of Bank attaches and is enforceable against Debtor.

The second requirement is that the debtor must have rights in the collateral or the power to transfer rights in the collateral to the secured party. Usually, the debtor will be an owner of the property. Sometimes, however, the debtor may not be an owner at all, but may have certain rights in the collateral because he has been invested with those rights by the true owner. For example, the parents of the debtor may have given the debtor a right to encumber certain property so that the debtor could obtain a loan. The principle is that one cannot convey an interest in property that one does not have.

The last requirement for attachment and enforceability ensures that the security interest is, in fact, consensual. It requires that the debtor sign a security agreement describing the collateral or that the collateral be in the possession or control of the secured party by oral agreement. The requirement that the debtor either sign a written security agreement or that the secured party have consensual

possession or control of the collateral also serves an evidentiary function, designed to forestall or prevent disputes regarding the rights of the debtor and secured party, respectively, in the collateral.

MTA 9-202(c) creates an exception to the requirements set forth in MTA 9-202(b). It refers to security interests that arise as a result of other relationships that exist between the parties to a commercial transaction. In the limited situations listed in subsection (c), there is no need for compliance with the subsection (b) requirements. See UCC 9-203(c).

MTA 9-202(d) provides that the attachment of the security interest in collateral also gives the secured party the right to any proceeds of the collateral if, for example, the collateral is sold. See UCC 9-203(f) and 9-315(a)(2).

MTA 9-202(e) provides that when the Act covers a security interest in a right to payment or performance that is itself secured by a mortgage or other lien on real property, the security interest also attaches to the mortgage or other lien. See UCC 9-203(g).

> ***Example:*** Buyer buys Blackacre, signing a negotiable promissory note and giving Seller a mortgage on Blackacre to secure the promissory note's repayment. Seller then borrows money from Bank, and gives Bank a security interest in the promissory note, delivering the promissory note to Bank. Since Bank has possession of the promissory note, its security interest in the promissory note attaches to the note. The attachment of the security interest in the note is also an attachment of the security interest in the mortgage on Blackacre.

MTA 9-202(f) provides that the attachment of a security interest in an investment account is also attachment of the security interest in any securities or commodity contracts credited to that account. In short, a security interest in the whole account is also a security interest in the parts. See UCC 9-203(h).

A debtor cannot give a security interest in property that he or she does not have an interest in. However, to facilitate commercial transactions, MTA 9-203(a) recognizes that a debtor can convey a security interest in his or her future, or "after acquired," property. This ability is especially important in inventory and accounts financing. It permits a secured party to use one security agreement and thus have an attached security interest in all assets the debtor acquires within the description for as long as

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the agreement remains effective. Recognition of after-acquired property clauses makes it possible for the parties to reduce to a minimum the paperwork and the cost necessary for their secured transactions. This practice enables a debtor to sell inventory and generate money to purchase more inventory and to repay the loan. See UCC 9-204(a).

MTA 9-203(b)(1) and (2) provide that in two specific situations a promise to convey after-acquired property is ineffective as a matter of policy. These situations arise when the property involved is either consumer goods or commercial tort claims.

> ***Example***: Retailer sells Consumer a lawnmower for home use (a consumer good) and retains a security interest in it and in all after-acquired lawn mowers. Consumer then buys another lawnmower for cash from Supplier. MTA 9-203(b)(1) prohibits Retailer's security interest from attaching to the new lawnmower despite the fact it is "after-acquired" property unless Consumer acquires it within 10 days of the time Retailer gives value. See UCC 9-204(b)(1).

Note that an after-acquired property clause (or a general description) that states "all consumer goods" is ineffective as a matter of policy. See MTA 9-116(c)(2).

Similarly, MTA 9-203(b)(2) provides, as a matter of policy, that under an after-acquired clause a debtor may not give a secured party an interest in future commercial tort claims that the debtor might or might never have. See UCC 9-204(b)(2).

MTA 9-203(c) provides that a security agreement may contain a provision that specifies that collateral may secure any present or future advances or other value that may be given by the secured party whether or not the advances or value are given. The idea behind MTA 9-203(c) is that the parties may agree in their original security agreement that the collateral will be used to secure any future advances or loans made by the secured party. This is particularly important in business financing. See UCC 9-204(c).

For example, as explained in connection with the after-acquired property clause above, this enables the debtor to sell its inventory and generate cash, accounts and/or other receivables, and to use these assets to repay the secured party and/or use them to secure additional advances made by the secured party. These "future advances" may then be used by the debtor to replenish its inventory. This inventory will be "after-acquired property" and will come within the reach of the parties' security agreement, serving as collateral for both the original advance (until it has been paid off) and any future advances the

secured party may have made. These "future advances," in turn, will be secured by the original and "after-acquired property." In this manner, the parties can, by including both a future advances clause and an after-acquired property clause in their security agreement, establish a mechanism for a continuous "closed circle transaction." In other words, the secured party can lend money secured by the debtor's inventory and accounts. The debtor can then sell the inventory and use the proceeds from its sale to pay down its debt to the secured party and to provide additional collateral to the secured party. The secured party may then make an additional or future advance which the debtor may use to purchase new inventory, all of which also will secure the debt owed to the secured party. The debtor can sell the newly acquired inventory and use the proceeds to pay down the debt, and so on and so forth.

See UCC 9-204.

MTA 9-204(a) generally provides that the secured party must use reasonable care in the custody and preservation of collateral in its possession or control, for example, in the case of a pawn of goods. The official version of the UCC contains more specific rules regarding the custody and preservation of collateral than does this Act. For example, it specifies whether, to what extent, and under what circumstances the secured party may use collateral in its possession or control. The Act does not contain such specific provisions. Under the Act, however, reasonable care would not permit the secured party's use of the property in such a manner that would cause the property to depreciate in value beyond the depreciation that would occur without such use. See UCC 9-207(a) and (d).

MTA 9-205 provides, in essence, that if a secured obligation has been paid off and the debtor makes a signed demand of the secured party, the secured party who has control of a investment account must provide the investment intermediary (the firm with which the account is maintained) a signed statement that releases the intermediary from any further obligation to comply with the secured party's instructions. See UCC 9-208(a) and (b)(4).

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MTA 9-207(a) enables a debtor to obtain, at any point during the existence of the secured transaction, a correct indication from the secured party of how much the debtor owes and what property has been given as collateral. This provision recognizes that debtors are less likely than lenders to have at their fingertips information concerning how much money they owe on a particular secured debt or what property stands as collateral for the secured debt. See UCC 9-210(a).

MTA 9-207(b) states the rule for how and when a secured party must comply with the debtor's request. A later provision provides a sanction for a failure to comply. Typically, the debtor will make a request regarding the outstanding balance or regarding the collateral that is subject to a security interest when the debtor is seeking to obtain financing with another lender or is desirous of paying off the secured debt. Under those circumstances, the debtor must have a mechanism for determining how much is owed and what stands as collateral. Were it not for MTA 9-207, the debtor would have no such mechanism, and it would therefore be unable to borrow additional sums from other lenders unless they were willing to take the debtor's word for what it owed or what stands as collateral for the debt. See UCC 9-210(b), (c), (d) and (e).

PART 3. Perfection and Priority

[Subpart 1. Law Governing Perfection and Priority]

MTA 9-301 sets out rules that determine what jurisdiction's laws govern perfection, the effects of being perfected or unperfected, and priority rights in collateral. This section does not determine the laws governing any other matter including attachment, validity, characterization and enforcement.

MTA 9-301 must be read in conjunction with MTA 9-110(a), which provides that the Act applies to certain types of transactions as long as they are within the jurisdiction of the Tribe. The basic choice-of-law rule set forth in MTA 9-301(1) is consistent with this approach; the Act rather than another jurisdiction's laws governs perfection, the effects of being perfected or unperfected, and priority rights

for transactions within the jurisdiction of the Tribe. This is true even if the Tribe's general choice-of-law principles would select another jurisdiction's law to govern other aspects of the transaction.

MTA 9-301(1) is subject to exceptions for transactions in which the collateral is so related to the land that a filing should be made in the official records related to that land. Thus, in the case of perfection by a fixture filing, a filing related to standing timber, or a filing related to as-extracted collateral, the law that governs perfection, the effects of being perfected or unperfected, and priority rights is the law of the jurisdiction where the land on which the fixture, standing timber, or wellhead or minehead is located. See MTA 9-301(2) and (3).

See UCC 9-301.

Certain goods, most commonly automobiles but often other assets such as boats and mobile homes, are subject to certificate-of-title statutes. These laws require that a security interest be indicated on a certificate "as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral." See MTA 9-106(a)(11). The mechanisms by which perfection is achieved under these types of laws are discussed in the comment to MTA 9-311.

MTA 9-303 does not deal with the mechanics of perfection. Instead, it determines the jurisdiction whose law governs perfection, the effects of being perfected or unperfected, and priority rights. The jurisdiction chosen might be the Tribe if it has adopted a certificate-of-title statute, another Tribe that has adopted such a statute, or a state of the United States.

MTA 9-303(b) provides that goods become covered by a certificate of title at the time a valid application for a certificate of title together with the applicable fee are delivered to the appropriate authority designated in the certificate-of-title statute of any jurisdiction. It is not necessary that there be any prior relationship between the jurisdiction and the goods or the debtor. In some jurisdictions, delivery of the application and fee will result in the security interest being perfected even though the secured party's interest is not yet indicated on a certificate. In other jurisdictions, perfection is deferred

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until the secured party's interest is indicated on a certificate. These distinctions are irrelevant for purposes of MTA 9-303. Once the application and fee are delivered to the appropriate office in a jurisdiction, the goods are deemed "covered by a certificate of title" of that jurisdiction. This means that the local law of that jurisdiction will govern whether perfection has occurred, the effects of being perfected or unperfected, and priorities with respect to the covered goods.

Goods cease to be covered by a certificate of title at the earlier of the time the certificate ceases to be effective under the law of the issuing jurisdiction or the time a valid application and applicable fee are delivered to the appropriate authority of another jurisdiction. In other words, the governing law immediately shifts from one jurisdiction to another when the goods become "covered by a certificate of title" in the other jurisdiction. The effects of a shift in the governing jurisdiction are determined by MTA 9-316(b) and (c).

The following examples illustrate the effect of MTA 9-303:

> ***Example 1****:* D buys a car on credit and grants Bank a security interest in the car. Bank delivers an application and fee to the proper office in Jurisdiction A, requesting that a certificate of title be issued showing its lien. The goods have "become covered" in Jurisdiction A. The law of Jurisdiction A determines whether perfection has occurred, the effects of being perfected or unperfected, and the priority of Bank's security interest.
>
> ***Example 2****:* D now moves to Jurisdiction B and on January 15 registers the car for the purpose of obtaining license plates but does not apply for a certificate of title. The law of Jurisdiction A continues to govern because the car has not ceased to be covered by its certificate.
>
> ***Example 3****:* D now moves to Jurisdiction C and on June 15 registers the car for the purpose of obtaining license plates. Jurisdiction C also requires that D apply for a certificate of title and, on June 15, D submits an application and fee. The car ceases to be covered by Jurisdiction A's certificate. See MTA 9-303(b). Accordingly, the law that determines perfection, the effect of perfection or nonperfection, and priority is now Jurisdiction C. See MTA 9-303(c).

See UCC 9-303.

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[Subpart 2. Perfection]

MTA 9-308 sets out basic rules for determining when a security interest is perfected. Except when perfection occurs automatically upon attachment under MTA 9-309, perfection requires that a security interest attach (see MTA 9-202(a) and (b)) and that an additional step designed to give public notice of the interest must be taken. The additional steps are set forth in MTA 9-310 through 9-314.

The additional steps for perfection may be taken before the time of attachment, as when a financing statement is filed in anticipation of a secured loan being made. MTA 9-308(a) provides that, in such instances, perfection occurs upon attachment.

MTA 9-308(b) provides that a secured party may shift among methods of perfection. As long as there is not an intermediate period when the security interest is unperfected, it will be deemed to have been continuously perfected. For example, a security interest in an instrument might be temporarily perfected without possession or public filing for 20 days under MTA 9-312(e). If the secured party takes possession of the instrument or files a financing statement describing it before the 20 days expires, it will be deemed continually perfected for priority purposes. However, if it allows the 20 days to lapse before taking possession or filing, it will be deemed perfected only as of the time of possession or filing.

MTA 9-308(c) addresses situations in which a right to payment or performance is secured by a security interest, mortgage or other lien on personal or real property. This subsection provides that perfection for the right to payment or performance occurs automatically with respect to a security interest, mortgage or lien. This rule must be read in connection with MTA 9-202(e), which provides that attachment of a security interest to a right to payment or performance also causes attachment to a security interest, mortgage, or other lien. The following example illustrates the application of MTA 9-308(c):

> ***Example:*** Owner grants Mortgagee a mortgage on land to secure a loan evidenced by a promissory note. Mortgagee borrows from Secured Party and grants a security interest in the note which Secured Party perfects. MTA 9-202(e) adopts the traditional view that the mortgage follows the note, and thus Secured Party's security interest is deemed to attach to the mortgage as well. Under MTA 9-308(c), perfection of the security interest in the note

> automatically causes perfection of the security interest in the mortgage. This means that Secured Party will have priority over a person that becomes a lien creditor of Mortgagee. The Act does not determine who has the power to release a mortgage of record. That determination is left to real estate law.

MTA 9-308(d) functions in a manner similar to subsection (c); that is, perfection of a security interest in an investment account causes the secured party to be automatically perfected in any security entitlements or commodity contracts held in the account. The term "security entitlement" is not defined in the Act but means the rights and interest of a person in a financial asset held by a financial intermediary. See UCC 8-102(a)(17).

See UCC 9-308.

In some transactions, a security interest is perfected as soon as it attaches and the secured party is not required to take any additional steps. MTA 9-309 identifies these. Parties dealing with types of personal property that are eligible for automatic perfection need to be aware that a perfected security interest might exist despite the lack of required notice or filing.

A purchase-money security interest in consumer goods is automatically perfected. This situation is the only permanent exception to the general filing requirement when goods that are original collateral are left in the debtor's possession. Thus, a seller of consumer goods is automatically perfected with respect to an interest retained in the goods to secure the unpaid purchase price. Similarly, a lender that provides a loan to facilitate a debtor's acquisition of consumer goods and takes back a security interest in the goods is automatically perfected. For example, if a bank provides a loan to a consumer to purchase a washer and dryer, the bank's security interest in the washer and dryer to secure the loan will be automatically perfected.

This provision is subject to two exceptions. If the consumer goods become fixtures, a fixture filing is needed to attain the priorities that the Act provides with respect to most other real property interests, although automatic perfection will defeat lien creditors such as a trustee in bankruptcy. See MTA 9-319(e)(3). The Act also precludes automatic perfection for goods subject to a certificate-of-title statute or a federal statute, regulation or treaty as provided in MTA 9-311. Thus, if a security interest in a vehicle can be perfected only pursuant to a certificate-of-title law, a purchase-money security interest in the vehicle cannot be automatic even if it is used for a personal, family or household purpose.

Filing is not required for perfection with respect to an assignment of accounts which, by itself or together with other assignments to the same assignee, does not transfer a significant part of the outstanding accounts of the assignor.

The Act applies to outright sales of accounts, chattel paper, payment intangibles and promissory notes. See MTA 9-110(a)(2). In the case of payment intangibles and promissory notes, the buyer's security interest is deemed to be automatically perfected. Note that permanent automatic perfection is not available if the payment intangible or promissory note is provided to the secured party as collateral for an underlying loan or other obligation.

A health-care-insurance receivable is "an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided." See MTA 9-106(a)(33). The category is a subset of "account," (see MTA 9-106(a)(2)) and, unless otherwise stated, rules applicable to accounts are applicable to health-care-insurance receivables. Inclusion in the "account" category means that sales of health-care-insurance receivables are within the scope of the Act. As with any account, the interest of an assignee in the case of an isolated assignment is automatically perfected (see above). Also, as illustrated by the following example, an assignment to the provider of the health-care goods or services is automatically perfected.

> ***Example*:** To pay for services rendered, Patient assigns to Doctor his rights under a private health-insurance policy. The transaction is governed by the Act, but the Doctor's interest is automatically perfected. If Doctor assigns all her accounts, including health-care-insurance receivables, to Bank as collateral for a loan, Bank must file to perfect its interest.

A security interest created by an assignment of a beneficial interest in a decedent's estate is automatically perfected at the time of the assignment.

A right to payment of winnings in a lottery or other game of chance is an "account" and the interest of an assignee of the account, whether a buyer or lender, is automatically and continuously perfected. The reason is that the payments are typically made over an extended period of time and, without this rule, the assignee would have to perfect again within four months following each time the assignor changed its location. See MTA 9-316(a) and (b).

See UCC 9-309.

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MTA 9-310(a) states the general rule that perfection of a security interest occurs upon the filing of a financing statement. Filing is required for perfection unless there is an exception that validates another method.

Filing is not necessary in the circumstances described in MTA 9-310(b). Each of the exceptions to the filing requirement contains a cross-reference to other provisions of the Act. Thus, MTA 9-310(b) creates the exceptions but defers to the other provisions for the details.

MTA 9-310(c) provides that if a perfected security interest is assigned, the assignee need not file a financing statement to continue its perfected status as against creditors of, and transferees from, the original debtor. This subsection applies not only to the assignment of a security interest perfected by filing but also to the assignment of a security interest perfected by another method. Although this subsection explicitly addresses only the absence of a filing by the assignee, the same result will normally obtain in the case of an assignment of a security interest perfected by another method.

Notwithstanding MTA 9-310(c), an assignee may wish to have the assignment recorded in the central filing office so that it becomes the secured party of record. This will facilitate the post-assignment filing of amendments to the filed financing statement.

See UCC 9-310.

MTA 9-311 provides for certain situations in which perfection must be accomplished by compliance with the provisions of a law other than the Act. MTA 9-311 (a) through (c) must be read together to understand the effect of the section. In the circumstances listed in subsection (a), the filing of a financing statement is neither necessary nor effective to perfect a security interest. However, MTA 9-311(b) provides that compliance with the provisions of a law other than the Act is equivalent to filing under the Act, and that a security interest in property subject to the other law may only be perfected by compliance with the other law. MTA 9-311(b) also provides that a security interest perfected under the

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other law remains perfected even though there has been a change in the use or a transfer of possession of the collateral. MTA 9-311(c) provides that duration and renewal of perfection are also governed by the other law.

MTA 9-311(b) and (c) are subject to two exceptions. MTA 9-311(d) provides that when collateral subject to a law designated in MTA 9-311(a) is inventory held for sale or lease, or is actually leased, by a person in the business of selling goods of that kind, perfection is not governed by MTA 9-311. Thus, a secured party with a security interest in a dealer's inventory of cars need only perfect by filing a financing statement even if there is a certificate-of-title statute generally applicable to cars. In addition, MTA 9-313(b) and MTA 9-316(c) provide for limited instances in which a secured party may perfect by possession because its perfection under a certificate-of-title statute is about to expire. The circumstance in which possession constitutes perfection is described in the Comment to MTA 9-313.

The types of laws to which MTA 9-311 apply are set forth in MTA 9-311(a). Subsection (a)(1) refers to statutes, regulations and treaties of the United States whose requirements preempt the Act with respect to the method by which a security interest is perfected. Whether a particular statute, regulation or treaty is effective against the Tribe and, if so, whether it has preemptive effect with respect to perfection, is not determined by the Act. An example of a federal statute that has preemptive effect as against state law is the Federal Aviation Act of 1958, as amended (49 U.S.C. §§ 44107-11), which applies to security interests in civil aircraft.

MTA 9-311(a)(2) requires the Tribe to list any certificate-of-title statutes adopted by it that provide for a security interest to be indicated on the certificate issued by the Tribe as a condition or result of perfection. If the Tribe has not adopted any such statute, the paragraph should be deleted.

NOTE: *MTA 9-311(a)(3) must be read in conjunction with MTA 9-303, which provides that the Tribe recognizes perfection accomplished pursuant to a certificate-of-title statute of another jurisdiction.*

See UCC 9-311.

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Comment to MTA 9-312. ***Perfection of Security Interests in Chattel Paper, Documents, Goods Covered by Documents, Instruments, and Money; Perfection by Permissive Filing; Temporary Perfection without Filing or Transfer of Possession***

MTA 9-312 sets forth certain rules applicable to security interests in chattel paper, documents, instruments, certificated securities, assets held in an investment account and money.

MTA 9-312(a) provides that a security interest in chattel paper, negotiable documents, instruments, securities, or investment accounts may be perfected by filing a financing statement. Filing is permissive and, while effective to gain priority over the rights of a lien creditor, leaves the secured party subject to claims by certain qualifying purchasers as described in the Comment to MTA 9-318. The risk from purchasers can be eliminated if the secured party perfects by taking possession of the collateral under MTA 9- 313. The same risk from purchasers is present if a secured party is perfected under the temporary automatic perfection rules of MTA 9-312(e) and (f).

MTA 9-312(a) does not apply to nonnegotiable documents or to money. With respect to money, MTA 9-312(b) provides that, except as provided in the provisions of the Act dealing with perfection as to money that constitutes proceeds (MTA 9-315), a security interest may only be perfected by possession.

MTA 9-312(c) governs perfection while goods are in the possession of a bailee that has issued a negotiable document covering them (*e.g.*, a bill of lading or warehouse receipt), and subsection (d) governs perfection while goods are in the possession of a bailee that has issued a nonnegotiable document covering them. A document of title operates as a receipt for goods placed in the custody of a bailee. It also controls access to the goods in that the bailee will not release them to a person that cannot present the document in proper form. In the case of a negotiable document, the document also represents title to the goods; that is, an interest in the goods can be transferred by transferring the document even though the bailee remains in custody of them. The same is not true with nonnegotiable documents.

While goods are in the possession of a bailee that has issued a negotiable document, MTA 9-312(c)(1) provides that a security interest may be perfected by perfecting as to the document itself since it represents title to the goods. Perfection may be by filing as provided in MTA 9-312(a), by possession as provided in MTA 9-313, or by temporary automatic perfection as provided in MTA 9-312(e) and

(f). A security interest may also be perfected as to the goods themselves without reference to the documents, but MTA 9-312(c)(2) provides that a security interest perfected in the document will take priority over a security interest perfected in the goods during the time the goods are covered by the document.

While goods are in the possession of a bailee that has issued a nonnegotiable document, MTA 9-312(d) provides that perfection may be accomplished by issuance of a document naming the secured party as the party entitled to possession of the goods, by causing the bailee to receive a notification of the secured party's interest, or by filing a financing statement as to the goods. Neither filing as to the document nor possession of a document running to someone other than the secured party will perfect the security interest.

MTA 9-312(e) and (f) provide for 20-day periods of temporary automatic perfection. MTA 9-312(g) provides that at the end of the 20-day period, perfection will lapse unless it is continued by another method without a gap in perfection having occurred. See also MTA 9-308(b).

MTA 9-312(e) applies to certificated securities, negotiable documents and instruments. It provides for 20 days of temporary perfection commencing with attachment of the security interest if the secured party gives new value pursuant to a signed security agreement.

MTA 9-312(f) provides for a similar 20 days of temporary perfection as to negotiable documents or goods in the possession of a bailee other than one that has issued a negotiable document if the secured party makes the goods or the negotiable document representing the goods available to the debtor for one of the purposes set forth in MTA 9-312(f)(1) or (f)(2). In cases in which there is not a negotiable document, the bailee may have issued a nonnegotiable document or may have custody of the goods without having issued a document.

See UCC 9-312.

MTA 9-313 governs perfection by possession. MTA 9-313(a) provides that the following types of collateral may be perfected by possession: goods of all types, chattel paper, instruments, negotiable documents, certificated securities and money. In the case of money other than proceeds, possession is

mandatory as provided in MTA 9-312(b). In all other cases, perfection may be by another appropriate method. It should be noted that if the collateral is chattel paper, instruments, or negotiable documents, perfection by a method other than possession leaves the secured party subject to claims by certain qualifying purchasers as described in the Comment to MTA 9-318.

MTA 9-313(b) deals with a limited circumstance involving goods subject to a certificate-of-title statute and must be read in conjunction with MTA 9-316(c). As a rule, compliance with such a statute is the only appropriate method of perfection. See Comment to MTA 9-311. Under MTA 9-316(c) however, if goods covered by a certificate of title issued by one jurisdiction subsequently become covered by a certificate of title issued by another jurisdiction, a secured party that perfected pursuant to the certificate-of-title statute of the first jurisdiction will become unperfected as to purchasers of the goods for value unless within four months it either perfects pursuant to the certificate-of-title statute of the second jurisdiction or takes possession as provided in MTA 9-313(b). The following examples illustrate the operation of these provisions:

> ***Example***. Debtor buys a car on credit and grants Bank a security interest in the car. Bank delivers an application and fee to the proper office in Jurisdiction A requesting that a certificate of title be issued showing its lien. MTA 9-303(b) provides that the goods have "become covered" in Jurisdiction A, meaning that the law of Jurisdiction A determines whether perfection has occurred, the effects of being perfected or unperfected, and the priority of Bank's security interest. Debtor now moves to Jurisdiction B and delivers an application and fee to the proper office in that jurisdiction requesting that a certificate of title be issued. Under MTA 9-303(b), the car ceases to be covered by Jurisdiction A's certificate and the law that now governs perfection and related issues is that of Jurisdiction B. Jurisdiction B's version of MTA 9-316(c) will provide that the secured party becomes unperfected as to purchasers of the goods for value if, within four months, the secured party does not either perfect by complying with Jurisdiction B's certificate-of-title law or by taking possession of the car.

If collateral in the possession of a bailee is property other than goods covered by a negotiable or nonnegotiable document (as to which, see Comment to MTA 9-312), a secured party may perfect by obtaining "constructive possession." Under MTA 9-313(c), constructive possession requires that the bailee sign a record acknowledging that it holds, or as to future assets will hold, the collateral for the secured party's benefit. This method cannot be used if the bailee is a lessee of the collateral from the debtor in the ordinary course of the debtor's business. The limitation represents a policy judgment that the lessee's possession of the goods in such circumstances is insufficient to provide adequate public notice of the secured party's interest.

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Under MTA 9-313(e), a bailee is not required to acknowledge that it holds collateral for a secured party's benefit and, under MTA 9-313(f)(2), the fact that a bailee so acknowledges does not impose any duties on the bailee under the Act. A duty might, however, be imposed by law other than the Act.

It should be noted that possession by an agent of the secured party has the same effect as possession by the secured party, and an authenticated acknowledgment from the agent is not necessary.

See UCC 9-313.

MTA 9-314 provides that a security interest in a security or an investment account may be perfected by control. The mechanisms for obtaining control are described in the definition of the term at MTA 9-106(a)(22A) (certificated security), MTA 9-106(22B) (investment security), and MTA 9-106(a)(22C) (mutual fund shares not in an investment account). See UCC 9-314.

MTA 9-315(a) states the basic rule that a security interest continues in collateral notwithstanding the fact that it is sold, leased, licensed, exchanged or otherwise disposed of, unless there is a contrary rule in the Act or the secured party participates in entrusting the goods to a merchant that deals in goods of the kind and the merchant sells them to a buyer in ordinary course of business. MTA 9-315(a) also states the basic rule that a security interest automatically attaches to any proceeds from a disposition of collateral that are identifiable.

MTA 9-315(b) deals with the identification of proceeds that have become commingled with other property. If the proceeds are goods, identification is governed by MTA 9-321. See Comment to MTA 9-321. If the proceeds are not goods, the secured party must be able to make the identification through a method of tracing that is permitted under law other than the Act with respect to commingled property of the type involved. As appropriate, the other law may be based on principles of equity.

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A security interest attaches to identifiable proceeds as described above. MTA 9-315(c) through (e) deal with perfection of a security interest in proceeds. The general rule of MTA 9-315(c) is that a security interest in proceeds is perfected if the security interest in the original collateral was perfected by any method, but this rule is limited by MTA 9-315(d). Under that subsection, a perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to them unless one of three conditions is met. In other words, there is a 20-day grace period in which perfection is indisputable.

Under MTA 9-315(d)(2), perfection does not lapse at the end of the grace period if the proceeds are identifiable cash proceeds. "Cash proceeds," defined to include only "money, checks, deposit accounts, or the like," are essentially cash or cash equivalents. See MTA 9-106(a)(9). As long as the proceeds are in this form, the secured party remains perfected.

MTA 9-315(d)(1) provides for perfection beyond the grace period with respect to noncash proceeds, but only if the secured party perfected its security interest in the original collateral by filing and certain other conditions are met. The other conditions are that the office in which a financing statement would be filed with respect to the proceeds is the same as the office in which the secured party filed to perfect its security interest in the original collateral, and that the proceeds at issue were not themselves acquired with cash proceeds. For example, if a secured party has a perfected-by-filing security interest in inventory and the debtor generates accounts or chattel paper upon disposition of the inventory, the secured party will remain perfected. Since a filing as to the accounts or chattel paper, had they been the original collateral, would inevitably have been made in the same office in which the filing was made for the inventory, perfection does not lapse at the end of the 20-day grace period.

Perfection beyond the grace period with respect to noncash proceeds is more restricted if the proceeds were themselves acquired with cash proceeds. In that case, perfection lapses at the end of the grace period unless: (1) perfection as to the original perfection was by filing a financing statement in the office in which filing would occur with respect to the proceeds and the description in the financing statement is broad enough to cover the proceeds; or (2) perfection occurs by any appropriate method before the grace period expires.

> ***Example*:** Secured Party perfects by filing a financing statement describing its collateral as "all Debtor's cattle." Debtor later sells some cattle in exchange for a check which Debtor deposits in a bank account. If Debtor later uses the proceeds in the account to purchase additional cattle, Secured Party's perfected status will not lapse at the end of the grace period since the

> description in the original financing statement is sufficient as to the proceeds. A purchase of a tractor with the cash proceeds, however, would result in lapse of perfection unless Secured Party amends its filing to describe the tractor or takes possession of it before the grace period expires.

MTA 9-315(e) states a rule applicable only to a situation in which a secured party remains perfected under MTA 9-315(d)(1). In that case, perfection lapses at the later of the time the effectiveness of the financing statement lapses or on the 21st day after the security interest attaches to the proceeds. This means that if the financing statement is allowed to lapse 13 days after the security interest attaches to the proceeds, the secured party still gets the benefit of the entire 20-day grace period with respect to the proceeds.

See UCC 9-315.

MTA 9-316 deals with the continuation of perfection accomplished in another jurisdiction when an existing transaction becomes subject to the Act. This will occur if a debtor changes its location to the jurisdiction of the Tribe or if collateral is transferred to a person that is located within the jurisdiction of the Tribe. MTA 9-316(d) states rules for determining whether a debtor has become located within the jurisdiction of the Tribe. This subsection is applicable only for purposes of MTA 9-316. It is not applicable to MTA 9-301.

If a debtor previously located within another jurisdiction becomes located within the Tribe's jurisdiction, the Act becomes the governing law for purposes of determining whether the security interest is perfected, the effects of being perfected or unperfected, and priority. Under MTA 9-316(a), the Act continues the effectiveness of perfection accomplished in another jurisdiction until the earlier of the time perfection would have ceased under the law of that jurisdiction or four months after the debtor becomes located within the Tribe's jurisdiction. If collateral is transferred to a person that is located within the Tribe's jurisdiction, thereby constituting that person a debtor, the Act continues the effectiveness of perfection accomplished in another jurisdiction until the earlier of the time perfection would have ceased under the law of that jurisdiction or one year after the transfer.

MTA 9-316(b) states the effects of perfecting or not perfecting under the Act in the situations described in MTA 9-316(a). If the secured party perfects under the Act before the end of the period

described in that subsection, the secured party remains perfected without lapse. However, if the secured party fails to perfect under the Act within the prescribed period, perfection lapses and the secured party becomes unperfected. If the secured party becomes unperfected upon lapse, it will be deemed never to have been perfected as against a purchaser of the collateral for value.

> ***Example 1:*** Manufacturer is located in State A. Bank has a security interest in Manufacturer's equipment, which it has perfected by filing in State A. Without Bank's consent, Manufacturer sells an item of equipment to Buyer who is located within the jurisdiction of the Tribe. Buyer is at all relevant times unaware of Bank's security interest. If Bank fails to perfect under the Act within the earlier of the time perfection would have ceased under the law of State A or one year after the transfer, Buyer, which was subordinate to Bank until the lapse occurred, will take priority.
>
> ***Example 2:*** Manufacturer is located in State A. Bank has a security interest in Manufacturer's equipment which it has perfected by filing in State A. Manufacturer becomes located within the jurisdiction of the Tribe and, two months later, grants a security interest in its equipment to Finance Company, which immediately perfects under the Act. If Bank fails to perfect under the Act within the earlier of the time perfection would have ceased under the law of State A or four months after the transfer, Finance Company, which was subordinate to Bank until lapse occurred, will take priority.

Note that in both of these examples, if Bank's adversary had been a lien creditor whose interest arose before lapse, Bank would have retained priority. Lien creditors do not qualify as purchasers.

MTA 9-316(c) applies when a security interest in goods is perfected under the law of another jurisdiction and then becomes covered by a certificate of title issued by the Tribe. It will not apply unless the Tribe has a statute governing the issuance of certificates of title. If the Tribe has a certificate-of-title law, goods "become covered" by a certificate of title when application for a certificate is properly made and the proper fee is tendered. See MTA 9-303(b).

The basic rule of MTA 9-316(c) is that the security interest remains perfected until it would have become unperfected under the law of the other jurisdiction even though the goods have become covered by a certificate of title issued by the Tribe. However, if the secured party fails to perfect by complying with the Tribe's certificate-of-title statute or by taking possession of the goods within the earlier of the time the security interest would have become unperfected under the law of the other jurisdiction or four months after the goods become covered by the certificate of title, the secured party becomes unperfected. In addition, the secured party is deemed never to have been perfected as against a purchaser for value. A security interest that is properly perfected under the law of another

jurisdiction does not become unperfected against a lien creditor even if the lien creditor's interest arises more than four months after goods become covered by a certificate of title issued by the Tribe.

For further discussion of perfection by possession in the context of MTA 9-316(c), see Comment to MTA 9-313.

See UCC 9-316 and 9-307.

[Subpart 3. Priority]

Subpart 3 deals with issues of priority; that is, the rights of a secured party with a security interest in collateral against a competing claimant for that collateral. There are a wide variety of potential third-party claims, including claims by other secured parties, lien creditors (including a trustee in bankruptcy), buyers, lessees and licensees. Perfection generally improves a secured party's position against these claimants but does not always guarantee priority.

MTA 9-201(a) contains a residual priority rule that makes a security interest effective against purchasers of the collateral (including other secured parties) and creditors. In addition, MTA 9-315(a)(1) contains a consistent residual rule pursuant to which a security interest continues in collateral notwithstanding sale, lease, license, exchange, or other disposition. These general rules are subject to numerous exceptions, however. The exceptions are provided by this Subpart.

MTA 9-317 provides a number of priority rules that are exceptions to the residual rules of MTA 9-201(a) and MTA 9-315(a)(1).

MTA 9-317(a)(1) deals with priority between a secured party and a lien creditor (defined in MTA 9-106(a)(37)). The most important lien creditor is the trustee in bankruptcy. Next is an unsecured creditor that acquires lien creditor status through statutory levy or similar process. MTA 9-317(a)(1) provides that a secured party's security interest granted by agreement is generally subordinate to, or ranks after, the interest of a person that later becomes a lien creditor before the secured party perfects its security interest. Conversely, if a secured party perfects before a lien creditor's interest arises, the secured party will have priority under MTA 9-201(a).

> ***Example***: On 6/1, SP's non-purchase money security interest attaches but SP is not perfected by a filing. On 6/5, LC's security interest arises as a matter of law. On 6/10, SP files a financing statement to perfect. LC has priority. The result would be otherwise if SP had filed on 6/4.

MTA 9-317(a)(2) creates an exception to the residual rules of priority for buyers of tangible personal property; lessees of goods; licensees of general intangibles; and buyers of accounts, general intangibles or investment property, if these parties *give value* and take certain specified actions *without knowledge* of the security interest and *before it is perfected*.

> ***Example 1***: On 6/1 SP's non-purchase money security interest in goods owned by D attaches but SP does not perfect. On 6/5, B buys from D and acquires possession of the goods. B gives value on that date and as of that date has no knowledge of SP's security interest. On 6/10, SP files a financing statement. B takes free of SP's security interest.
>
> ***Example 2***: On 6/1, SP's non-purchase money security interest in goods owned by D attaches but SP does not perfect by filing a financing statement. On 6/5, B contracts to buy the goods from D, gives value but does not acquire possession of the goods. On 6/10, SP files a financing statement. On 6/11, B finally acquires possession. SP has priority. The result would have been the same even if SP had not filed but B had knowledge of SP's security interest before possessing the goods.

See UCC 9-317(a) through (d).

MTA 9-317(b) contains a purchase-money security interest exception to the rules stated above. If a purchase-money secured party perfects by filing a financing statement before or within 20 days after the debtor acquires possession of the collateral, the security interest will have priority over the rights of a buyer, lessee or lien creditor which arise between the time the security interest attaches and the time of filing.

> ***Example*****:** On 6/1, SP's purchase-money security interest attaches but the security interest is not perfected. On 6/5, LC's lien is created. On 6/10, D acquires possession of the collateral. On 6/29, SP files a financing statement. SP has priority. The results would be otherwise if D had acquired possession on 6/8 since the 20-day grace period would have lapsed.

See UCC 9-317(e).

MTA 9-317(c) states the general priority rule of "first-to-file-or-perfect" as between secured parties. That is, priority dates from the earlier of (1) the time a filing covering the collateral is first made, or (2) the time perfection is first achieved.

> ***Example 1:*** On 6/1, SP-1 files a financing statement in anticipation of entering into a loan transaction with D. SP-1 does not have an attached security interest because it has not yet given value and because D has not yet authenticated a security agreement. On 6/5, SP-2 takes and perfects a security interest in the collateral described in SP-1's financing statement. On 6/10, SP-1 obtains an authenticated security agreement and gives value, simultaneously causing its security interest to attach and become perfected. SP-1 has priority.
>
> ***Example 2*****:** On 6/1, SP-1's non-purchase money security interest attaches to collateral but SP-1 does not file a financing statement to perfect. On 6/5, SP-2, who knows of SP-1's interest, takes and by possession perfects a security interest in the same collateral. On 6/10, SP-1 files a financing statement. SP-2 has priority.

MTA 9-317(c)(2) and (3) state rules for situations in which one or more of the secured parties is unperfected. MTA 9-317(c)(2) provides that a perfected secured party defeats an unperfected secured party, and MTA 9-317(c)(3) provides that, among unperfected secured parties, the first to attach has priority. See UCC 9-322(a).

MTA 9-317(d) states that, except as provided for purchase-money security interests in MTA 9-318, the time of filing or other perfection as to proceeds from the disposition of the collateral is the same as the time of filing or other perfection for the security interest in the original collateral.

> ***Example:*** SP-1 takes a security interest in D's present and after-acquired inventory, and perfects by filing. SP-2 later does the same with respect to D's accounts. If inventory is sold producing accounts as proceeds, SP-1 will have priority.

See UCC 9-322(b).

MTA 9-317(e) states a special rule for security interests covering proceeds that have priority under MTA 9-318(e) (purchaser of an instrument or chattel paper), MTA 9-318(f) (holder in due course of negotiable instrument, holder to whom a negotiable instrument has been duly negotiated, protected purchaser of security), or MTA 9-318(i) (transferee of money or funds from deposit account). Those rules provide for non-temporal priority, that is, priority not predicated on the first-to-file-or-perfect rule of MTA 9-317(c)(1). A secured party with non-temporal priority in collateral also has priority in the proceeds of the collateral if the security interest in the proceeds is perfected (see MTA 9-315 (c) and (d)), and the proceeds are either cash proceeds or are of the same type as the original collateral.

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> ***Example 1***: SP-1 perfect a security interest in all D's instruments, whenever acquired, by filing a financing statement. SP-2 later perfects a security interest in a promissory note owned by D by taking possession of the note and thus acquires priority under MTA 9-318(e) or (f). D subsequently receives an installment payment on the note in the form of cash, and also receives a check for the balance of the note. If applicable, the rule set forth in MTA 9-317(c)(1) would give priority in the proceeds to SP-1. MTA 9-317(e) applies, however, and gives priority to SP-2. The cash and check are both cash proceeds, and the check is also the same type of collateral as the promissory note, *i.e.*, an instrument.

The special rule also governs if there are proceeds of proceeds. Perfection under the special rule applies only if all of the intervening proceeds are cash proceeds, proceeds of the same type as the original collateral, or an account relating to the collateral. If any of the intervening proceeds do not comply, priority in the proceeds is governed by the first-to-file-or-perfect rule.

The foregoing rule is limited to proceeds of a type that might be referred to as "non-filing collateral," meaning that filing is either unavailable to perfect a security interest or is less effective than perfection by possession or control.

The rule of subsection (e) does not provide for priority in proceeds that constitute "filing" collateral. Under subsection (f), a security interest in chattel paper, negotiable documents, instruments, securities or investment accounts is perfected by a method other than filing and the proceeds are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter of credit rights, priority is based on the first to file (not the first to file or perfect) with respect to the proceeds.

> ***Example***: SP-1 takes a security interest in D's deposit account and perfects by control. SP-2 thereafter takes a security interest in all D's inventory, whenever acquired, and perfects by filing a financing statement. D subsequently uses funds from the deposit account to buy inventory, and SP-1 promptly files with respect to the inventory, thereby extending its perfected status beyond the 20-day period of temporary perfection for proceeds. SP-1 claims the inventory as proceeds from the deposit account and SP-2 claims it as original collateral. SP-2 has priority. (*Note* that if the first-to-file-or-perfect rule of MTA 9-317(c)(1) applied, SP-1 would prevail.)

See UCC 9-322(c) and (d) for additional guidance for MTA 9-317(e) and (f), respectively.

MTA 9-318 contains further priority rules of particular application.

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MTA 9-318(c) provides that a buyer or lessee of goods in the ordinary course of business, or a licensee that takes a non-exclusive license of a general intangible in the ordinary course of business, takes free of a security interest created by that person's seller, lessor or licensor, without regard to either perfection of the security interest or knowledge by the buyer, lessee or licensee of the security interest. See UCC 9-320(a) and 9-321.

> ***Example***: On 6/1, SP takes and perfects a security interest in D's inventory. On 6/5, B, a buyer in the ordinary course of business, buys from D. B knows of SP's security interest. B nevertheless has priority. If B had not been a buyer in the ordinary course of business, SP would have had priority. The result would have been the same in favor of a lessee of goods in the ordinary course of business or a licensee taking a non-exclusive license of a general intangible in the ordinary course of business.

MTA 9-318(c) does not apply to a buyer in ordinary course of business who buys farm products from a person engaged in farming operations unless the buyer obtains from the seller a notarized list of parties with conflicting security interests and either (1) obtains from any such party a waiver of its rights, or (2) makes payment jointly to the seller and the secured party.

> ***Example:*** Bank has a perfected security interest in Farmer's crops. Farmer sells the crops to Buyer who qualifies as a buyer in ordinary course of business. Buyer fails to obtain from Farmer a notarized list of secured parties. Buyer cannot take advantage of subsection (c) and, since Bank is perfected, Buyer will be subordinate to Bank's security interest. See MTA 9-315(a) and MTA 9-317(a)(2). The same would be true if Buyer obtained a notarized list and failed to either obtain a waiver from Bank or make payment jointly to Farmer and Bank. As a practical matter, and in most cases, Buyer will be a commercial party that can protect itself more easily than Bank will be able to keep track of what Farmer is doing at what time with crops or other farm products in which Bank has a security interest. Buyers from the initial Buyer will be protected because, in most cases, the Bank will be unable to identify the collateral at that level.

The exception for buyers of farm products provides them with rights similar to, although not entirely consistent with, those provided by the Federal Food Security Act of 1985, 7 U.S.C. § 1631. MTA 9-318(c) does not protect a buyer in ordinary course of business, whether of farm products or otherwise, if the collateral is in the secured party's possession pursuant to MTA 9-313.

MTA 9-318(d) states a rule that allows certain consumer buyers to take free of security interests perfected by a method other than possession. To take free, the goods must be consumer goods in the hands of a seller, and the buyer must buy without knowledge of the security interest, for value, and for

a personal, family or household purpose. In other words, the rule is limited to consumer-to-consumer sales. If the goods have a value of $5,000 or more, a secured party can avoid the impact of the rule by filing a financing statement covering the goods.

MTA 9-318(e)(1) provides that certain purchasers of instruments and chattel paper are entitled to priority over a perfected secured party. To prevail, the purchaser must take possession of the collateral, act in good faith, buy in the ordinary course of its business, and give new value. In addition, the instrument or chattel paper must not indicate on its face that it has been assigned to an identified person other than the purchaser, and the purchaser must be without knowledge of the secured party's rights.

> ***Example:*** D grants SP-1 a security interest in all its chattel paper, and SP-1 perfects by filing a financing statement. The chattel paper does not indicate on its face that it has been assigned to SP-1 or any other named person. SP-2, acting in good faith and without knowledge of SP-1's security interest, makes a loan to D and takes a security interest in all D's chattel paper. SP-2 perfects by taking possession. SP-2 has priority. The same would have been true if SP-2 had bought the chattel paper (so long as it gives new value) and took possession.

MTA 9-318(e)(2) provides that a purchaser with a priority in chattel paper under subsection (e)(1) also has priority in the *proceeds* of the chattel paper. This covers specific goods covered by the chattel paper or cash proceeds from the sale of the specific goods, even if the purchaser's security interest in the proceeds in unperfected. See UCC 9-320(b).

MTA 9-318(f) provides that a holder in due course of a negotiable instrument, a holder to which a negotiable document has been duly negotiated, or a person protected by law against a claim to investment property, takes free of a perfected security interest. Notice by the filing of a financing statement of a claim or defense against the holder or protected person has no effect.

> ***Example:*** D grants SP a security interest in a negotiable promissory note, and SP perfects by filing a financing statement. D later negotiates the instrument to a holder in due course. The holder in dues course takes free of SP's security interest notwithstanding the filing. Whether a person qualifies as a holder in due course is determined by law other than this Act.

See UCC 9-330.

MTA 9-318(g)(1) provides that when advances are made, priority among secured parties will date from the time of the advance rather than the time of perfection by filing or otherwise. The security

interest is perfected automatically at the time the advance is made unless it is made pursuant to a commitment made before or while the security interest is being perfected.

> ***Example 1***: SP-1 makes a loan secured by D's equipment on 6/1 and files a financing statement on that same date. SP-2 makes a loan secured by the same equipment on 7/1 and files on that date. SP-1 later makes an advance pursuant to a future-advances clause in its security agreement. SP-1's security interest has priority with respect to the future advance.
>
> ***Example 2***: SP-1 makes a loan secured by D's equipment on 6/1 and files a financing statement on that same date. SP-1's security agreement does not contain a future-advances clause. SP-2 makes a loan secured by the same equipment on 7/1 and files on that date. SP-1 later makes a new loan and takes a security agreement covering D's equipment. SP-1 has priority with respect to the new loan.
>
> ***Example 3:*** SP-1 makes a loan secured by D's instruments on 6/1 but does not file or take possession at that time. The loan constitutes new value. SP-1 is automatically perfected for 20 days beginning with the time of attachment under MTA 9-312(e). The security agreement contains an optional future-advances clause. On 6/10, SP-2 makes a loan, takes a security interest in the same instruments and files. On 6/15, SP-1 makes an advance although it was not committed to do so. On 6/18, SP-1 files in order to maintain its perfected status beyond the 20-day grace period. SP-2 has priority with respect to its advance. The answer would be otherwise if the advance had been made pursuant to a commitment.

MTA 9-318(g)(2) provides that an advance made by a lender pursuant to a future-advances clause has priority over a subsequent lien creditor's interest if it is made within 45 days after the lender's security interest arises, made without knowledge of the interest, or made pursuant to a commitment granted without such knowledge. In the following examples, assume that levy by a judicial officer gives rise to a lien under applicable law.

> ***Example 1***: SP has a perfected security interest in goods owned by D. D owes an unsecured debt to LC who obtains a judgment and has a judicial officer levy on the goods. 60 days after levy, SP, unaware of LC's interest, advances additional money to D pursuant to an optional future-advances clause. SP has priority over LC with respect to the advance.
>
> ***Example 2***: SP has a perfected security interest in goods owned by D. D owes an unsecured debt to LC who obtains a judgment and has a judicial officer levy on the goods. 30 days after levy, SP, who knows of LC's interest, advances additional money to D pursuant to an optional future-advances clause. SP has priority over LC with respect to the advance.
>
> ***Example 3***: SP has a perfected security interest in goods owned by D. D owes an unsecured debt to LC, who later obtains a judgment and has a

judicial officer levy on the goods. 60 days after levy, SP, who knows of LC's interest, advances additional money to D pursuant to an optional future-advances clause. SP does not have priority over LC with respect to the advance.

Example 4: SP has a perfected security interest in goods owned by D. D owes an unsecured debt to LC, who obtains a judgment and has a judicial officer levy on the goods. 60 days after levy, SP, who knows of LC's interest, advances additional money to D pursuant to a commitment made without knowledge of LC's interest, and 50 days after it arose. SP has priority over LC with respect to the advance. The result would be otherwise if SP had known of LC's interest when it made the commitment.

As between a secured party and a buyer of goods other than a buyer of goods in the ordinary course of business or a lessee of goods in the ordinary course of business, MTA 9-318(g)(3) provides that an advance made pursuant to a future advances clause is subordinate to the interest of the buyer or lessee if (1) it is made after the secured party acquires knowledge of the purchase, or (2) 45 days after the purchase unless the advance is made pursuant to a commitment made without knowledge of the purchase or lease, and within 45 days after it occurs.

Example 1: SP has a perfected security interest in goods owned by D. Without authority from SP, D sells the goods to B. B is not a buyer in the ordinary course of business and takes the goods subject to SP's interest. 60 days after purchase, SP, unaware of B's interest, advances additional money to D pursuant to an optional future-advances clause in its security agreement. SP does not have priority over B with respect to the advance.

Example 2: SP has a perfected security interest in goods owned by D. Without authority from SP, D sells the goods to B. B is not a buyer in the ordinary course of business and takes the goods subject to SP's interest. 30 days after purchase, SP, unaware of B's interest, advances additional money to D pursuant to an optional future-advances clause in its security agreement. SP has priority over B with respect to the advance.

Example 3: SP has a perfected security interest in goods owned by D. Without authority from SP, D sells the goods to B. B is not a buyer in the ordinary course of business and takes the goods subject to SP's interest. 30 days after purchase, SP, who knows of B's interest, advances additional money to D pursuant to an optional future-advances clause in its security agreement. SP does not have priority over B with respect to the advance.

Example 4: SP has a perfected security interest in goods owned by D. Without authority from SP, D sells the goods to B. B is not a buyer in the ordinary course of business and takes the goods subject to SP's interest. 60 days after purchase, SP, who knows of B's interest, advances additional money to D pursuant to a commitment made without knowledge of B's interest. SP has priority over B with respect to the advance if the

commitment was made within 45 days after the purchase; otherwise, B has priority.

For goods other than inventory and livestock that are farm products, MTA 9-318(h)(1) provides that a perfected purchase-money security interest has priority over any conflicting security interest in the same collateral if it is perfected when the debtor acquire possession of the collateral or within 20 days thereafter. The same is true with respect to all identifiable proceeds of purchase-money collateral that is goods. See UCC 9-331.

MTA 9-318(h)(2) provides purchase-money priority in inventory or livestock that are farm products, but the rules differ from the rules provided in subsection(h)(1). The secured party that seeks purchase-money priority in this category must be perfected when the debtor acquires possession of the purchase-money collateral -- there is no grace period as there is under the general rule stated above. Also, the purchase-money secured party must send a timely and appropriate notice of its purchase money interest to the holder of the conflicting security interest. The Act does not define what constitutes a timely and appropriate notice but, in general, the notice should describe the purchase-money collateral and should be sent in time for it to be received before the holder of the conflicting security interest advances funds in reliance on the purchase-money collateral. No notice is required unless the holder of the conflicting security interest has already filed a financing statement before the purchase-money secured party perfects by filing or, if the purchase-money secured party is temporarily perfected under MTA 9-312(f), before the period of temporary perfection begins.

If a purchase-money secured party has priority in livestock that are farm products (and in the products of livestock in their unmanufactured state), it will also have a purchase-money priority with respect to all identifiable proceeds of the sale of any of the livestock.

A secured party with purchase-money priority in inventory also has purchase-money priority in cash proceeds received on or before delivery of the inventory to a buyer, chattel paper or an instrument constituting proceeds, and the proceeds of chattel paper. The term “cash” means “money, checks, deposit accounts, or the like.” See MTA 9-106(a)(9).

> ***Example 1:*** SP-1 and SP-2 each have a perfected security interest in D’s present and after-acquired inventory. SP-1 was the first to file, but SP-2 has purchase-money priority. D sells an item of inventory subject to SP-2’s security interest for cash, another item in exchange for a check, and a third item in exchange for an electronic debit to the buyer’s bank account (and

corresponding credit to D's bank account). SP-2 has priority to all the above proceeds.

Example 2: Same facts as above except D sells an item of inventory on unsecured credit without requiring the buyer to sign a negotiable instrument, sells another item of inventory and requires the buyer to sign a negotiable instrument, and sells a third item of inventory on secured credit. The proceeds respectively are an account, an instrument, and chattel paper. None of the proceeds is cash proceeds.

As to the account proceeds, SP-2's purchase-money priority is not effective, and SP-1 prevails based on the first to file or perfect. SP-2 has priority to proceeds evidenced by both the instrument and chattel paper, and also has priority to the proceeds of the chattel paper to the extent provided in MTA 9-318(e)(2) (a purchaser with priority as to chattel paper also has priority as to the proceeds of the chattel paper which proceeds arose out of the specific goods covered by the chattel paper or cash proceeds of the specified goods, even if the purchaser's security interest in the proceeds is unperfected.

Example 3: SP-1 has a perfected-by-filing security interest in all D's inventory, whenever acquired. D sells an item of inventory to Buyer on secured credit, in exchange for chattel paper. SP-2 makes a loan against the chattel paper and obtains priority under MTA 9-318(e)(1). SP-2 perfects by taking possession of the chattel paper and does not file a financing statement. Subsequently, Buyer returns the item to D, who places it back into inventory. The item of inventory is part of the proceeds of the chattel paper and SP-2 is automatically perfected for 20 days under MTA 9-315(c). Under MTA 9-318(d)(2), SP-2 will have priority as to the item over SP-1 even if SP-2 becomes unperfected at the end of the 20-day period.

Under MTA 9-115(c), there can be no purchase-money security interest in software unless the software is acquired in a transaction in which the secured party also acquires a purchase-money security interest in the goods for which the software is acquired. MTA 9-318(h)(3) provides that in the integrated transaction, a perfected purchase-money security interest in software has priority over a conflicting security interest to the same extent as the purchase-money security interest in the related goods and their proceeds under the rules set forth in the preceding subpart.

Example: Buyer purchases a computer for home use that is loaded with software, on secured credit, and Seller takes a purchase-money security interest in both the computer and software. Ten days later, Buyer takes out a personal loan from Bank and grants Bank a security interest in both the computer and the software. If Seller's security interest in the software is perfected, its priority in the software will be the same as its priority in the computer. To perfect its security interest in the software, Seller must separately describe it in the security agreement and file a financing statement. (Seller's purchase-money security interest in the computer,

however, is automatically perfected since it is a consumer good, but Seller cannot rely on automatic perfection for the software because software is a general intangible which requires filing.) Since Seller has priority over Bank as to the computer under the general purchase-money priority rule set forth in MTA 9-317(b) for goods, it also has similar priority as to the software.

A secured party with purchase-money priority in software has priority as to its proceeds to the extent that the purchase-money security interest in related goods has priority in both the goods and their proceeds.

MTA 9-318(h)(4) provides the following rule for cases involving multiple purchase-money security interests: A seller's interest takes priority over a third party lender's interest and, as between conflicting sellers' or lenders' interests, the first to file or perfect has priority. See UCC 9-323 and 9-324.

MTA 9-318(i) provides that a transferee of money or funds from a deposit account takes the money or funds free of any security interest in them unless the transferee acts in collusion with the debtor to violate the secured party's rights. The transferee does not need to give value to take advantage of this provision. See UCC 9-332.

Example: SP has a security interest in all funds in D's deposit account. D wires funds from the account to her niece as a Christmas gift. The niece takes the funds free of SP's security interest unless she acted in collusion with D to violate SP's rights.

MTA 9-318(j) states priority rules for securities and investment accounts. A security interest perfected by control has priority over a security interest perfected in any other manner and, subject to an exception for investment intermediaries, if more than one secured party has control, the first to acquire control prevails. An investment intermediary (other than an issuer of an investment company security), has priority in an investment account that it maintains regardless of the time it acquires control. Finally, a security interest in a certificated security in registered form that is perfected by delivery or possession has priority over a security interest perfected by a method other than control (*e.g.*, by filing or by temporary automatic perfection). See UCC 9-328.

MTA 9-318(k) provides a priority rule for certain possessory liens created under law other than the Act. If such a lien is created by statute or other rule of law to secure payment or performance of an obligation for services or material furnished with respect to goods in the ordinary course of business,

and if the lien is perfected by possession of the goods, the lien has priority over a security interest created under this Act unless the lien law expressly provides for a different result.

> ***Example:*** Feedlot takes possession of D's cattle and fattens them for sale. The cattle are subject to an existing perfected security interest in favor of SP. Under a statute, Feedlot acquires a statutory agister's lien on the cattle for any unpaid charges. The lien depends for its existence on Feedlot's continued possession of the cattle. Feedlot has priority unless the lien statute expressly provides otherwise.

The Act does not apply to possessory liens except to the extent MTA 9-318(k) provides a priority rule. See MTA 9-111(a)(2). See also UCC 9-333.

NOTE: *The Tribe should consider whether it asserts any tribal liens and, if so, which tribal liens should be given priority and which should be subordinate. The Act does not apply to tribal liens except to the extent this section provides a priority rule.* See MTA 9-111(a)(3).

MTA 9-319 governs a priority dispute between a secured party with a security interest in a fixture and an owner or encumbrancer of the real estate to which the fixture is affixed. MTA 9-106(a)(30) defines a fixture as goods that are "so related to particular real property that an interest in them arises under real property law." MTA 9-319(a) provides that a security interest may be created in a fixture, and also that a security interest in goods continues if they become a fixture. However, a security interest may not exist in ordinary building materials incorporated into an improvement on land. Such materials are deemed part of the real estate for purposes of the Act. *Note* that MTA 9-104 limits the scope of the Act to property, including fixtures, that is alienable.

MTA 9-319(b) provides that the Act is not the exclusive method for obtaining an encumbrance on fixtures in that an encumbrance may arise under real property law.

MTA 9-319(d) through (h) set forth an elaborate set of priority rules. MTA 9-319(c) provides that in cases not governed by those rules, the holder of a security interest in a fixture is subordinate to the interest of an encumbrancer or owner of the related real estate that is not the debtor.

MTA 9-319(d) provides for purchase-money priority in a fixture. To obtain purchase-money priority over a conflicting encumbrancer or owner, the debtor must have an interest of record or be in possession of the real property, the interest of the encumbrancer or owner must have arisen before the

goods became fixtures (meaning that the encumbrancer or owner did not rely on the fixtures in making its investment), and the secured party must perfect by making a fixture filing within 20 days after the goods become fixtures. A fixture filing is a financing statement that satisfies the special content requirements of MTA 9-502(a).

MTA 9-319(h) effectively precludes the operation of the purchase-money priority rule of MTA 9-319(d) against construction lenders. The rationale for the rule is that construction lenders rely on the fact that fixtures will be present in the improvement being financed.

> ***Example:*** Suppose Debtor is building an office building financed by a construction loan from Bank, which has recorded a mortgage. On August 1, Seller sells Debtor cabinets for wall-mounted installation, retaining a purchase-money security interest in the cabinets. On August 2, the cabinets are installed and become fixtures. On August 15, Seller makes a proper fixture filing. Without the special rule on construction mortgages, Seller would take priority over Bank under subsection (d). Under subsection (h), however, Seller's interest is subordinate to Bank's mortgage.

MTA 9-319(e)(1) provides that a security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner if the debtor has an interest of record or is in possession of the real property, the secured party perfects by making a fixture filing before the encumbrancer or owner records its interest, and the secured party has priority over any predecessor in title of the encumbrancer or owner. This is, in effect, a "pure race" priority rule.

MTA 9-319(e)(2), (3) and (4) deal with situations in which perfection by a method other than a fixture filing will provide priority over conflicting interests that arise after perfection. The most important provision is MTA 9-319(e)(3), which provides for priority over a person with a lien on the real property obtained by a legal or equitable proceeding. Thus, a security interest perfected by an ordinary filing, or automatically in the case of a purchase-money security interest in consumer goods, will defeat a bankruptcy trustee.

MTA 9-319(f) provides an exception to the residual priority rule of subsection (c) in two situations. MTA 9-319(f)(1) provides for priority if the holder of the conflicting interest, in a signed record, consents to the security interest or disclaims an interest in the goods as fixtures. This is a particularized application of the subordination rule of MTA 9-323. MTA 9-319(f)(1) is applicable only if the Tribe has adopted the so-called "trade-fixture" doctrine under which goods affixed to leased business premises generally are treated as personal property as between the lessor and the lessee.

MTA 9-319(i) provides a sweeping priority rule for security interests in crops. A perfected security interest in crops will have priority over a conflicting encumbrancer or owner if the debtor has an interest of record or is in possession of the real property. Although dealt with in the same section as fixtures, crops are treated as pure personal property and a fixture filing is not necessary. MTA 9-319(j) reinforces the rule of MTA 9-319(i) by providing that subsection (i) prevails over the inconsistent provisions of any listed statutes. MTA 9-319(j) is not necessary if the statutes that would otherwise be listed are amended to remove any inconsistent language.

MTA 9-604(b), (c) and (d) should be consulted with regard to foreclosure against fixtures. MTA 9-319(b) provides that a secured party can foreclose on fixtures under Part 6 of the Act or under real property law, in which case the other provisions of Part 6 do not apply.

Under MTA 9-604(c), a secured party with priority over the claims of all other persons with an interest in the real property may, subject to the normal rules governing repossession, remove the fixture. If it does so, MTA 9-604(d) provides that it must promptly reimburse any encumbrancer or owner of the real property for the cost of repair of any physical damage to the real property, but not for any diminution in market value caused by the absence of the fixture.

See UCC 9-334.

Accessions are analogous to fixtures, except that an accession is an item of personal property attached to another item of personal property rather than to real estate. MTA 9-106(a)(1) defines accessions as goods physically integrated with other goods in such a manner that the identity of the original goods remains. In other words, an accession retains its identity and can be removed from the goods to which it is attached and thus sold separately. This distinguishes it from a “commingled good” which arises if an item of personal property becomes so intertwined with other goods that it loses its separate identity. MTA 9-321 governs commingled goods.

MTA 9-320(a) provides that a security interest may be created in an accession, and also that a security interest in goods continues if the goods become an accession. MTA 9-320(b) provides that if a security

interest in goods is perfected when they become an accession, the secured party continues its perfected status without further action.

MTA 9-320(c) incorporates the Act's ordinary priority rules to govern priorities between a secured party with a security interest in an accession and a third party with a competing interest in the whole. The following examples illustrate this approach:

> ***Example 1:*** D grants Bank a security interest in a new computer hard drive to be installed in D's computer which is already subject to a perfected security interest in favor of Finance Company. If Bank's interest is a purchase-money security interest, it will take priority as to the hard drive if Bank perfects its security interest within 20 days after D acquired possession of the hard drive. See MTA 9-318(h)(1). If Bank fails to perfect its interest within this grace period, or if its interest is not a purchase-money interest, Finance Company will take priority. See MTA 9-317(c)(1).
>
> ***Example 2***: After installing the hard drive, D sells the computer to B for value. If B took possession of the computer without knowledge and before Bank's security interest was perfected, B takes the computer free of Bank's security interest in the hard drive.

MTA 9-320(d) creates an exception to MTA 9-320(c). Under subsection (d), a security interest in an accession is subordinate to a security interest in the whole good that is perfected under a certificate-of-title statute.

> ***Example 3:*** S finances a sound system for D's car and takes a purchase-money security interest in the system. S perfects its interest by filing within the 20-day grace period under MTA 9-318(g)(1). Bank has a security interest in the car that is perfected under a certificate-of-title statute. Bank has priority in the sound system as well.

Under MTA 9-320(e), a secured party with priority over the claims of all other persons with an interest in an accession may, subject to the normal rules governing repossession, remove the accession from the goods to which it is attached. If it does so, MTA 9-320(f) provides that it must promptly reimburse any holder of a security interest or other lien on the whole or on the goods to which the accession was attached, or owner of the whole or of the other goods, for the cost of repair to the whole or the other goods, but not for any diminution in market value caused by the absence of the accession.

See UCC 9-335.

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Comment to MTA 9-321. *Commingled Goods*

MTA 9-321 governs the effectiveness of a security interest in goods that have been commingled, meaning that they have become physically united with other goods such that their identity is lost. MTA 9-321(c) provides that if a security interest attaches to goods that become commingled, it also attaches to the resulting product or mass. MTA 9-321(d) provides that if the security interest in the goods was perfected before commingling, the security interest in the product or mass will also be perfected.

With respect to the conflicting rights of lien creditors and transferees, MTA 9-321(e) incorporates the Act's standard priority rules. For example, a perfected security interest in a product or mass will have priority over the interest of a lien creditor or a buyer not in ordinary course of business. However, a buyer in ordinary course of business will take free of the security interest.

With regard to conflicting security interests, MTA 9-321(f) provides that any two or more conflicting perfected security interests that arise solely under MTA 9-321 rank equally in priority in proportion to the collateral's value at the time of commingling.

> ***Example:*** Suppose Bank has a perfected security interest in Debtor's flour (worth $100) and Finance Company has a perfected security interest in Debtor's eggs (worth $200). Debtor commingles the flour and eggs to make cakes. Suppose further that after Debtor's default, the cakes are sold for only $150. From this $150, Bank would receive $50 and Finance Company $100.

Note that the foregoing priority rule applies only if the conflicting security interests both arise under MTA 9-321. The section's priority rule will not apply if one secured party claims a direct security interest in the commingled product or mass. In that case, the Act's standard priority rules apply.

> ***Example:*** Suppose Bank has a perfected security interest in Debtor's flour and Finance Company has a perfected security interest in all of Debtor's now-owned and after- acquired inventory. Debtor commingles the flour with other ingredients to make cakes. If Finance Company filed a financing statement covering the inventory before Bank filed a financing statement covering the flour, then Finance Company will have priority in the cakes under MTA 9-317(c)(1). Likewise, if Bank filed against the flour before Finance Company filed against the inventory, Bank will have priority in the cakes.

See UCC 9-336.

MTA 9-322 applies when a security interest in goods is perfected under the law of another jurisdiction and then a certificate of title is issued by the Tribe that does not either show that the goods are subject to the security interest or contain a statement that the goods may be subject to security interests not shown on the certificate. **NOTE:** ***This section will not apply unless the Tribe also has a statute governing the issuance of certificates of title.***

In the circumstances described above, MTA 9-322(1) provides that a buyer takes free of a perfected security interest if the buyer gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest. A buyer in the business of selling goods of the kind, however, cannot take advantage of this rule.

MTA 9-322(2) provides that the holder of a conflicting security interest can acquire priority over the perfected security interest if the secured party perfects the conflicting security interest under the Tribe's certificate-of-title statute after issuance of the certificate and without knowledge of the other security interest. The fact that the other security interest is perfected by possession under MTA 9-313(d) does not of itself preclude the holder of the conflicting security interest from obtaining priority under this section.

See UCC 9-337.

MTA 9-323 makes it clear that a person entitled to priority under any provision of the Act may effectively agree to subordinate its claim. Only the person entitled to priority may make such an agreement; a person's rights cannot be adversely affected by an agreement to which the person is not a party. See UCC 9-339.

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PART 4. Rights of Third Parties

Part 4 of the Act codifies certain contract principles and personal property law relevant to commercial transactions covered by the Act. These are modified, however, to be more suitable to govern the rights of third parties in connection with such transactions.

The first clause of the first sentence of MTA 9-401 states the general principle that whether property rights may be voluntarily or involuntarily transferred is governed by law other than the Act. The second clause limits the applicability of this general principle by providing that an agreement between a debtor and a secured party that prohibits the transfer of a debtor's rights in collateral, or an agreement that makes such transfer an event of default, does not prevent the transfer from taking effect. Thus, the owner of property may still sell or otherwise transfer the property, or the property may be seized by creditors, even though a security interest has been granted in the property.

> ***Example***: Debtor grants a security interest in its equipment to Bank as collateral for a loan. The security agreement provides that any transfer of Debtor's rights in the equipment, whether voluntary or involuntary, is ineffective and also constitutes an event of default. Debtor sells a piece of equipment to Buyer. The sale is effective to transfer Debtor's property rights to Buyer but Debtor is in default to Bank, which has the rights provided by Part 6 of the Act. Whether Buyer takes the equipment subject to Bank's security interest is determined by the priority rules of Part 3.

The second sentence of MTA 9-401 also limits the applicability of the general principle by making it subject to MTA 9-404, which overrides legal and contractual restrictions on transferability in the context of certain transactions.

See UCC 9-401.

MTA 9-402 recognizes that merely because a creditor takes a security interest in property, the creditor does not by that action assume responsibility for actions by the debtor-owner that may create liability in contract or tort. For example, if a secured party takes a security interest in a vehicle that the debtor

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negligently involves in an accident, the secured party is not liable for the debtor's negligent use of the collateral. See UCC 9-402.

MTA 9-403 deals with certain rights of assignees as illustrated by the following example: The seller of a vehicle takes a security interest in the vehicle to secure the unpaid purchase price but wants full payment earlier than the sales contact provides. To get earlier funding, the seller may sell the sales contract to a bank at a discount, or borrow from the bank and secure the loan using the seller's rights to collect future payments under the sales contract. These transactions are both covered by the Act.

The bank, however, may be worried that if the vehicle is defective the buyer will refuse to pay. Under general contract law, the buyer would have that right, and could assert that right to not pay against the seller. In addition, the buyer's right to refuse to pay the seller could be asserted against the bank as the assignee of seller's rights and obligations under the sales contract. This rule is stated in MTA 9-403(c). Because of this risk, the seller may have enticed the buyer to agree to a waiver of its defense against an assignee of the seller (in this case, the bank), although not against the seller itself. Under MTA 9-403(a), such a waiver would shield the bank from such defense (buyer's right not to pay) unless the sale is a consumer transaction. This means that the bank can continue to force the non-consumer buyer to pay, and the buyer must seek recovery from the seller for the defects.

Suppose, however, that the buyer is not informed of the assignment of the sales contract to the bank and continues to pay the seller who, in turn, fails to turn the money over to the bank. MTA 9-403(d) protects the buyer, and prevents the bank from demanding duplicate payments from the buyer. The bank is not entitled to collect from the buyer unless the buyer has been notified of the assignment to the bank and has been notified that payment must now be made to the bank. Even then, the buyer may insist on receiving reasonable proof of the assignment and, until such proof is provided, may continue to pay the seller.

Now suppose the buyer, who is not notified of the transfer, asks the seller to waive several payments and the seller agrees. According to MTA 9-403(e), whether this will prejudice the bank is determined by contract law outside of the Act.

See UCC 9-403, 9-404, 9-405, 9-406(a), (b) and (c).

MTA 9-404 elaborates on MTA 9-401 and overrides otherwise valid restrictions similar to those that may appear in a security agreement. The restrictions that are overridden are known collectively as "commercially harmful restrictions on alienation."

MTA 9-404(b) provides for a broad override in certain traditional transactions, including all assignments (whether for security or sale purposes) of chattel paper and accounts other than health-care-insurance receivables, and assignments for security (but not sales) of payment intangibles and promissory notes. Under this subsection, both contract terms that restrict assignment and terms that render an assignment an event of default are overridden.

> ***Example 1***: Vendor enters into an installment land contract with Vendee. The contract provides that Vendor's right to payment is not assignable and that any attempt to assign the right constitutes an event of default. Vendor sells the right to payment (an account) to Bank or assigns it to Bank as collateral for a loan. The assignment of the account is effective and may be enforced by the assignee. Moreover, the Vendor is not in breach.
>
> ***Example 2***: Buyer enters into an agreement with Seller to buy equipment that Seller will manufacture. Buyer agrees to make prepayments during manufacturing and Seller agrees these funds will be put into a special account and will be used only for the manufacture of the equipment. Seller also agrees not to assign its rights under the agreement but nevertheless grants a security interest to Bank in the agreement, that is, the right to receive payment under the agreement. The prohibition against assignment is overridden but not the part of the agreement concerning the special account.

MTA 9-404(c)(1) provides for an override in certain transactions that is less broad than the override in subsection (b). In an assignment of a health-care-insurance receivable (whether for security or sale purposes) or a sale of a payment intangible or promissory note, the rule is generally as stated in subsection (b) except that references to enforcement of a security interest are excluded. MTA 9-404(c)(2) elaborates on this rule by providing that if a commercially harmful restriction on alienation would otherwise be effective under law other than the Act, then the creation, attachment, or enforcement of a security interest is not enforceable against the account debtor or person obligated on the promissory note, does not impose a duty or obligation on the account debtor or obligated person, and does not entitle the secured party to *inter alia* use the debtor's property rights or have access to trade secrets or other confidential information.

> ***Example 3:*** Pharmacy routinely takes from its customers assignments of their rights under private health-care-insurance policies. The policies prohibit secondary assignments by health-care providers. Pharmacy sells all of its existing rights to Bank or assigns them to Bank as collateral for a loan. Bank's security interest attaches to the rights, but Bank may not enforce its interest against the insurance companies without obtaining a waiver of the prohibition on reassignment.

MTA 9-404(d) provides that legal restrictions on assignment are to be treated the same as contractual restrictions under subsections (b) and (c). That is, a legal restriction will be entirely overridden in the traditional transactions referenced in subsection (b) but the override will not permit enforcement of a security interest in the transactions referred to in subsection (c)(1).

Under MTA 9-404(e), certain types of limitations on this override are recognized, such as a law that provides greater rights to consumers or a law that seeks to assure that an injured party who has received a structured settlement (payments for injures that extend over time) will not be able to obtain immediate cash for that right that might be squandered. **NOTE:** ***Any other limitations that might exist under tribal law, such as restrictions on the assignment of a tribal member's right to receive various types of payment - for example, per capita distributions - should be added to this provision.***

See UCC 9-406(d) through (j), and 9-408.

PART 5. Filing

Part 5 of the Act deals with filing systems for secured transactions. It sets forth the rules that govern financing statements – what to file, where to file, when a filing is effective and when it lapses, and when refiling is necessary due to changed circumstances, among other things. Part 5 is not complete in itself and should be supplemented by filing office regulations. Section IV of this Implementation Guide discusses filing systems in more detail and sets forth filing system options for a Tribe to consider.

MTA 9-501 states rules for acceptance or rejection of financing statements by the filing office, the place of filing, and the effects of filing a financing statement that contains incorrect information.

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MTA 9-501(a) provides that most financing statements are to be filed in a single filing system. At the Tribe's option, financing statements related to assets that are considered part of the land for at least some purposes – as-extracted collateral, standing timber, and fixtures – may be filed in the office where a mortgage on the underlying land would be filed or recorded.

If the Tribe will be administering its own filing system, it should specify the Tribal office for filing (which may be different for regular and land-related filings). A Model Tribal Filing System Regulation is set forth as Exhibit B to this Implementation Guide. The model regulation may also be used where a number of tribes enter into an agreement to jointly administer a central filing system. In this case, all participating tribes will need to address consistency in their filing rules and regulations.

If the Tribe contracts to use a state's filing system, which it is authorized to do under MTA 9-501(g), then the proper state office must be identified. A model Joint Sovereign Filing System Memorandum of Understanding is attached as Exhibit A for a Tribe and state to consider to establish this agency relationship. Additional information on filing systems is set forth in Section IV of this Guide.

MTA 9-501(b) provides that a financing statement may be filed before there is a security agreement and before a security interest attaches. A secured party that pre-files must be entitled to do so under MTA 9-502(g). MTA 9-501(b) also provides that a financing statement is deemed filed if it is received by the filing office in appropriate form and by an appropriate method, in which case the filing officer is required to accept it. If the financing statement is refused because it is not in appropriate form or is not communicated by an appropriate method (*e.g.*, a facsimile transmission when the regulations of the filing office do not permit filing by such a method), the filing officer must communicate the fact of refusal and the reason for refusal to the filer, along with the date and time the financing statement would have been filed if it had been accepted. This permits a court to determine the time of perfection if the filing officer's refusal is in error.

MTA 9-501(c) deals with the effectiveness of a financing statement when there is filing officer error. If the filing officer improperly refuses a financing statement that is in appropriate form and was communicated by an appropriate method, the financing statement is effective as against any person other than a purchaser of the collateral for value who reasonably relied on the absence of the filing from the record. Thus, an improperly refused financing statement will always confer perfection as against a lien creditor.

If the filing officer accepts the financing statement but indexes it incorrectly, it confers perfection on the secured party as against any person, including a purchaser for value who relied on the absence of the financing statement from the record. The policy here is one of efficiency – indexing mistakes will be relatively rare, and imposing a cost on each filer to determine whether the indexing is correct would be burdensome to debtors who would inevitably bear the cost.

If a financing statement is accepted by the filing officer but contains minor errors that are not seriously misleading, it is effective to perfect the security interest. If the error is in the name of the debtor, however, it is deemed seriously misleading unless a search of the filing office's records under the correct name and using the filing office's standard logic, if any, would disclose the erroneous financing statement.

MTA 9-501(d) deals with errors in information required to be included in a financing statement but not part of the minimum information necessary for perfection as designated in MTA 9-502(a). The model regulation (see discussion of MTA 9-501(f) below) requires certain information beyond the minimum, and errors in that information will not cause a secured party to lose its perfected status. However, a secured party that provides erroneous required information will be subordinated to the interest of a holder of a conflicting security interest or other purchaser that gives value in reasonable reliance on the erroneous information and, in the case of a purchaser other than a secured party, takes possession of the collateral if it is capable of being possessed.

MTA 9-501(f) gives the filing office authority, subject to appropriate procedures, to promulgate and make available regulations necessary for the implementation and enforcement of Part 5 of the MTA. Regulation is critical in this context as Part 5 is not complete in itself, and leaves many details to be resolved by regulation. As indicated above, Exhibit B to this Implementation Manual provides a Model Tribal Filing System Regulation. See the discussion in Section IV of this Implementation Guide.

See UCC 9-501(a) and (b); 9-502(d); 9-506; 9-516(a) and (d); 9-517; 9-520(a) and (b); 9-523(f)(modified); 9-525; 9-526; and 9-338.

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MTA 9-502 states the minimum requirements needed for a valid financing statement. The essential requirements are the name of the debtor, the name of the secured party (or a representative of the secured party), and a description of the collateral. The description need not be specific as long as it reasonably identifies the collateral, and it may consist of a statement that the security interest covers all assets or all personal property even though such a description would be ineffective in a security agreement. See MTA 9-116(b). A filed financing statement that contains the requisite information simply indicates that the secured party *may* have a security interest in the collateral indicated, and that interested parties should inquire further to discover the complete state of affairs. The requirements for a fixture filing as well as for termination and continuation statements and other records that may be filed are specified in the Model Tribal Filing System Regulation set forth as Exhibit B to this Implementation Guide.

MTA 9-502(b) allows a filing to contain information other than that required by subsection (a), including information required in the model regulation.

MTA 9-502(c) states, subject to certain exceptions, that a financing statement is effective for five years after the date of filing unless it is terminated sooner. After five years, the financing statement lapses unless a proper continuation statement is filed. MTA 9-502(d) provides that a continuation statement must be filed within the six-month period prior to lapse.

The exceptions to the general rule on duration of effectiveness include filings for manufactured home transactions or public finance transactions, if the debtor is a transmitting utility, or if the financing statement is a mortgage. MTA 9-502 also contains the rules on who may file a financing statement or other record, and what should be filed when a debtor changes its name or transfers collateral. Finally, MTA 9-502 requires a termination statement that ends the effectiveness of a filing when a transaction is concluded. If a filing is not terminated upon completion of a transaction, a person looking at the record might conclude that the collateral is still encumbered and refuse to extend secured credit to the debtor.

MTA 9-502(d) provides that a financing statement that lapses ceases to perfect the security interest unless it is perfected by another method (*e.g.*, possession) prior to lapse. Moreover, upon lapse, a security interest that is not perfected by another method will be deemed never to have been perfected if the holder of the conflicting interest is a purchaser for value.

MTA 9-502(e) states the effect of a continuation statement or other amendment. A properly filed continuation statement extends the effective date of the financing statement for an additional period equivalent to the original period, commencing on the date the original financing statement otherwise would have lapsed. An amendment to a financing statement other than a continuation statement is effective only from the time of filing. An amendment may be effective as a termination statement as prescribed in filing office regulations.

MTA 9-502(f) provides that a financing statement ceases to be effective upon the filing of a termination statement. The secured party's obligations with respect to termination statements should be provided by regulation, as in the Model Tribal Filing System Regulation set forth in Exhibit B to this Implementation Guide. Prospective filers should be aware that a financing statement that remains on the record may present a problem even if the security agreement to which it relates has been discharged. If the secured party that filed the financing statement enters into a new transaction with the debtor and takes a security interest in the collateral within the financing statement's description, the secured party's priority will date from the time the financing statement was originally filed. A creditor considering extending secured credit thus should consider requiring the debtor to demand a termination statement if appropriate.

MTA 9-502(g) provides that a person must be authorized to file a record. Authorization may come from the debtor or may be provided by regulation. By signing a security agreement, a debtor authorizes the filing of a financing statement and amendments covering the collateral described in the security agreement and any identifiable proceeds of that collateral.

MTA 9-502(h) deals with the effectiveness of a financing statement after certain circumstances change. If a debtor changes its name, or an organization changes its identity or corporate structure, such that a filed financing statement becomes seriously misleading, the financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change unless an appropriate filing is made before the expiration of that time. To be appropriate, the filing would have to provide the debtor's new name. Secured parties that do not rely on after-

acquired property clauses need not be concerned about the effect of this rule. It should be noted that MTA 9-502(h) does not address whether a successor entity is bound by a security agreement entered into by a debtor – that determination must be made by reference to other law. See UCC 9-203(d), (e), and related provisions dealing with "new debtors."

See UCC 9-502(a), (b) and (c); 9-503; 9-504; 9-505; 9-507; 9-508 (modified); 9-509; 9-510; 9-512; 9-513; 9-514; and 9-515.

PART 6. Default

[Subpart 1. Default and Enforcement of Security Interests]

Part 6 sets forth the rules that a secured party must follow after a debtor defaults on a loan or other extension of credit, and the creditor wants to foreclose on the collateral. A default by the debtor triggers an array of remedies for a secured party. A party defaults by either failing to make a payment when due or by violating a term or terms of the security agreement. Most security agreements have extensive definitions of what will constitute a default by a debtor. The rights of a secured party to enforce its security interest in collateral after the debtor's default are an important feature of a secured transaction. Once a debtor defaults, the secured party may proceed with the rights as agreed to by the parties to the security agreement and the rights listed in Part 6 of the Act.

Certain rules in Part 6 give specific rights to the debtor once the debtor is in default. Some of these rules are considered so important that a debtor may not waive or vary them, even by agreement. These rules address the concern that a secured party may overreach and pressure the debtor to give up rights.

After a debtor defaults on a secured transaction, the process allows the secured party to obtain possession or control of the collateral, either by written consent of the debtor obtained after default, or by obtaining an order by the Tribal Court. The secured party can then either dispose of the collateral and apply the proceeds to the debt or, in some instances, keep the collateral in satisfaction of the debt. The debtor has an opportunity to reacquire, or redeem, the collateral by paying off the debt up until the collateral is disposed of. The priority rules set forth in prior sections of the Act come into play following default, and will determine the order of payout to the various interested parties.

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Comment to MTA 9-601. ***Rights after Default; Judicial Enforcement; Consignor or Buyer of Accounts, Chattel Paper, Payment Intangibles or Promissory Notes***

MTA 9-601 establishes certain rights and duties of the secured party and of the debtor and any obligor. These parties may or may not be the same individual. The debtor is the person whose property secures the debt and an obligor is a person who owes payment or other performance on the debt. See MTA 9-106.

MTA 9-601 describes the rights of the secured party under the Act except as limited under the agreement between the parties. After default, the secured party may also enforce the security agreement by reducing the claim to judgment, by foreclosing, or by any available judicial procedure.

MTA 9-601(g) imposes fewer duties on a secured party that is a consignor or a buyer of accounts, chattel paper, payment intangibles or promissory notes, except as provided in section 9-607(b) dealing with commercially reasonable collection and enforcement.

An agreement may provide for arbitration. In an agreement with a consumer, a court should carefully examine such a clause under regular contract principles to ensure consent, fairness, and that the clause is not unconscionable.

See UCC 9-601.

MTA 9-602 seeks to protect the debtor and obligor from any pressure by the secured party to waive or vary rights. Thus, waiving or varying any of the rights that are listed in this section (except those permitted under section 9-622) is not permitted. See UCC 9-602.

MTA 9-603 incorporates the principle of freedom of contract by allowing parties to agree on standards as opposed to elimination of the rights and duties of the debtor and secured party as long as they are

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not "manifestly unreasonable." An illustration of an agreement that would be manifestly unreasonable is one where the debtor agrees that the secured party may enter the debtor's property and reclaim the collateral even if the secured party breaches the peace. See UCC 9-603.

MTA 9-604 establishes the process for enforcement when a security agreement covers both personal and real property, and when it covers goods that are or become fixtures. This section allows removal of fixtures, and because the collateral in many secured transactions consists of both real and personal property, MTA 9-604(a) and (b) allow a secured party to proceed as to both real property and personal property in accordance with its rights to the real property. This section is subject to MTA 9-104 (no application to property not alienable). See UCC 9-604.

MTA 9-605 provides that a secured creditor does not owe a duty to a debtor or obligor that is unknown. It also states that a secured party does not owe a duty to a secured party or lien holder who has filed a financing statement against the debtor if the secured party does not know about the debtor.

> ***Example***: D1, the original debtor, sells the collateral that is subject to a security interest held by SP to D2. SP has no knowledge of the sale to D2. SP owes no duty to D2 that it would otherwise owe under the Act to a debtor, or to another secured party who has filed a financing statement against D2.

This section should be read in conjunction with MTA 9-628 regarding limitations on the liability of a secured party. See UCC 9-605.

MTA 9-607 sets forth the rules for collection and enforcement by a secured party, essentially where the collateral is money owed to the debtor like an account or a promissory note. It thus allows a secured party to enforce claims that its debtor may have against others. MTA 9-607 applies to

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collection rights after default, and to collection and enforcement rights even if a default has not occurred, as long as the debtor has agreed.

MTA 9-607 states the general rule that after default or by agreement, a secured party may notify a person obligated on collateral to pay or render performance to or for the benefit of the secured party. This section requires the secured party to proceed in a commercially reasonable manner. A failure to proceed in a commercially reasonable manner may make a secured party liable under MTA 9-628.

See UCC 9-607.

MTA 9-608 states the rules that apply when the security interest is in collateral covered by MTA 9-607. MTA 9-608(a)(1) provides that cash proceeds must be paid toward the reasonable expenses of collection and enforcement, including attorneys fees and legal expenses where permitted. Then payment goes to satisfy the obligations secured by the security interest, and any remaining proceeds will be applied to satisfy obligations secured by subordinate interests if the secured party has received a signed demand for proceeds before distribution of the proceeds is completed.

MTA 9-608(a)(3) provides that when a secured party has noncash proceeds, it does not have to pay out under the rules established in MTA 9-607 unless it would be commercially unreasonable not to do so. However, the proceeds remain collateral subject to the Act. If there is a surplus, MTA 9-608(a)(4) states that the secured party must account to and pay the debtor such surplus. If there is a deficiency, the obligor must pay the deficiency.

See UCC 9-608.

MTA 9-609(a) entitles a secured party to take possession of collateral after default unless otherwise agreed. However, this section allows a secured party to take possession only by consent of the debtor or judicial process. Self-help repossession is not permitted under the Act. Any actions taken pursuant to a debtor's consent must be done without breaching the peace.

LEGISLATIVE NOTE: ***The decision not to provide for repossession by self-help was based on the Committee's understanding that issues involving repossession are typically reserved to Tribal courts. There are economic efficiencies that might be realized by permitting self-help repossession so long as it does not constitute a breach of the peace, and a Tribe considering such an approach might wish to consult UCC 9-609.***

MTA 9-610 states the rules for disposing of collateral after a default. It allows a secured party to dispose of the collateral by any commercially reasonable manner. Disposition is not restricted to sales and it may be by public or private proceedings. Every aspect of a disposition must be commercially reasonable. The collateral may be disposed of in the condition that the secured party receives it or following any commercially reasonable preparation or processing. In certain situations, the secured party may buy the collateral but, if it is at a private disposition, the collateral must be of a kind that is usually sold in a recognized market or subject to widely distributed price quotations.

A disposition will include the usual warranties unless they are effectively disclaimed or modified.

See UCC 9-610.

Unless the collateral is perishable, the type that declines quickly in value or is customarily sold in a recognized market, or the debtor or any secondary obligor has waived the right to notice, a secured party must send a signed notice before disposing of the collateral. MTA 9-611(c) lists the persons who must be notified and when that notice must be received. This includes secondary obligors, like a guarantor, as well as the debtor. Where multiple security interests encumber collateral, the best way to avoid conflict is for the secured party to send notice to all other secured parties.

The time requirements for notice are set forth in MTA 9-612. The requirements differ for consumer and non-consumer transactions. Whether a notice has been sent within a reasonable amount of time

before disposition of collateral is a question of fact. If the Tribal Court has not established a specific time within which notice must be provided, a notice will be deemed reasonable if it has been sent at least 20 calendar days before disposition with regard to a consumer transaction, and at least 10 calendar days before disposition in all other transactions. See UCC 9-611.

MTA 9-613 describes the content and form of notice that is required prior to disposition of collateral. If any of the information specified in this section is lacking, it is a question of fact whether the notice is nevertheless sufficient. Particular phrasing is not required in a notice, as long as the content of the notice is deemed sufficient in accordance with the requirements in this section. See UCC 9-613 and 9-614.

Upon default, a secured party has two alternatives: (1) accept the collateral in satisfaction of the debt (strict foreclosure), or (2) dispose of the collateral and apply the proceeds of the disposition to satisfaction of the debt (foreclosure by disposition such as a sale, lease or license).

MTA 9-615 contains the rules governing application of proceeds and a debtor's liability for a deficiency after a disposition of collateral. Reasonable expenses must be paid first, then the obligations secured by the security interest that is being enforced. Next, in certain instances, subordinate security interests are paid as long as there has been a signed demand for proceeds. If there is a consignor, the security interest paid must be senior to the consignor's interest. Under MTA 9-615(b), a secured party may request proof of the subordinate interest. MTA 9-615(c) provides that noncash proceeds do not need to be paid over unless it would be commercially unreasonable not to do so. However, if they are paid over it must be done in a commercially reasonable manner.

MTA 9-615(d) basically states that the secured party is required to account to and pay the debtor any surplus and the obligor is liable for any deficiency. The surplus or deficiency is calculated according to

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the proceeds received. However, if the fairness of the amount of proceeds is placed in issue, and the disposition was to the secured party or a party related to the secured part, the secured party must prove that the amount of the proceeds after disposition is not significantly below the wholesale value of the collateral.

MTA 9-615(f) provides a safe harbor for a junior secured party that receives cash proceeds in good faith and without knowledge that the receipt of those proceeds violates the rights of a secured party with priority. In such a case, a junior secured party takes the cash proceeds free of the security interest or other lien and has no obligation to apply the proceeds to the superior party.

See UCC 9-615.

MTA 9-616 reflects the view that in a consumer transaction, the debtor or obligor is entitled to be informed of the amount of a surplus or deficiency after the disposition of collateral following default, and how the surplus or deficiency was calculated. A secured party is required to provide a reasonably detailed explanation of the calculation upon request and at least 10 tribal business days before suing a consumer debtor for a deficiency. See UCC 9-616.

MTA 9-617 sets forth the rights of a person who acquires collateral for value from a secured party disposing of the collateral after a debtor's default. The acquiring party generally takes free of the rights of the debtor and secured party even if the disposition did not comply with the rules of the Act. See UCC 9-617.

MTA 9-618 applies in situations involving a secondary obligor (defined in MTA 9-106(a)(50)), *e.g.*, a guarantor. If the secondary obligor receives an assignment of a secured obligation or receives a transfer of collateral from the secured party and agrees to accept the rights and assume the duties of the secured party, it becomes obligated to perform the duties of the secured party but also acquires the

rights. This is also true when the secondary obligor is subrogated to the secured party's rights with respect to collateral by operation of law when the secondary obligor pays off the secured party. An assignment, transfer or subrogation is not a disposition. See UCC 9-618.

MTA 9-619 provides a process for a secured party to facilitate disposition in situations where a debtor who is the record owner of a piece of collateral refuses to cooperate with the secured party in effecting the disposition of the collateral. For instance, a secured party may have trouble disposing of collateral if it is covered by a certificate of title in the debtor's name. A transfer of record title to a secured party prior to disposition simply puts a secured party in the position to pass legal or record title at a foreclosure. See UCC 9-619.

MTA 9-620 specifies a process whereby a secured party may notify the debtor and propose to accept collateral in full or partial satisfaction. The general rule is that a secured party may accept collateral in full or partial satisfaction of the secured obligation as long as the conditions in MTA 9-620(c) are met and a notice of objection is not received by the secured party within the time frame listed.

There are special rules for consumer cases. The secured party must dispose of consumer goods under certain specified circumstances.

See UCC 9-616, 9-621, and 9-622.

A debtor, any secondary obligor, or any other secured party or lien holder may redeem collateral. To redeem collateral, a party must tender fulfillment of all obligations secured by the collateral, plus

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reasonable expenses and attorney's fees. Redemption may occur at any time before a secured party (1) has collected collateral, (2) has disposed of collateral or entered into a contract for its disposition, or (3) has accepted collateral in full or partial satisfaction of the obligation it secures. See UCC 9-623.

MTA 9-602 generally prohibits waiver by debtors and obligors, but a debtor or obligor may waive the right to notice of disposition of collateral and the right to require disposition of collateral by an agreement entered into and signed after default. Except in a consumer transaction, a debtor or secondary obligor may waive the right to redeem collateral by an agreement to that effect entered into and signed after default. See UCC 9-624.

[Subpart 2. Noncompliance with Act]

MTA 9-625(a) and (b) provide the basic remedies afforded to those parties aggrieved by a secured party's failure to comply with the Act. If it is established that a secured party is not proceeding in accordance with the Act, an aggrieved person may seek injunctive relief, and may recover damages for noncompliance. MTA 9-625(c) lists who may recover damages.

MTA 9-625(c) provides a minimum damage recovery set by statute for a debtor and secondary obligor in a consumer goods transaction. A debtor whose deficiency is eliminated but where a deficiency or surplus is an issue may recover damages for the loss of any surplus under MTA 9-625(d).

In addition to any damages recoverable under the basic remedy provision, MTA 9-625(e) and (f) provide statutory against damages against a person who fails to comply with the provisions specified in (e). Subsection (f) imposes similar damages on a person who, without reasonable excuse, fails to comply with a request for an accounting or a request regarding a list of collateral or statement of account under MTA 9-207.

MTA 9-625(g) also limits the extent to which a secured party who fails to comply with a request regarding a list of collateral or statement of account may claim a security interest. If a secured party

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fails to file or send a termination statement, MTA 9-625(h) allows the debtor to claim any the loss due to the failure.

See UCC 9-625.

MTA 9-626 addresses situations where the amount of a deficiency or surplus is in issue in situations in which the secured party has collected, enforced, disposed of or accepted the collateral.

If the secured party's compliance with provisions of the Act relating to collection, enforcement, disposition or acceptance is placed in issue, the secured party has the burden of establishing compliance. If the secured party cannot meet this burden, the liability of a debtor or secondary obligor for a deficiency is calculated on the rebuttable presumption that the proceeds of the disposition equal the sum of the secured obligation, expenses and allowable attorney's fees.

MTA 9-626(b) allows a court to determine the proper rules in consumer transactions and the remedy described above need not be used.

See UCC 9-626.

MTA 9-627 gives guidance on how to determine whether a secured party's conduct was commercially reasonable. The general rule is that the fact that a better price could have been obtained does not establish lack of commercial reasonableness. This section also gives secured parties a safe harbor by listing a number of dispositions that are assumed to be reasonable. A disposition made in the usual manner in any recognized market, at the price current in any recognized market at the time of disposition, or otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition will be considered to be in a commercially reasonable manner. Another safe harbor for a secured party is to have a collection, enforcement, disposition or acceptance approved in a judicial proceeding, by a bona fide creditor's committee, by a representative of creditors, or by an assignee for the benefit of creditors. See UCC 9-627.

MTA 9-628(a), (b) and (c) contain exculpatory provisions that need to be read in conjunction with MTA 9-625. The key factor is what the secured party knows. MTA 9-628(a) limits the liability of a secured party for noncompliance with this Act when the secured party does not know that a person is a debtor or obligor, does not know the identity of the person, or does not know how to communicate with the person. In addition, MTA 9-628 (b) limits liability based on status as a secured party to a debtor or obligor unless the secured party knows that the person is a debtor or obligor, the identity of the person, and how to communicate with the person. It also limits liability based on status as a secured party to a secured party or lien holder that has filed a financing statement against a person unless the secured party knows that the person is a debtor and the identity of the person.

Finally, MTA 9-628(c) deals with the problem that may occur if a secured party believes a transaction is not a consumer goods transaction and then finds out later that the transaction is in fact one for consumer goods. If a secured party reasonably but mistakenly believes that a consumer transaction is a non-consumer transaction, and if the secured party's belief is based on its reasonable reliance on a representation by the debtor concerning the purpose for which collateral was to be used, acquired or held, or on an obligor's representation concerning the purpose for which a secured obligation was incurred, then the secured party should escape liability for lack of knowledge.

See UCC 9-628.

MTA 9-629 provides that attorney's fees may be awarded to a consumer debtor when a secured party's compliance with this Act is placed in issue with respect to a consumer transaction and the secured party would have been able to collect attorney's fees if it had been the prevailing party. In other cases where the consumer obligor or consumer debtor prevails on that issue, the court may award costs and reasonable attorney's fees. When the court awards attorney's fees, the amount of recovery should not be a controlling factor.

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PART 7. Miscellaneous Provisions

Comment to MTA 9-701. *Effective Date*

In MTA 9-701, an effective date sufficient to allow parties to prepare to comply with the law should be inserted. The Committee recommends a period of at least six months. However, the Tribe's particular circumstances should control.

MTA 9-702 provides that the provisions of the Act are severable, meaning that if one provision is held invalid by a Tribal Court as applied to a particular person or circumstance, the remaining provisions may nevertheless be applied. This means that transactions may generally be enforced as if the offending provision were not part of the Act.

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IV. FILING SYSTEMS

Purpose of Filing Systems

Secured transaction laws govern transactions in which security interests in personal property or fixtures are created by agreement between a debtor and creditor. Security interests can be either *possessory*, or what could be termed "quasi-possessory," where the property subject to a security interest, *i.e.*, the *collateral*, is physically held or controlled (such as the case where a broker with which the debtor has an investment account agrees to follow the secured party's instructions) by the secured party until the debt is paid; or *nonpossessory*, where the creditor does not have physical possession or control of the collateral, but nevertheless retains a legal interest – something short of actual ownership - in the collateral. For nonpossessory security interests, filing in a *central filing system* is the most common way for a creditor to perfect its security interest and to ensure its priority in the collateral as against other creditors and purchasers.

Filing accomplishes two things. First, it puts third parties who may deal with a given debtor on notice that the debtor's property at issue may be collateral for another debt or debts. Second, it establishes a "first in time" method by which to determine which creditor, if there is more than one, will generally have a prior interest in that collateral. Thus, a filing system establishes a regime of certainty for secured parties. A filing system and the ability to both publish notice of security interests and search for existing security interests are indispensable components of a secured transactions system.

Real Estate Recordings and Secured Transaction (UCC) Filings Compared

Both secured transaction laws and real estate laws provide that to ensure that a creditor's security interest in property is protected against competing claims, the creditor must file information that will put the public on notice of its interest in the property. However, the regimes for public notice of real estate interests and personal property interests differ. For real estate transactions, the transaction document, *i.e.*, the mortgage or deed of trust, is "recorded" by placing the original document in a recording office. The mortgage or deed of trust is then made available for review for informational purposes to the public. Recording offices are local, typically in a division of a county, town, parish or district office. A mortgage or deed of trust on real estate must normally be recorded in the local recording office for the designated area in which the parcel of real estate is located.

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The filing of security interests in personal property are handled differently than real estate recordings. In a secured transaction involving personal property as collateral, the transaction document is the security agreement. The security agreement is roughly the equivalent of a mortgage or deed of trust in a real property transaction. Unlike a real estate recording, however, a secured creditor normally will not file the transaction document itself, *i.e.*, the security agreement, to perfect its nonpossessory security interest. Instead, the creditor will file an initial financing statement, as well as amendments to and continuations or assignments thereof, which together comprise what is called a UCC filing under state law. A financing statement is a partial summary of the transaction that notifies the public that the secured party may have a lien on specified personal property of a particular debtor. In state filing regimes, it is typically the Secretary of State's office that administers the UCC filing office.[2] The filing office makes this information publicly available. An interested party may search the UCC filing records to determine whether certain personal property of a debtor may be subject to a prior lien or liens.

There are exceptions to the general rules above regarding where to record or file real property and personal property secured interests. Security interests in as-extracted collateral or timber to be cut, and in fixtures or in collateral that is goods that are to become fixtures, are typically required under state law to be filed in the office designated for the recording of a mortgage on the real property involved. The rationale is that these types of personal property are so closely connected or related to the real property that it is reasonable to assume that interested parties would expect to discover information about the collateral in the same location they would search for information about the underlying land. In this regard, real estate recording offices also serve as UCC filing offices.

Other Filing Regimes

State and federal laws create some exceptions to the general rules for where and how to file for some types of personal property in order to establish a secured party's claim or interest in that property. In effect, these laws put the *perfection* of interests in certain assets outside the scope of UCC Article 9. In most states, perfection of an interest in a motor vehicle that is not inventory will be subject to a state certificate-of-title law and will not be covered by the Act. For example, under a state's certificate-of-title law, if a person borrows from a bank to purchase a car, and the bank retains a security interest in the car as collateral to secure the loan, a notation will be put on the car's certificate of title indicating

[2] In some states, other state agencies or divisions administer the state's central filing system. Other state filing offices include Bureau of Conveyances, Department of Assessments and Taxation, Department of Revenue, Division of Corporations and Commercial Code, and the Department of Financial Institutions, to name a few.

the bank's lien. In some states, assets such as boats, mobile homes and farm tractors are also subject to certificate-of-title laws. Federal law also creates exceptions for the registration of interests in certain types of property. For example, a security interest in an airplane must be registered by filing with the Federal Aviation Administration. Similarly, an interest in a radio transmission tower must be filed with the Federal Communications Commission.

Filing Office; Filer Responsibilities and Requirements

Secured transaction laws, or the rules or regulations promulgated under such laws, set forth the requirements for legally sufficient filings as well as the responsibilities of the filing office and those searching the files. Responsibilities of a filing office are administrative and include, for example, determinations of when filings must be accepted or rejected, what a rejection communication to a filer must include, how the filed information must be maintained, the fees to be charged, and how information must be made available to the public. Requirements for a legally sufficient filing will include the use of specified forms, the correct format and content to identify the debtor, and the content necessary to describe the collateral. The rules, whether specified in the secured transaction law itself or set forth in a separate regulation or administrative rule, are a necessary component of a secured transaction system.

The filing rules that a Tribe should adopt and apply will depend on the filing system it establishes and /or uses. The options are discussed below.

Filing System Options for Enacting Tribes

The Act recognizes that Tribes will have preferences depending on their needs as they pertain to filing systems. In this regard, the Act recognizes three options: (1) a Tribe, by agreement with the state in which the tribal jurisdiction is located, may participate in the state filing system; (2) a Tribe may establish and administer its own filing system; and (3) several Tribes may collaborate to administer a joint, or collaborative, filing system. A Tribe should carefully consider these options to determine which will best suit its needs, recognizing that a filing system is an indispensable component of a secured transaction system.

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State Filing System

Creditors that have security interests in personal property under the existing secured transaction laws of a number of tribes file their financing statements with the central filing office of the state in which the Tribe's jurisdiction is located. At least one Tribe has formalized this arrangement by entering into an agreement with the state in which it is located.[3] In some cases, tribes have enacted secured transaction laws but have not addressed the crucial filing system component. Creditors taking security interests under these tribal laws typically file with the state in which a Tribe's jurisdiction is located because there is simply no other designated place to file. In other instances, tribal law does in fact designate the state filing office as the location to file but has done so without a formal agency arrangement with the state filing office. These informal practices raise a number of potential issues as to the validity of perfection from such filings, resulting priority among competing creditors, and whether these state filing offices have responsibilities or potential liabilities in connection with these filings, to name but a few.

There are benefits, however, for a Tribe and secured creditors in designating a state filing office as the Tribe's filing office. First, most states have converted at least in part to electronic filing systems. Those that have not are in the process of doing so. The benefits of an electronic filing system are significant in that both filings and searches can be done on-line, thus realizing significant time and cost savings for potential lenders and other creditors.

For many tribes, the cost of implementing a central filing system may be prohibitive. To take advantage of a state's filing system and thus avoid the cost of implementing and administering its own is desirable. Thus, a Tribe desiring to pursue this course should enter into an agreement with the state in which its jurisdiction is located to serve as its filing office. By entering into a written agreement with the state for this purpose, the potential legal issues noted above can be avoided. Since it would be important that the Tribe's filing rules be consistent with the state's filing rules, a couple of options may be considered. First, the Tribe could adopt Section 2 of the Model Filing System Regulation (Exhibit B) by incorporation into Part 5 of the Act. Second, the Tribe could agree to adopt, or incorporate by reference into its secured transactions law, Part 5 only of the state's Article 9 (dealing with filing), and any applicable administrative filing rules and/or regulations (modified where

[3] *Joint Powers Agreement between South Dakota Secretary of State and Cheyenne River Sioux Tribe*. Under this agreement, the Cheyenne River Sioux Tribe has agreed to adopt verbatim, subject to several carve-outs, the State of South Dakota's UCC Article 9 as tribal law. In return, the South Dakota Secretary of State's Office serves as the designated filing office for security interest filings under Cheyenne River Sioux Tribal law. See www.sdsos.gov/ucc/.

necessary). If a Tribe chooses this option and the state in which it is located is agreeable, a model Memorandum of Understanding is set forth as Exhibit A for the Tribe's and state's mutual consideration. In addition, the Tribe should add the following provision to MTA 9-501(g) at the end:

> **"The tribal legislative body hereby delegates to [***name of appropriate authority pursuant to written agreement with the designated state, or the name of appropriate authority pursuant to a written agreement setting up a collaborative administration***] to administer Part 5 of this Act."**

Tribal Filing System

A Tribe may wish to implement its own central filing system. Such a system may be paper-based, electronic, or both. A paper-based system will be the most cost effective to set up initially, and would be sufficient until such time that the number of filings and searches would be difficult to manage manually. There are several excellent resources that a Tribe may consult to set up and administer a filing office.[4] It will, of course, require trained staff that understand the UCC filing and search processes, and the Tribe will need to establish a filing and search fee structure. The Committee recommends if the Tribe desires to set up its own system, that it utilize the national standard financing statement forms (including financing statement addendums, amendments and corrections) to facilitate secured party use.[5] These forms are standard throughout the country and are accepted in all jurisdictions' central filing offices. Standardization has been encouraged to facilitate the ease of commercial transactions across jurisdictional boundaries. See Exhibit B: Model Tribal Filing System Regulation.

Tribal Consortium Filing System

Finally, a Tribe may consider a collaborative effort with several other tribes to establish and administer a single filing system on behalf of the participating tribes. This would allow the

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[4] *International Association of Commercial Administrators* (IACA). The Secured Transaction Section (STS) of IACA provides valuable information to those who administer a personal property secured transaction registry function. IACA has had a significant role in shaping the filing provisions in the revision of Article 9 of the Uniform Commercial Code. In addition, IACA develops educational programs for filing system administrators. It's website may be found at www.iaca.org. Under its Documents section, a STS subsection may be found which contains pdf files of all standard financing statement and other UCC filing forms, in addition to various guidelines.

In addition, Ernst Publishing Co. presents a wealth of information and resources for UCC filing office administrators such as a subscription service entitled "The UCC Revised Article 9 Alert," which hosts articles that explain practical aspects of Revised Article 9 for those who prepare, file and search UCC financing and other statements. Its website may be found at www.ernstpublishing.com.

implementation and administrative costs of a central filing system to be shared. Recommended is a requirement that all participating tribes adopt the Act, modified as each Tribe deems necessary except for Part 5 (Filing). It is recommended that each participating Tribe be required to adopt Part 5, as modified mutually and uniformly by the tribal consortium, so as to maintain consistency in the filing provisions among all participants. In addition, any related filing system administrative rules or regulations should be applied to all participating tribes.

It would be advisable for participating tribes to enter into an agreement that states the terms and conditions of participation. Agreement terms might include, but not necessarily be limited to, responsibilities for administration, cost- and revenue-sharing, applicability of filing rules or regulations, process of amending such rules and/or regulations, limitations on liability, retention and disposition of records, termination of participation, sovereign immunity of participating tribes, choice of law and venue governing disputes arising under the participation agreement, and filing fee structure.

[5] The standard forms are attached to this Guide as part of Section VII, Exhibit B, and may also be downloaded from IACA's website (see footnote 4). Links to the standard forms may also be found on Ernst Publishing Co.'s website.

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V. PUBLICATION OF TRIBAL LAWS and TRIBAL COURT DECISIONS

The timely publication of tribal court decisions, and tribal laws and any amendments to those laws, as well as easy access to such decisions and laws, is important for both practical and reputational reasons. From a practical standpoint, lenders, retailers and other persons that wish to extend credit on a secured basis to businesses and persons within a Tribe's jurisdiction need access to the Tribe's secured transaction law and any related laws in order to know the legal requirements, terms and processes for such transactions. Also, if a tribal court has rendered decisions under the Tribe's secured transaction law, the same parties will want to know how a tribal court is likely to adjudicate such issues. In addition to the reasons noted above, timely publication of court decisions and easy access to those decisions as well as to the Tribe's laws will help set a tone of professionalism and integrity for outside parties that may not be familiar with dealing under tribal law or within a tribal court system.

Tribes have a number of options for publishing both laws and court decisions. A Tribal government website is a good location. Many tribal governments have established websites, and many of these already publish their constitutions, laws and even court decisions on their sites. Some Tribal courts host their own websites. A Tribe's or Tribal court's website is a logical place for an outside party to search. In addition, a Tribe or Tribal court has direct control over administration of its own site, and therefore laws and court decisions can be updated on a timely basis and as frequently as needed. Several national American Indian organizations offer similar web-based services. The Tribal Court Clearinghouse, the National Indian Law Library and the National Tribal Justice Resource Center publish tribal constitutions and laws on their respective sites. Other organizations have websites with links to other sites with tribal laws and court decisions, such as the University of Montana Indian Law Center's site. One drawback is that a Tribe will not have control over the timeliness of updating information pertaining to its Tribe on these host sites. While these websites serve as excellent repositories of such information, a Tribe should consider maintaining its own site as the primary repository, and ensure that information is kept current.

Of course, a Tribe always has the option of publishing paper-based copies of laws and decisions. However, the drawbacks are obvious, including cost of publishing, lack of easy access to the information by outside parties, and the cost of updating and republishing. Whatever method a Tribe chooses or already uses, it would be beneficial for a Tribe to educate lenders and other parties doing

business with or considering doing business with the Tribe or its members as to where such laws and related information may be found.

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VI. NON-CODIFIED SPECIAL TRANSITIONAL PROVISIONS TO BE CONSIDERED

In addition to the adoption of the Act itself, a Tribe will need to consider whether special transition provisions are warranted. These fall within a number of categories.

First, the Tribe will need to consider enacting the Act with a delayed effective date. This will be necessary for persons to become familiar with the Act and, in particular, for the Tribe to set up a tribal filing office, enter into a filing consortium with other tribes, or contract with some other governmental filing office entity. Because the ability to file is central to a secured transaction system, a filing office must be available before the Act goes into effect. Similarly, rules governing filing and forms for filing will need to be adopted or created and in place. If the Tribe has an existing filing office, this will be less of an issue but the filing office must ensure that it will operate in a way that is consistent with the Act. See MTA 9-701.

Second, if the Tribe has an existing secured transactions law that the Act will supersede, there will need to be provisions that address the following:

- To what extent should transactions created under prior law continue to be governed by that law? The simplest transition rule would be to treat pre-Act transactions as being governed by pre-Act law and post-Act transactions as being governed by the Act. This might not be workable for long-term relationships, however. One solution would be to select a sunset date for pre-Act law to the extent it is procedural in nature. That is, after a date selected by the Tribe, a pre-Act transaction will be governed by the Act except to the extent the Act would impair substantive rights created under pre-Act law. This would require *inter alia* that perfection be accomplished as required by the Act.

- If a security interest was perfected under pre-Act law, later becomes governed by the Act, and perfection is accomplished under the Act by the sunset date, the secured party's priority date should relate back to the date perfection was accomplished under pre-Act law, thus ensuring that there is no loss of status as a result of the shift to the Act. If perfection is not accomplished by the sunset date, the priority date should be the date perfection is accomplished under the Act.

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- If a security interest was perfected under pre-Act law, later becomes governed by the Act, and perfection would have expired under pre-Act law before the sunset date, the steps necessary for perfection under the Act should be accomplished before the expiration date in order for the priority date to relate back to the date perfection was accomplished under pre-Act law.

Even if the Tribe does not have an existing secured transactions law, there may be particular transactions governed by the laws of the Tribe that would be governed by the Act if it had been in force at the time the transactions were entered into. In such instances, it is desirable to declare that the rights, duties, and interests flowing from the transactions remain valid but that the Act governs the transaction except to the extent the Act would impair substantive rights created under the other law. In such instances, a date should be established for accomplishing perfection under the Act.

Third, what if any effect or treatment does the Tribe wish to give to security interests created under state law with respect to property, debtors or creditors that will be subject to the Act as adopted by the Tribe?

Fourth, if the Tribe is using a regional consortium or state office as the filing location, what remedy if any does a creditor have for a filing error? Does it matter if the Tribe itself is the creditor?

The Act offers significant benefits to the Tribe but its implementation requires thought and planning. A careful consideration of the issues raised in this section of the Implementation Guide will significantly smooth the transition to the new law.

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VII. EXHIBITS

Exhibit A: Model Joint Sovereign Filing System Memorandum of Understanding

Exhibit B: Model Tribal Filing System Regulation

- *Appendix 1:* UCC Financing Statement
- *Appendix 2:* UCC Financing Statement Addendum
- *Appendix 3:* UCC Financing Statement Amendment
- *Appendix 4:* UCC Financing Statement Additional Party
- *Appendix 5:* Correction Statement

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Exhibit A

Model Joint Sovereign Filing System

Memorandum of Understanding
between
"x" [Nation] or [Tribe]
and
Office of the Secretary of State of the State of ["x"]

This Memorandum of Understanding is made and entered into this __ day of ___, between the [Office of the Secretary of State] of the State of ["x"] whose address is _____, (hereinafter the ["Office of the Secretary"] or ["Secretary"]), and ["x" Tribe or Nation], whose address is _____, (hereinafter the "Tribe").

PURPOSE OF AGREEMENT

WHEREAS, the [Office of the Secretary] is the designated UCC central filing office for the State of ["x"] for the filing of financing statements, assignments, continuations, amendments, partial releases and terminations of UCC documents for which central filing is required, as well as the place of filing for effective financing statements (EFS) under the Federal Food Security Act of 1985 (7 U.S.C. §1631); and

WHEREAS, the Tribe has enacted the [name and citation of secured transaction law] (hereinafter the "Tribal Act") which is consistent in its core principles with Article 9 of the Uniform Commercial Code as revised by the National Conference of Commissioners on Uniform State Laws in 1999 and as adopted by the State of ["x"] in [year], and any subsequent amendments thereto; and

WHEREAS, the Tribe wishes to provide a central filing system for lenders to perfect a security interest in personal property collateral that arise under the Tribal Act; and

WHEREAS, the [Office of the Secretary] wishes to serve as the location and administrator for lenders to perfect a security interest in personal property collateral that arise under the Tribal Act; and

WHEREAS, both the [Office of the Secretary] and the Tribe acknowledge that it is imperative that the laws, regulations and administrative rules of the State of ["x"] and the Tribe are identical in all respects as they pertain specifically to filing.

IN FURTHERANCE THEREOF, the [Office of the Secretary] and the Tribe agree that the [Office of the Secretary] shall serve as the central filing office for security interest filings that arise under the Tribal Act, pursuant to the terms and conditions set forth herein.

RESPONSIBILITIES OF TRIBE

1. The Tribe agrees to keep on its books a secured transactions law consistent in its core principles with UCC Revised Article 9, as adopted by the State of ["x"].

2. The Tribe agrees to adopt verbatim and incorporate by reference into the Tribal Act [reference/citation to State's Part 5 of Article 9], as well as any statutory amendments by the State of ["x"] Legislature to such Part.

3. The Tribe agrees to adopt verbatim and incorporate by reference into tribal law [reference to applicable state administrative filing rules or regulations] as they pertain to the administration of the central filing system and any requirements thereto, as well as any amendments to such rules or regulations.

RESPONSIBILITIES OF OFFICE OF SECRETARY

4. The [Office of the Secretary] agrees to be the designated central filing office for purposes of receiving filings under the Tribal Act in the same manner as it performs these filing duties under [citation of the state's Article 9].

5. The [Office of the Secretary] agrees that it will provide to the designated tribal representative/s on a timely basis notice of any anticipated and final amendments to [name of state law], and [applicable administrative rules or regulations].

DURATION

6. This Memorandum of Understanding shall be effective for ["x" years or other period] commencing [date], and may be renewed thereafter for additional ["x" year] periods until terminated pursuant to Paragraph 7 or Paragraph 9.

TERMINATION

7. This Memorandum of Understanding may be terminated by either party hereto without cause upon 90 days' written notice sent by U.S. mail, first class, postage prepaid to the other party at the address set forth in the introductory paragraph, such 90-day period commencing upon receipt of the notice. Such 90-day period may be modified upon mutual agreement of the parties set forth in writing.

8. Notwithstanding the provisions of the above paragraphs, the obligations of the [Office of the Secretary] under this Memorandum of Understanding depend upon the continued legislative authority under state law to operate the central filing system and perform the duties and services contemplated herein. This Memorandum of Understanding will be terminated if the Legislature of the State of ["x"] removes the [Office of the Secretary's] authority or fails to appropriate funds or grant expenditure authority sufficient to cover the costs and expenses necessary to carry out the duties hereunder.

9. This Memorandum of Understanding may be terminated upon 30 days' written notice by any party upon the substantial failure by the other party to fulfill its obligations

hereunder. The defaulting party shall have 30 calendar days from receipt of notice to cure such default. If such default is not timely cured, termination shall be effective 30 days after receipt of the initial notice by the defaulting party.

10. The [Office of the Secretary] agrees to continue to perform its duties hereunder during any notice period, up to and including the date of termination. After the date of termination, the [Office of the Secretary] is unconditionally relieved from any and all duties, responsibilities and obligations hereunder, with the exception of the preservation and disposition of records pursuant to Paragraph 11.

RECORD PRESERVATION AND DISPOSITION UPON TERMINATION

11. The [Office of the Secretary] agrees to preserve all filings received on behalf of the Tribe under this Memorandum of Understanding in exactly the same manner as it preserves UCC filings received under state law. If during the term of this Memorandum of Understanding the [Office of the Secretary] in any manner upgrades or otherwise changes the method of preservation of the UCC filings under state law, the [Office of the Secretary] agrees to perform the same upgrades and changes as to tribal filings. In the event of termination of this Memorandum of Understanding, the [Office of the Secretary] agrees at the Tribe's sole option to deliver all records then currently maintained hereunder or to continue to preserve the tribal records in exactly the same manner as it would preserve similar state records for the requisite period then in effect. In addition, the [Office of the Secretary] agrees to provide to the Tribe, at Tribe's expense, copies of any magnetically stored tribal records together with both print-out and digital copies of such tribal records as are then available in electronic form. Tribe agrees to pay the actual costs of providing such records.

COURT APPEARANCE BY [SECRETARY]

12. The [Secretary], or his designee, agrees to respond to subpoenas issued by the [tribal court] for the purpose of giving testimony relative to authentication of tribal records maintained by the [Office of the Secretary] hereunder. The Tribe agrees to reimburse the reasonable expenses incurred by the [Office of the Secretary] in such cases. Expenses shall be deemed reasonable if they are comparable to those paid in the event the [Secretary] or his designee were appearing in state or federal court under similar circumstances.

13. The Tribe agrees that copies of tribal records under this Memorandum of Understanding that are certified by the [Secretary] or his designee as true copies shall be admissible as evidence in tribal court without further foundation, and notwithstanding any tribal law of evidence that may be inconsistent with this provision.

FILING FEES

14. The Tribe agrees that the [Office of the Secretary], as compensation for the duties performed hereunder, may collect and retain all filing and related fees for filings under the Tribal Act. The [Office of the Secretary] agrees that such fees shall be the same as those required under state law.

SOVEREIGN IMMUNITY

15. Nothing in this Memorandum of Understanding shall be construed as a waiver of sovereign immunity of either the Tribe or the State of ["x"].

NO LIABILITY FOR PERFORMANCE

16. The Tribe agrees that it will not bring any legal action or claim against the [Secretary] arising out of or in any way connected with the [Secretary's] performance of the services set forth hereunder. Furthermore, the Tribe agrees to hold the [Secretary] harmless and defend the [Secretary] from any and all third party claims arising out of or in any way connected with the [Secretary's] performance of the services set forth hereunder; provided, however, that nothing herein requires the Tribe to hold the [Secretary] harmless from third party claims arising solely from the errors or omissions of the [Secretary].

ASSIGNMENTS; AMENDMENTS

17. This Memorandum of Understanding, or any part thereof, shall not be assigned, transferred, or disposed of to any person, firm, corporation, or other entity. This Agreement may not be amended or modified except in writing, and which writing shall be signed by the [Secretary] and the Tribe's authorized designee.

[SIGNATURE BLOCK)

[This Model Memorandum of Understanding is available in a separate WORD file]

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Exhibit B

Model Tribal Filing System Regulation

Instructions
and
Special Considerations for Adapting the Regulation

A Tribe that wishes to adopt the model filing system regulation for its use should carefully consider the following in its adaptation of the regulation:

1. Bracketed Provisions. Throughout the model regulation, bracketed notes will instruct the authority delegated to promulgate this regulation to insert information or consider for use specified language.

2. Instructions for subsections 2.9.1, 2.15.2, 3.1.6, and 3.4.1 State filing identification requirements for real-estate filings may have a bearing on requirements that a Tribe will need to include in subsections 2.9.1, 2.15.2, 3.1.6, and 3.4.1. Accordingly, if a Tribe's jurisdiction is located in a state whose real-estate filing offices require additional information in amendments and cannot search their records by both the name of the debtor and the file number, Tribe should enact the following alternative provisions to the subsections indicated:

ALTERNATIVE for subsection 2.9.1:

2.9.1 Amendment of information in a financing statement. Subject to section 2.8, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or, subject to subsection 2.9.5, otherwise amend the information provided in, a financing statement by filing an amendment that:

2.9.1.1 identifies, by its file number, the initial financing statement to which the amendment relates; and

2.9.1.2 if the amendment relates to an initial financing statement filed or recorded in a filing office designated for the filing or recording of a record of a mortgage on the related real property if the collateral is as-extracted collateral or timber to be cut, or the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures, indicates that it covers this type of collateral, indicates that it is to be filed for record in the real property records, provides the date and time that the initial financing statement was filed or recorded, provides a description of the real property to which the collateral is related, and provides the name of the record owner if the debtor does not have an interest of record in the real property.

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ALTERNATIVE for subsection 2.15.2:

2.15.2 Sufficiency of correction statement. A correction statement must:

2.15.2.1 identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates; and, if the correction statement relates to a record filed or recorded in a filing office designated for the filing or recording of a record of a mortgage on the related real property if the collateral is as-extracted collateral or timber to be cut or the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures, indicates that it is to be filed in the real property records, provides the date and time that the initial financing statement was filed or recorded, provides a description of the real property to which the collateral is related, and provides the name of the record owner if the debtor does not have an interest of record in the real property.

2.15.2.2. indicate that it is a correction statement; and

2.15.2.3 provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

ALTERNATIVE for subsection 3.1.6:

3.1.6 Retrieval and association capability. The filing office shall maintain the capability to:

3.1.6.1 retrieve a record by the name of the debtor and

3.1.6.1.1 if the filing office described is designated for the filing or recording of a record of a mortgage on the related real property if the collateral is as-extracted collateral or timber to be cut or the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures, by the file number assigned to the initial financing statement to which the record relates and the date and time the record was filed or recorded; or

3.1.6.1.2 if the filing office described is designated in subsection 1.2.6, by the file number assigned to the initial financing statement to which the record relates; and

3.1.6.2 associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement.

ALTERNATIVE for subsection 3.4.1:

3.4.1. *Post-lapse maintenance and retrieval of information.* *The filing office shall maintain a record of the information provided in a filed financing statement for at least one year after the effectiveness of the financing statement has lapsed under section 2.12.3 with respect to all secured parties of record. The record must be retrievable by using the name of the debtor and:*

3.4.1.1. *if the record was filed or recorded in the filing office designated for the filing or recording of a record of a mortgage on the related real property if the collateral is as-extracted collateral or timber to be cut , by the file number assigned to the initial financing statement to which the record relates and the date and time that the record was filed or recorded; or*

3.4.1.2. *if the record was filed in a filing office designated in subsection 1.2.6, by using the file number assigned to the initial financing statement to which the record relates.*

(3) Instructions for Subsection 3.1.9 A Tribe whose jurisdiction is located in a state that elects not to require real-estate filing offices to comply with either or both of subsections 3.1.2 (File Number) and 3.1.8 (Timeliness of Filing Office Performance), may adopt an applicable variation of subsection 3.1.9 (Inapplicability to real property-related office) and add "Except as otherwise provided in subsection 3.1.9," to the appropriate subsection or subsections.

NOTE: ***A Tribe that is not considering the administration of its own filing system should still adopt Section 2 of the Regulation and any applicable definitions from Section 1 in order to flesh out the provisions of Part 5 of the Act.***

[This Model Regulation is available in a separate WORD file]

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Secured Transactions Filing Regulation

OF THE

[NAME OF TRIBE'S FILING OFFICE]

[Street Address]
_____
_____
_____

Office Hours: _:__ AM - _:__PM
(Monday through Friday, except Tribal holidays)

[Mailing Address, if different]
_____
_____
_____

[Telephone Numbers]
xxx-xxx-xxxx (General Information)
xxx-xxx-xxxx (Fax)
xxx-xxx-xxxx (TDD)
xxx-xxx-xxxx (Fax for Filings and Search Requests)

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Section 1 -- General Provisions.

1.1 Regulatory Authority. These regulations are promulgated pursuant to section [*insert citation of Tribe's corresponding provision to MTA 9-501(f)*] of [*insert name of Tribe's Secured Transaction Act*].

1.2 Definitions. The following terms shall have the respective meanings provided in this regulation. Terms not defined in this regulation which are defined in the [*insert name of Tribe's Secured Transaction Act*] (hereinafter "Secured Transaction Act") shall have the respective meanings accorded such terms in the Secured Transaction Act.

1.2.1 "**Amendment**" means a document that purports to amend the information contained in a financing statement. Amendments include assignments, continuations and terminations.

1.2.2 "**Assignment**" is an amendment that purports to reflect an assignment of all or a part of a secured party's power to authorize an amendment to a financing statement.

1.2.3 "**Continuation**" means an amendment that purports to continue the effectiveness of a financing statement.

1.2.4 "**Correction statement**" means a document that purports to indicate that a financing statement is inaccurate or wrongfully filed.

1.2.5 "**File number**" means the unique identifying information assigned to an initial financing statement by the filing officer for the purpose of identifying the financing statement and other documents relating to the financing statement in the filing officer's information management system. (*NOTE: UCC Revised 9-519 establishes a standard basic format for file numbers to be used by all UCC filing systems. That format should be followed by the filing office identified in subsection 1.2.6 below to ensure compatibility among all filing systems.)*

1.2.6 "**Filing office**" and "**filing officer**" mean [*identify the entity charged by the Tribal legislature with the administration of the filing system*].

1.2.7 "**Financing statement**" means a record or records composed of an initial financing statement and any filed record(s) relating to the initial financing statement.

1.2.8 "**Individual**" means a human being, or a decedent in the case of a debtor that is such decedent's estate.

1.2.9 "**Initial financing statement**" means a document that does not identify itself as an amendment or identify an initial financing statement to which it relates, as required by Part 5 of the Secured Transaction Act.

1.2.10 "**Organization**" means a legal person who is not an individual under subsection 1.2.8.

1.2.11 "**Remitter**" means a person who tenders a document to the filing officer for filing, whether the person is a filer or an agent of a filer responsible for tendering the document for filing. "Remitter" does not include a person responsible merely for the delivery of the document

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to the filing office, such as the postal service or a courier service, but does include a service provider who acts as a filer's representative in the filing process.

1.2.12 "**Secured party of record**" means, with respect to a financing statement, a person whose name is provided as the name of a secured party or a representative of the secured party in an initial financing statement that has been filed. A person remains a secured party of record until the filing of an amendment of the financing statement which deletes the person.

1 1.2.13 "**Termination**" means an amendment intended to indicate that the related financing statement has ceased to be effective with respect to the secured party authorizing the termination.

1.2.14 "**Document**" for purposes of this Regulation means an initial financing statement, an amendment, an assignment, a continuation, a termination or a correction statement. [*Optional for inclusion*: "*The word "document" shall not be deemed to refer exclusively to paper or paper-based writings; documents may be expressed or transmitted electronically or through media other than such writings*."] (***Note**: this definition is used for the purpose of this regulation only.)*

1.3 Office Hours. The filing office's regular office hours are [*insert times: for example, "Monday – Friday, 8:30 a.m. – 5:00 p.m., excluding Tribal holidays"*]. The office also receives transmissions by telefacsimile 24 hours per day, 365 days per year, except for scheduled maintenance and unscheduled interruptions of service.

1.4 Document Delivery. Documents may be tendered for filing at the filing office as follows:

1.4.1 **Personal delivery**, at the filing office's street address. The file time for a document delivered by this method is when delivery of the document is accepted by the filing office (even though the document may not yet have been accepted for filing and subsequently may be rejected).

1.4.2 **Courier delivery**, at the filing office's street address. The file time for a document delivered by this method is, notwithstanding the time of delivery, at the earlier of the time the document is first examined by a filing officer for processing (even though the document may not yet have been accepted for filing and may be subsequently rejected), or the next close of business following the time of delivery. A document delivered after regular business hours or on a day the filing office is not open for business [if not examined for processing sooner] will have a filing time of the close of business on the next day the filing office is open for business.

1.4.3 **Postal service delivery**, to the filing office's mailing address. The file time for a document delivered by this method is the next close of business following the time of delivery (even though the document may not yet have been accepted for filing and may be subsequently rejected). A document delivered after regular business hours or on a day the filing office is not open for business will have a filing time of the close of business on the next day the filing office is open for business.

1.4.4 **Telefacsimile delivery**, to the filing office's fax filing telephone number. The file time for a document delivered by this method is, notwithstanding the time of delivery, at the earlier of the time the document is first examined by a filing officer for processing (even though the document may not yet have been accepted for filing and may be subsequently rejected), or the

next close of business following the time of delivery. A document delivered after regular business hours or on a day the filing office is not open for business [if not examined for processing sooner] will have a filing time of the close of business on the next day the filing office is open for business.

1.4.5 **Search request delivery**. Search requests may be delivered to the filing office by any of the means by which documents may be delivered to the filing office. Requirements concerning search requests are set forth in Section 4. Search requests upon a debtor named on an initial financing statement may be made by an appropriate indication on the face of the initial financing statement form if the form is entitled to be filed with the standard form fee and the relevant search fee is also tendered with the initial financing statement.

Section 2 – Contents and Effectiveness of Financing Statements and other Documents.

2.1 Contents of Financing Statement; Record of Mortgage as Financing Statement; Time of Filing Financing Statement.

2.1.1 Sufficiency of financing statement**.** Subject to subsection 2.1.2, a financing statement is sufficient only if it:

2.1.1.1 provides the name of the debtor;

2.1.1.2 provides the name of the secured party or a representative of the secured party; and

2.1.1.3 indicates the collateral covered by the financing statement with a description, whether or not specific, that reasonably identifies the collateral or states that it covers all assets or personal property.

2.1.2 Real-property-related financing statements. To be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection 2.1.1 and also:

2.1.2.1 indicate that it covers this type of collateral;

2.1.2.2 indicate that it is to be filed (for record) in the real property records;

2.1.2.3 provide a description of the real property to which the collateral is related (sufficient to give constructive notice of a mortgage under the applicable law); and

2.1.2.4 if the debtor does not have an interest of record in the real property, provide the name of a record owner.

2.1.3 Record of mortgage as financing statement. A record of mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:

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2.1.3.1 the record indicates the goods or accounts that it covers;

2.1.3.2 the goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut;

2.1.3.3 the record satisfies the requirements for a financing statement in this section other than an indication that it is to be filed in the real property records; and

2.1.3.4 the record is duly recorded.

2.2 Name of Debtor and Secured Party.

2.2.1 Sufficiency of debtor's name. A financing statement sufficiently provides the name of the debtor:

2.2.1.1 if the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized;

2.2.1.2 if the debtor is the Tribe, only if the financing statement indicates [*insert formal or authoritative business name of Tribe*];

2.2.1.3 if the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate;

2.2.1.4 if the debtor is a trust or a trustee acting with respect to property held in trust, only if the financing statement: (1) provides the name specified for the trust in its organic documents or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors; and (2) indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust; and

2.2.1.5 in other cases, (1) if the debtor has a name, only if it provides the individual or organizational name of the debtor; and (2) if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

2.2.2 Additional debtor-related information. A financing statement that provides the name of the debtor in accordance with subsection 2.2.1 is not rendered ineffective by the absence of (1) a trade name or other name of the debtor; or (2) unless required under subsection 2.2.1.5(2), names or partners, members, associates, or other persons comprising the debtor.

2.2.3 Debtor's trade name insufficient. A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.

2.2.4 Representative capacity. Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement.

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2.2.5 Multiple debtors and secured parties. A financing statement may provide the name of more than one debtor and the name of more than one secured party.

2.3 Filing and Compliance with Other Statutes and Treaties for Consignments, Leases, Other Bailments, and Other Transactions.

2.3.1 Permissible use of terms other than "debtor" and "secured party." A consignor, lessor, or other bailor of goods, a licensor, or a buyer of a payment intangible or promissory note may file a financing statement, or may comply with a statute or treaty described in [*insert citation of Tribe's corresponding provision to MTA 9-311*], using the terms "consignor", "consignee", "lessor", "lessee", "bailor", "bailee", "licensor", "licensee", "owner", "registered owner", "buyer", "seller", or words of similar import, instead of the words "secured party" and "debtor."

2.3.2 Effect of financing statement under subsection 2.3.1. This part applies to the filing of a financing statement under subsection 2.4.1., and as appropriate, to compliance that is equivalent to filing a financing statement under [*insert citation of Tribe's corresponding provision to MTA 9-311*], but the filing or compliance is not of itself a factor in determining whether the collateral secures an obligation. If it is determined for another reason that the collateral secures an obligation, a security interest held by the consignor, lessor, bailor, licensor, owner, or buyer which attaches to the collateral is perfected by the filing or compliance.

2.4 Effect of Errors or Omissions.

2.4.1 Minor errors or omissions. A financing statement substantially satisfying the requirements of Section 2 is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

2.4.2 Financing statement seriously misleading. Except as otherwise provided in subsection 2.4.3, a financing statement that fails sufficiently to provide the name of the debtor in accordance with subsection 2.2.1 is seriously misleading.

2.4.3 Financing statement not seriously misleading. If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with subsection 2.2.1, the name provided does not make the financing statement seriously misleading.

2.5 Effect of Certain Events on Effectiveness of Financing Statement.

2.5.1 Disposition. A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest continues, even if the secured party knows of or consents to the disposition.

2.5.2 Information becoming seriously misleading. Except as otherwise provided in subsection 2.5.3, a financing statement is not rendered ineffective if, after it is filed, the information provided in the financing statement becomes seriously misleading under section 2.4.

2.5.3 Change in debtor's name. If a debtor so changes its name that a filed financing statement becomes seriously misleading under section 2.5.2:

2.5.3.1 the financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the change; and

2.5.3.2 the financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four months after the change.

2.6 Persons Entitled to File a Record.

2.6.1 Person entitled to file record. A person may file an initial financing statement, an amendment that adds collateral covered by a financing statement, or an amendment that adds a debtor to a financing statement only if the debtor authorizes the filing in an authenticated record or pursuant to subsections 2.6.2 or 2.6.3.

2.6.2 Security agreement as authorization. By authenticating or becoming bound as debtor by a security agreement, a debtor authorizes the filing of an initial financing statement, and an amendment, covering (1) the collateral described in the security agreement; and (2) the property that becomes collateral under [*insert citation of Tribe's corresponding provision to MTA 9-315(a)(2)*], whether or not the security agreement expressly covers proceeds.

2.6.3 Acquisition of collateral as authorization. By acquiring collateral in which a security agreement continues under [*insert citation of Tribe's corresponding provision to MTA 9-315(a)(10*], a debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral and property that becomes collateral under MTA 9-315(a)(2).

2.6.4 Person entitled to file certain amendments. A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if :

2.6.4.1 the secured party of record authorizes the filing; or

2.6.4.2 (1) the amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required by subsections 2.10.1.or 2.10.3, (2) the debtor authorizes the filing, and (3) the termination statement indicates that the debtor authorized it to be filed.

2.6.5 Multiple secured parties of record. If there is more than one secured party of record for a financing statement, each secured party of record may authorize the filing of an amendment under subsection 2.6.4.

2.7 Effectiveness of Filed Record.

2.7.1 Filed record effective if authorized. A filed record is effective only to the extent that it was filed by a person that may file under section 2.6.

2.7.2 Authorization by one secured party of record. A record authorized by one secured party of record does not affect the financing statement with respect to another secured party of record.

2.7.3 Continuation statement not timely filed. A continuation statement that is not filed within the six-month period prescribed by subsection 2.12.4 is ineffective.

2.8 Secured Party of Record.

2.8.1 Secured party of record. A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party or a representative of a secured party in an initial financing statement that has been filed. If an initial financing statement is filed under subsection 2.11.1, the assignee named in the initial financing statement is the secured party of record with respect to the financing statement.

2.8.2 Amendment naming secured party of record. If an amendment of a financing statement which provides the name of a person as a secured party or a representative of a secured party is filed, the person named in the amendment is a secured party of record. If an amendment is filed under subsection 2.11.2, the assignee named in the amendment is a secured party of record.

2.8.3 Amendment deleting secured party of record. A person remains a secured party of record until the filing of an amendment of the financing statement which deletes the person.

2.9 Amendment of Financing Statement.

2.9.1 Amendment of information in a financing statement. Subject to section 2.6, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or, subject to subsection 2.9.5, otherwise amend the information provided in, a financing statement by filing an amendment that:

2.9.1.1 identifies, by its file number, the initial financing statement to which the amendment relates; and

2.9.1.2 if the amendment relates to an initial financing statement filed or recorded in a filing office designated for the filing or recording of a record of a mortgage on the related real property if the collateral is as-extracted collateral or timber to be cut, or the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures, indicates that it is to be filed in the real property records, provides a description of the real property to which the collateral is related, and provides the name of the record owner if the debtor does not have an interest of record in the real property.

2.9.2 Period of effectiveness not affected. Except as otherwise provided in subsection 2.12, the filing of an amendment does not extend the period of effectiveness of a financing statement.

2.9.3 Effectiveness of amendment adding collateral. A financing statement that is amended by an amendment that adds collateral is effective as to the added collateral only from the date of the filing of the amendment.

2.9.4 Effectiveness of amendment adding debtor. A financing statement that is amended by an amendment that adds a debtor is effective as to the added debtor only from the date of the filing of the amendment.

2.9.5 Certain amendments ineffective. An amendment is ineffective to the extent it (1) purports to delete all debtors and files to provide the name of a debtor to be covered by the financing statement; or (2) purports to delete all secured parties of record and fails to provide the name of a new secured party of record.

2.10 Termination Statement.

2.10.1 Consumer goods. A secured party shall cause the secured party of record to file a termination statement for the financing statement if the financing statement covers consumer goods and:

2.10.1.1 there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

2.10.1.2 the debtor did not authorize the filing of an initial financing statement.

2.10.2 Time for compliance with subsection 2.10.1. To comply with subsection 2.10.1, a termination statement must be filed:

2.10.2.1 within one month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

2.10.2.2 within 14 tribal business days after the secured party receives an authenticated demand from a debtor.

2.10.3 Other collateral. In cases not governed by subsection 2.10.1, within 14 tribal business days after a secured party receives an authenticated demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if:

2.10.3.1 except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covering the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value;

2.10.3.2 the financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation;

2.10.3.3 the financing statement covers goods that were the subject of a consignment to the debtor but are not in the debtor's possession; or

2.10.3.4 the debtor did not authorize the filing of the initial financing statement.

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2.10.4 Effect of filing termination statement. Except as otherwise provided in section 2.7, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective. Except as otherwise provided in section 2.7, for purposes of subsections 3.1.7, 3.4.1, and 3.5.3, the filing with the filing office of a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness of the financing statement to lapse.

2.11 Assignment of Powers of Secured Party of Record.

2.11.1 Assignment reflected on initial financing statement. Except as otherwise provided in subsection 2.11.3, an initial financing statement may reflect an assignment of all the secured party's power to authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party.

2.11.2 Assignment of filed financing statement. Except as otherwise provided in subsection 2.11.3, a secured party of record may assign of record all or part of its power to authorize an amendment to a financing statement by filing in the filing office an amendment of the financing statement which (1) identifies, by its file number, the initial financing statement to which it relates; (2) provides the name of the assignor; and (3) provides the name and mailing address of the assignee.

2.11.3 Assignment of record of mortgage. An assignment of record of a security interest in a fixture covered by a record of a mortgage which is effective as a financing statement filed as a fixture filing under subsection 2.9.1.2, may be made only by assignment of record of the mortgage in the manner provided by applicable law.

2.12 Duration and Effectiveness of Financing Statement; Effect of Lapsed Financing Statement.

2.12.1 Five-year effectiveness. Except as otherwise provided in subsections 2.12.2, 2.12.5, 2.12.6 and 2.12.7, a filed financing statement is effective for a period of five years after the date of filing.

2.12.2 Public-finance or manufactured home transaction. Except as otherwise provided in subsections 2.12.5, 2.12.6, and 2.12.7, an initial financing statement filed in connection with a public-finance transaction or manufactured home transaction is effective for a period of 30 years after the date of filing if it indicates that it is filed in connection with a public-finance transaction or manufactured home transaction.

2.12.3 Lapse and continuation of financing statement. The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection 2.12.4. Upon lapse, a financing statement ceases to be effective and any security interest that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

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2.12.4 When continuation statement may be filed. A continuation statement may be filed only within six months before the expiration of the five-year period specified in subsection 2.12.1 or the 30-year period specified in subsection 2.12.2, whichever is applicable.

2.12.5 Effect of filing continuation statement. Except as otherwise provided in section 2.7, upon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective in the absence of a filing. Upon the expiration of the five-year period, the financing statement lapses in the same manner as provided in subsection 2.12.3, unless, before the lapse, another continuation statement is filed pursuant to subsection 2.12.4. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement.

2.12.6 Transmitting utility financing statement. If the debtor is a transmitting utility and a filed financing statement so indicates, the financing statement is effective until a termination statement is filed.

2.12.7 Record of mortgage as financing statement. A record of mortgage that is effective as a financing statement filed as a fixture filing under subsection 2.9.1.2. remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.

2.13 What Constitutes Filing; Effectiveness of Filing.

2.13.1 What constitutes filing. Except as otherwise provided in subsection 2.13.2, receipt of a financing statement or other record by a filing office, in an appropriate form by an appropriate method, and tender of the filing fee, constitutes filing.

2.13.2 Refusal to accept record. Filing does not occur with respect to a record that a filing office refuses to accept because:

2.13.2.1 the record is not communicated by a method or medium of communication authorized by the filing office;

2.13.2.2 an amount equal to or greater than the applicable filing fee is not tendered;

2.13.2.3 the filing office is unable to index the record because:

2.13.2.3.1 in the case of an initial financing statement, the record does not provide a name for the debtor;

2.13.2.3.2 in the case of an amendment or correction statement, the record (1) does not identify the initial financing statement as required by sections 2.9 and 2.15, or (2) identifies an initial financing statement whose effectiveness has lapsed under section 2.12;

2.13.2.3.3 in the case of an initial financing statement that provides the name of a debtor identified as an individual which was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's last name; or

2.13.2.3.4 in the case of a record filed or recorded in the filing office designated for the filing or recording of a record of a mortgage on the related real property if the collateral is as-extracted collateral or timber to be cut, or the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures, the record does not provide a sufficient description of the real property to which it relates;

2.13.2.4 in the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record;

2.13.2.5 in the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not:

2.13.2.5.1 provide a mailing address for the debtor;

2.13.2.5.2 indicate whether the debtor is an individual or an organization; or

2.13.2.5.3 if the financing statement indicates that the debtor is an organization, provide (1) a type of organization for the debtor; (2) a jurisdiction for the debtor; or (3) an organizational identification number for the debtor or indicate that the debtor has none;

2.13.2.6 in the case of an assignment reflected in an initial financing statement under subsection 2.11.1, or an amendment filed under subsection 2.11.2, the record does not provide a name and mailing address for the assignee; or

2.13.2.7 in the case of a continuation statement, the record is not filed within the six-month period prescribed by subsection 2.12.4.

2.13.3 Rules applicable to subsection 2.13.2. For purposes of subsection 2.13.2:

2.13.3.1 a record does not provide information if the filing office is unable to read or decipher the information; and

2.13.3.2 a record that does not indicate that it is an amendment or identify an initial financing statement to which it relates as required by sections 2.9.1, 2.11, and 2.12, is an initial financing statement.

2.13.4 Refusal to accept record; record effective as a filed record. A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than the one set forth in subsection 2.13.2, is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files.

2.14 Effect of Indexing Errors. The failure of the filing office to index a record correctly does not affect the effectiveness of the filed record.

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2.15 Claim Concerning Inaccurate or Wrongfully Filed Record.

2.15.1 Correction statement. A person may file in the filing office a correction statement with respect to a record indexed there under the person's name if the person believes that the record is inaccurate or was wrongfully filed.

2.15.2 Sufficiency of correction statement. A correction statement must:

2.15.2.1 identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

2.15.2.2 indicate that it is a correction statement; and

2.15.2.3 provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

2.15.3 Record not affected by correction statement. The filing of a correction statement does not affect the effectiveness of an initial financing statement or other filed record.

LIMITATION OF LIABILITY: **THE RESPONSIBILITY FOR THE LEGAL EFFECTIVENESS OF FILING RESTS WITH FILERS AND REMITTERS AND THE FILING OFFICE BEARS NO RESPONSIBILITY FOR SUCH EFFECTIVENESS.**

Section 3 – Duties and Operations of Filing Office.

3.1 Numbering, Maintaining, and Indexing Records; Communicating Information Provided in Records.

3.1.1 Filing Office Duties. For each record filed in a filing office, the filing office shall:

3.1.1.1 assign a unique number to the filed record;

3.1.1.2 create a record that bears the number assigned to the filed record and the date and time of filing;

3.1.1.3 maintain the filed record for public inspection; and

3.1.1.4 index the filed record in accordance with subsections 3.1.3, 3.1.4, and 3.1.5.

3.1.2. File number. A file number must include a digit that (1) is mathematically derived from or related to the other digits of the file number; and (2) aids the filing office in determining whether a number communicated as the file number includes a single-digit or transpositional error.

3.1.3. Indexing; general. Except as otherwise provided in subsections 3.1.4 and 3.1.5, the filing office shall:

3.1.3.1. index an initial financing statement according to the name of the debtor and index all filed records related to the initial financing statement in a manner that associates with one another an initial financing statement and all filed records related to the initial financing statement; and

3.1.3.2. index a record that provides a name of a debtor which was not previously provided in the financing statement to which the record relates also according to the name that was not recorded previously.

3.1.4. Indexing; real property-related financing statement. If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, [*it must be filed for record and*] the filing office shall index it:

3.1.4.1. under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described; and

3.1.4.2. under the name of the secured party as if the secured party were the mortgagor, or, if indexing is by description, as if the financing statement were a record of a mortgage of the real property described.

3.1.5. Indexing; real property-related assignment. If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, the filing office shall index as assignment under subsection 2.11.1. or an amendment filed under subsection 2.11.2, (1) under the name of the assignor as grantor; and (2) under the name of the assignee.

3.1.6. Retrieval and association capability. The filing office shall maintain the capability to:

3.1.6.1. retrieve a record by the name of the debtor and by the file number assigned to the initial financing statement to which the record relates; and

3.1.6.2. associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement.

3.1.7. Removal of debtor's name. The filing office may not remove a debtor's name from the index until one year after the effectiveness of a financing statement naming the debtor lapses under section 2.12 with respect to all secured parties of record.

3.1.8. Timeliness of filing office performance. The filing office shall perform the acts required by subsections 3.1.1 through 3.1.5 at the time and in the manner prescribed by filing-office rule, but not later than two tribal business days after the filing office receives the record in question.

3.1.9. Inapplicability to real property-related office. Subsections 3.1.2 and 3.1.8 do not apply to a filing office designated for the filing or recording of a record of a mortgage on the related real property if the collateral is as-extracted collateral or timber to be cut, or if the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures and it indicates that it is to be filed in the real property record.

3.2. Acceptance and Refusal to Accept Record.

3.2.1 Mandatory refusal to accept record. A filing office shall refuse to accept a record for filing for a reason set forth in subsection 2.13.2 and may refuse to accept a record for filing only for a reason set forth in subsection 2.13.2.

3.2.2. Communication concerning refusal. If a filing office refuses to accept a record for filing, it shall communicate that fact of and reason for the refusal, and the date and time the record would have been filed had the filing office accepted it. The communication must be made no more than two tribal business days after the filing office receives the record

3.2.3. When a filed financing statement is effective. A filed financing statement satisfying subsections 2.1.1 and 2.1.2 is effective if it is accepted, even if the filing office is required to refuse to accept it for filing under subsection 3.2.1.

3.3. Uniform Form of Written Financing Statement and Amendment.

The filing office may not refuse to accept records using the standardized national forms for UCC financing, amendment, continuation, correction and termination statements.

3.4. Maintenance and Destruction of Records.

3.4.1 Post-lapse maintenance and retrieval of information. The filing office shall maintain a record of the information provided in a filed financing statement for at least one year after the effectiveness of the financing statement has lapsed under section 2.12 with respect to all secured parties of record. The record must be retrievable by using the name of the debtor and by using the file number assigned to the initial financing statement to which the record relates.

3.4.2. Destruction of written records. The filing office may destroy written records evidencing a financing statement as long as it maintains in some other medium for the time periods required for retention all of the information contained in those records in compliance with subsection 3.4.1.

3.5. Information from Filing Office.

3.5.1 Acknowledgement of filing record. If a person that files a record requests an acknowledgement of the filing, the filing office shall send an acknowledgement showing the number assigned to the record and the date and time of the filing.

3.5.2 Communication of requested information. The filing office shall make available in written record (upon request) *[Optional: "or record in an electronic or other medium to any person that so requests"]:*

3.5.2.1 whether there is on file on a date and time specified by the filing office, but not a date earlier than 3 tribal business days before the filing office receives the request, any financing statement that (1) designates a particular debtor, (2) has not lapsed with respect to all secured parties of record, and (3) has lapsed but is maintained under subsection 3.4.1;

3.5.2.2 the date and time of filing of each such financing statement; and

3.5.2.3 the information provided in each financing statement.

3.5.3 Timeliness of filing office performance. The filing office shall required in this section 3.5 no later than two tribal business days after the filing office receives the request.

Section 4 - Search Requests and Reports.

4.1 General Requirements. The filing officer maintains for public inspection a searchable index for all records of documents that provides for the retrieval of a record by the name of the debtor and by the file number of the initial financing statement to which the record relates and which associates with one another each initial financing statement and each filed document relating to the initial financing statement.

4.2 Search Requests. Search requests shall contain the following information:

4.2.1 Name searched. A search request should set forth the full correct name of a debtor or the name variant desired to be searched and must specify whether the debtor is an individual or an organization.

4.2.1.1. Individual. The full name of an individual shall consist of a first name, a middle name or initial, and a last name, although a search request may be submitted with no middle name or initial and, if only a single name is presented (e.g., Cher) it will be treated as a last name. A search request will be processed using the name in the exact form it is submitted.

4.2.1.2 Organization. The full name of an organization shall consist of the name of the organization as stated on the articles of incorporation or other organic documents in the state or country of organization or the name variant desired to be searched. A search request will be processed using the name in the exact form it is submitted.

4.2.2 Requesting party. The name and address of the person to whom the search report is to be sent.

4.2.3 Fee and method of payment. The appropriate fee shall be enclosed, payable by a method described in section 6.

4.2.4 Search request with filing. If a filer requests a search at the time a document is filed, the name to be searched will be the debtor name as set forth on the form, the requesting party will be the remitter of the document, and the search request will be deemed to request a search that would be effective to retrieve all financing statements filed on or prior to the date the document is filed.

4.3 Optional Information. A search request may contain any of the following information:

4.3.1 Copies of all Documents in Report. A request that copies of documents referred to in the report be included with the report. The request may limit the copies requested by limiting them by reference to [the address of the debtor,] the city of the debtor, the date

of filing (or a range of filing dates) or the identity of the secured party(ies) of record on the financing statements located by the related search. The request may ask for copies of documents identified on the primary search response.

4.3.2 Mode of delivery. Instructions on the mode of delivery requested, if other than by ordinary mail, which request will be honored if the requested mode is then made available by the filing office. Additional fees may be assessed.

4.4 Rules Applied to Search Requests.

4.4.1 No limit to matches. There is no limit to the number of matches that may be returned in response to the search criteria.

4.4.2 Upper and lower case letters irrelevant. No distinction is made between upper and lower case letters.

4.4.3 Punctuation marks disregarded. Punctuation marks and accents are disregarded.

4.4.4 Organizational words and abbreviations disregarded. Words and abbreviations at the end of a name that indicate the existence or nature of an organization are disregarded (e.g., company, limited, incorporated, corporation, limited partnership, limited liability company or abbreviations of the foregoing).

4.4.5 Other items disregarded. The word "the" at the beginning of the search criteria is disregarded; and all spaces are disregarded.

4.4.6 First and middle names; initials. For first and middle names of individuals, initials are treated as the logical equivalent of all names that begin with such initials, and no middle name or initial is equated with all middle names and initials. For example, a search request for John A. Smith would cause the search to retrieve all filings against all individual debtors with John as the first name, Smith as the last name, and with the initial A or any name beginning with A in the middle name field. If the search request were for John Smith (first and last names with no designation in the middle name field), the search would retrieve all filings against individual debtors with John as the first name, Smith as the last name and with any name or initial or no name or initial in the middle name field.

4.4.7 Exact matches for debtor names. After taking the preceding rules into account to modify the name of the debtor requested to be searched and to modify the names of debtors contained in active financing statements in the UCC information management system, the search will reveal only names of debtors that are contained in active financing statements and, as modified, exactly match the name requested, as modified.

4.5 Search Responses. Reports created in response to a search request shall include the following:

4.5.1 Filing officer. Identification of the filing officer and the certification of the filing officer.

4.5.2 Report date. The date the report was generated.

4.5.3 Name searched. Identification of the name searched.

4.5.4 Certification date. The certification date applicable to the report; i.e., the date and time through the search is effective to reveal all relevant documents filed on or prior to that date.

4.5.5 Identification of initial financing statements. Identification of each unlapsed initial financing statement filed on or prior to the certification date and time corresponding to the search criteria, by name of debtor, by identification number, and by file date and file time.

4.5.6 History of financing statement. For each initial financing statement on the report, a listing of all related documents filed by the filing officer on or prior to the certification date.

4.5.7 Copies. Copies of all documents revealed by the search and requested by the searcher.

Section 5 – Fees; Methods of Payment.

5.1 Filing Fees.

[5.1.1 Filing fee. The fee for filing and indexing a document of one or two pages communicated on paper or in a paper-based format (including faxes) is $__[X]___. If there are additional pages, the fee is $__[X]____. [Optional: The fee for filing and indexing a document communicated by a medium authorized by these rules which is other than on paper or in a paper-based format shall be $__[X]___.]]

[5.1.2 Additional fees. A fee of $_____ shall be paid for an initial financing statement that indicates that it is filed in connection with a public-finance transaction, a fee of $_____ shall be paid for an initial financing statement that indicates that it is filed in connection with a manufactured-home transaction, and a fee of $____ shall be paid for each additional debtor name more than two that is required to be indexed if the relevant document is communicated in writing.]

NOTE: Subsections 5.1.1 and 5.1.2 should be retained only if the Tribe has selected the second alternative under MTA 9-501(e).

5.1.3 Search fee. The fee for a search request communicated on paper or in a paper-based format is $_____. [Optional: *The fee for filing and indexing a search request communicated by a medium authorized by these rules which is other than on paper or in a paper-based format shall be $_____.*]

5.1.4 Search copies. The fee for search copies is $_____ per page [Optional: "or page equivalent for electronically transmitted search responses"].

5.2 Methods of Payment. Filing fees may be paid by the following methods.

5.2.1 Cash. The filing officer discourages cash payment unless made in person to the cashier at the filing office.

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5.2.2 Checks. Checks made payable to the filing office, including checks in an amount to be filled in by a filing officer but not to exceed a particular amount, will be accepted for payment if they are cashier's checks or certified checks drawn on a bank acceptable to the filing office or if the drawer is acceptable to the filing office. *[Insert standards for such acceptability.]* The identity of acceptable banks will be made available to prospective filers and remitters upon request.

5.2.3 Optional: Electronic funds transfer. The filing office will accept payment via electronic funds transfer under National Automated Clearing House Association ("NACHA") rules from remitters who have entered into appropriate NACHA-approved arrangements for such transfers and who authorize the relevant transfer pursuant to such arrangements and rules.]

5.2.4 Optional: Prepaid account. A remitter may open an account for prepayment of filing fees by submitting an application furnished by the filing officer. Fees may be prepaid in amounts not less than $____. The filing officer shall issue an account number to be used by a remitter who chooses to pay filing fees in advance. The filing officer shall deduct filing fees from the remitter's prepaid account when authorized to do so by the remitter as follows: [describe the manner by which transactions against the prepaid account may be authorized by the remitter].

5.2.5 Optional: Debit cards. The filing office accepts payment by debit cards issued by approved debit card issuers. A current list of approved debit card issuers is available from the filing office. Remitters shall provide the filing officer with the card number, the expiration date of the card, the name of the approved card issuer, the name of the person or entity to whom the card was issued and the billing address for the card. Payment will not be deemed tendered until the issuer or its agent has confirmed to the filing office that payment will be forthcoming.]

5.2.6 Optional: Credit card. The filing office accepts payments using credit cards issued by approved credit card issuers. A current list of approved credit card issuers is available from the filing office. Remitters shall provide the filing officer with the card number, the expiration date of the card, the name of the approved card issuer, the name of the person or entity to whom the card was issued and the billing address for the card. Payment will not be deemed tendered until the issuer or its agent has confirmed to the filing office that payment will be forthcoming.]

5.2.7 Optional: Other account. [Describe other methods by which filing parties may pay filing fees.]

5.3 Overpayment and Underpayment Policies.

5.3.1 Overpayment. The filing officer shall refund the amount of an overpayment exceeding $_____ to the remitter. The filing officer shall refund an overpayment of $_____ or less only upon the written request of the remitter.

5.3.2 Underpayment. Upon receipt of a document with an insufficient fee, the filing officer shall do one of the following.

5.3.2.1 A notice of the deficiency shall be sent to the remitter and the document shall be held for a period of 10 calendar days from the date of the notice, in anticipation of receipt of the fee. Upon receipt of the fee, the document will be filed as of the time and date of receipt of the full filing fee. If the fee has not been received within 10 calendar days of the date of the notice, the document shall be returned to the remitter with a written explanation for the refusal to accept the document; or

5.3.2.2 The document shall be returned to the remitter. A refund of a partial payment may be included with the document or delivered under separate cover.

Section 6 – New Practices and Technologies.

The filing officer is authorized to adopt methods and procedures to accomplish receipt, processing, maintenance, retrieval and transmission of, and remote access to, filing data by means of electronic, voice, optical and/or other technologies, and to maintain and operate, in addition to or in lieu of a paper-based system, a non-paper-based filing system utilizing any of such technologies. In developing such technologies, the filing officer shall, to the greatest extent feasible, take into account compatibility and consistency with, and whenever possible be uniform with, technologies, practices, policies and regulations adopted in connection with Article 9 filing systems maintained by other Tribes and States.

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APPENDICES

- *Appendix 1:* UCC Financing Statement
- *Appendix 2:* UCC Financing Statement Addendum
- *Appendix 3:* UCC Financing Statement Amendment
- *Appendix 4:* UCC Financing Statement Additional Party
- *Appendix 5:* Correction Statement

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[redacted]

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

Print Reset

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME

OR

1b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

1c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY

1d. SEE INSTRUCTIONS | ADD'L INFO RE ORGANIZATION DEBTOR | 1e. TYPE OF ORGANIZATION | 1f. JURISDICTION OF ORGANIZATION | 1g. ORGANIZATIONAL ID #, if any ☐ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

2c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY

2d. SEE INSTRUCTIONS | ADD'L INFO RE ORGANIZATION DEBTOR | 2e. TYPE OF ORGANIZATION | 2f. JURISDICTION OF ORGANIZATION | 2g. ORGANIZATIONAL ID #, if any ☐ NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME

OR

3b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

3c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY

4. This FINANCING STATEMENT covers the following collateral:

5. ALTERNATIVE DESIGNATION [if applicable]: ☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ SELLER/BUYER ☐ AG. LIEN ☐ NON-UCC FILING

6. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS. Attach Addendum [if applicable]

7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) [ADDITIONAL FEE] [optional] ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

8. OPTIONAL FILER REFERENCE DATA

Instructions for UCC Financing Statement (Form UCC1)

Please type or laser-print this form. Be sure it is completely legible. Read all Instructions, especially Instruction 1; correct Debtor name is crucial. Follow Instructions completely.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. Filing office cannot give legal advice.

Do not insert anything in the open space in the upper portion of this form; it is reserved for filing office use.

When properly completed, send Filing Office Copy, with required fee, to filing office. If you want an acknowledgment, complete item B and, if filing in a filing office that returns an acknowledgment copy furnished by filer, you may also send Acknowledgment Copy; otherwise detach. If you want to make a search request, complete item 7 (after reading Instruction 7 below) and send Search Report Copy, otherwise detach. Always detach Debtor and Secured Party Copies.

If you need to use attachments, you are encouraged to use either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP).

A. To assist filing offices that might wish to communicate with filer, filer may provide information in item A. This item is optional.

B. Complete item B if you want an acknowledgment sent to you. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form a carbon or other copy of this form for use as an acknowledgment copy.

1. **Debtor name**: Enter only one Debtor name in item 1, an organization's name (1a) or an individual's name (1b). Enter Debtor's exact full legal name. Don't abbreviate.

1a. Organization Debtor. "Organization" means an entity having a legal identity separate from its owner. A partnership is an organization; a sole proprietorship is not an organization, even if it does business under a trade name. If Debtor is a partnership, enter exact full legal name of partnership; you need not enter names of partners as additional Debtors. If Debtor is a registered organization (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed charter documents to determine Debtor's correct name, organization type, and jurisdiction of organization.

1b. Individual Debtor. "Individual" means a natural person; this includes a sole proprietorship, whether or not operating under a trade name. Don't use prefixes (Mr., Mrs., Ms.). Use suffix box only for titles of lineage (Jr., Sr., III) and not for other suffixes or titles (e.g., M.D.). Use married woman's personal name (Mary Smith, not Mrs. John Smith). Enter individual Debtor's family name (surname) in Last Name box, first given name in First Name box, and all additional given names in Middle Name box.

For both organization and individual Debtors: Don't use Debtor's trade name, DBA, AKA, FKA, Division name, etc. in place of or combined with Debtor's legal name; you may add such other names as additional Debtors if you wish (but this is neither required nor recommended).

1c. An address is always required for the Debtor named in 1a or 1b.

1d. Reserved for Financing Statements to be filed in North Dakota or South Dakota only. If this Financing Statement is to be filed in North Dakota or South Dakota, the Debtor's taxpayer identification number (tax ID#) — social security number or employer identification number must be placed in this box.

1e,f,g. "Additional information re organization Debtor" is always required. Type of organization and jurisdiction of organization as well as Debtor's exact legal name can be determined from Debtor's current filed charter document. Organizational ID #, if any, is assigned by the agency where the charter document was filed; this is different from tax ID #; this should be entered preceded by the 2-character U.S. Postal identification of state of organization if one of the United States (e.g., CA12345, for a California corporation whose organizational ID # is 12345); if agency does not assign organizational ID #, check box in item 1g indicating "none."

Note: If Debtor is a trust or a trustee acting with respect to property held in trust, enter Debtor's name in item 1 and attach Addendum (Form UCC1Ad) and check appropriate box in item 17. If Debtor is a decedent's estate, enter name of deceased individual in item 1b and attach Addendum (Form UCC1Ad) and check appropriate box in item 17. If Debtor is a transmitting utility or this Financing Statement is filed in connection with a Manufactured-Home Transaction or a Public-Finance Transaction as defined in applicable Commercial Code, attach Addendum (Form UCC1Ad) and check appropriate box in item 18.

2. If an additional Debtor is included, complete item 2, determined and formatted per Instruction 1. To include further additional Debtors, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 for determining and formatting additional names.

3. Enter information for Secured Party or Total Assignee, determined and formatted per Instruction 1. To include further additional Secured Parties, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 for determining and formatting additional names. If there has been a total assignment of the Secured Party's interest prior to filing this form, you may either (1) enter Assignor S/P's name and address in item 3 and file an Amendment (Form UCC3) [see item 5 of that form]; or (2) enter Total Assignee's name and address in item 3 and, if you wish, also attaching Addendum (Form UCC1Ad) giving Assignor S/P's name and address in item 12.

4. Use item 4 to indicate the collateral covered by this Financing Statement. If space in item 4 is insufficient, put the entire collateral description or continuation of the collateral description on either Addendum (Form UCC1Ad) or other attached additional page(s).

5. If filer desires (at filer's option) to use titles of lessee and lessor, or consignee and consignor, or seller and buyer (in the case of accounts or chattel paper), or bailee and bailor instead of Debtor and Secured Party, check the appropriate box in item 5. If this is an agricultural lien (as defined in applicable Commercial Code) filing or is otherwise not a UCC security interest filing (e.g., a tax lien, judgment lien, etc.), check the appropriate box in item 5, complete items 1-7 as applicable and attach any other items required under other law.

6. If this Financing Statement is filed as a fixture filing or if the collateral consists of timber to be cut or as-extracted collateral, complete items 1-5, check the box in item 6, and complete the required information (items 13, 14 and/or 15) on Addendum (Form UCC1Ad).

7. This item is optional. Check appropriate box in item 7 to request Search Report(s) on all or some of the Debtors named in this Financing Statement. The Report will list all Financing Statements on file against the designated Debtor on the date of the Report, including this Financing Statement. There is an additional fee for each Report. If you have checked a box in item 7, file Search Report Copy together with Filing Officer Copy (and Acknowledgment Copy). Note: Not all states do searches and not all states will honor a search request made via this form; some states require a separate request form.

8. This item is optional and is for filer's use only. For filer's convenience of reference, filer may enter in item 8 any identifying information (e.g., Secured Party's loan number, law firm file number, Debtor's name or other identification, state in which form is being filed, etc.) that filer may find useful.

UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

9. NAME OF FIRST DEBTOR (1a or 1b) ON RELATED FINANCING STATEMENT

9a. ORGANIZATION'S NAME

OR

9b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME,SUFFIX

10. MISCELLANEOUS:

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THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

11. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one name (11a or 11b) - do not abbreviate or combine names

11a. ORGANIZATION'S NAME

OR

11b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

11c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

11d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	11e. TYPE OF ORGANIZATION	11f. JURISDICTION OF ORGANIZATION	11g. ORGANIZATIONAL ID #, if any
				☐ NONE

12. ☐ ADDITIONAL SECURED PARTY'S or ☐ ASSIGNOR S/P'S NAME - insert only one name (12a or 12b)

12a. ORGANIZATION'S NAME

OR

12b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

12c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

13. This FINANCING STATEMENT covers ☐ timber to be cut or ☐ as-extracted collateral, or is filed as a ☐ fixture filing.

14. Description of real estate:

15. Name and address of a RECORD OWNER of above-described real estate (if Debtor does not have a record interest):

16. Additional collateral description:

17. Check only if applicable and check only one box.

Debtor is a ☐ Trust or ☐ Trustee acting with respect to property held in trust or ☐ Decedent's Estate

18. Check only if applicable and check only one box.

☐ Debtor is a TRANSMITTING UTILITY

☐ Filed in connection with a Manufactured-Home Transaction — effective 30 years

☐ Filed in connection with a Public-Finance Transaction — effective 30 years

Instructions for UCC Financing Statement Addendum (Form UCC1Ad)

9. Insert name of first Debtor shown on Financing Statement to which this Addendum relates, exactly as shown in item 1 of Financing Statement.

10. Miscellaneous: Under certain circumstances, additional information not provided on Financing Statement may be required. Also, some states have non-uniform requirements. Use this space to provide such additional information or to comply with such requirements; otherwise, leave blank.

11. If this Addendum adds an additional Debtor, complete item 11 in accordance with Instruction 1 of Financing Statement. To include further additional Debtors, attach either an additional Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 of Financing Statement for determining and formatting additional names.

12. If this Addendum adds an additional Secured Party, complete item 12 in accordance with Instruction 3 of Financing Statement. To include further additional Secured Parties, attach either an additional Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 of Financing Statement for determining and formatting additional names. In the case of a total assignment of the Secured Party's interest before the filing of this Financing Statement, if filer has given the name and address of the Total Assignee in item 3 of Financing Statement, filer may give the Assignor S/P's name and address in item 12.

13-15. If collateral is timber to be cut or as-extracted collateral, or if this Financing Statement is filed as a fixture filing, check appropriate box in item 13; provide description of real estate in item 14; and, if Debtor is not a record owner of the described real estate, also provide, in item 15, the name and address of a record owner. Also provide collateral description in item 4 of Financing Statement. Also check box 6 on Financing Statement. Description of real estate must be sufficient under the applicable law of the jurisdiction where the real estate is located.

16. Use this space to provide continued description of collateral, if you cannot complete description in item 4 of Financing Statement.

17. If Debtor is a trust or a trustee acting with respect to property held in trust or is a decedent's estate, check the appropriate box.

18. If Debtor is a transmitting utility or if the Financing Statement relates to a Manufactured-Home Transaction or a Public-Finance Transaction as defined in the applicable Commercial Code, check the appropriate box.

UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

Print Reset

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1a. INITIAL FINANCING STATEMENT FILE #

1b. ☐ This FINANCING STATEMENT AMENDMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS.

2. ☐ TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement.

3. ☐ CONTINUATION: Effectiveness of the Financing Statement identified above with respect to security interest(s) of the Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law.

4. ☐ ASSIGNMENT (full or partial): Give name of assignee in item 7a or 7b and address of assignee in item 7c; and also give name of assignor in item 9.

5. AMENDMENT (PARTY INFORMATION): This Amendment affects ☐ Debtor or ☐ Secured Party of record. Check only one of these two boxes.

Also check one of the following three boxes and provide appropriate information in items 6 and/or 7.

☐ CHANGE name and/or address: Please refer to the detailed instructions in regards to changing the name/address of a party. ☐ DELETE name: Give record name to be deleted in item 6a or 6b. ☐ ADD name: Complete item 7a or 7b, and also item 7c; also complete items 7e-7g (if applicable).

6. CURRENT RECORD INFORMATION:

6a. ORGANIZATION'S NAME

OR

6b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

7. CHANGED (NEW) OR ADDED INFORMATION:

7a. ORGANIZATION'S NAME

OR

7b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

7c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

7d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	7e. TYPE OF ORGANIZATION	7f. JURISDICTION OF ORGANIZATION	7g. ORGANIZATIONAL ID #, if any ☐ NONE

8. AMENDMENT (COLLATERAL CHANGE): check only one box.

Describe collateral ☐ deleted or ☐ added, or give entire ☐ restated collateral description, or describe collateral ☐ assigned.

9. NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT (name of assignor, if this is an Assignment). If this is an Amendment authorized by a Debtor which adds collateral or adds the authorizing Debtor, or if this is a Termination authorized by a Debtor, check here ☐ and enter name of DEBTOR authorizing this Amendment.

9a. ORGANIZATION'S NAME

OR

9b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

10. OPTIONAL FILER REFERENCE DATA

Instructions for UCC Financing Statement Amendment (Form UCC3)

Please type or laser-print this form. Be sure it is completely legible. Read all Instructions, especially Instruction 1a; correct file number of initial financing statement is crucial. Follow Instructions completely.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. Filing office cannot give legal advice.

Do not insert anything in the open space in the upper portion of this form; it is reserved for filing office use.

An Amendment may relate to only one financing statement. Do not enter more than one file number in item 1a.

When properly completed, send Filing Office Copy, with required fee, to filing office. If you want an acknowledgment, complete item B and, if filing in a filing office that returns an acknowledgment copy furnished by filer, you may also send Acknowledgment Copy, otherwise detach. Always detach Debtor and Secured Party Copies.

If you need to use attachments, you are encouraged to use either Amendment Addendum (Form UCC3Ad) or Amendment Additional Party (Form UCC3AP).

Always complete items 1a and 9.

A. To assist filing offices that might wish to communicate with filer, filer may provide information in item A. This item is optional.

B. Complete item B if you want an acknowledgment sent to you. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form a carbon or other copy of this form for use as an acknowledgment copy.

1a. **File number:** Enter file number of initial financing statement to which this Amendment relates. Enter only one file number. In some states, the file number is not unique; in those states, also enter in item 1a, after the file number, the date that the initial financing statement was filed.

1b. Only if this Amendment is to be filed or recorded in the real estate records, check box 1b and also, in item 13 of Amendment Addendum, enter Debtor's name, in proper format exactly identical to the format of item 1 of financing statement, and name of record owner if Debtor does not have a record interest.

Note: Show purpose of this Amendment by checking box 2, 3, 4, 5 (in item 5 you must check two boxes) or 8; also complete items 6, 7 and/or 8 as appropriate. Filer may use this Amendment form to simultaneously accomplish both data changes (items 4, 5, and/or 8) and a Continuation (item 3), although in some states filer may have to pay a separate fee for each purpose.

2. To terminate the effectiveness of the identified financing statement with respect to security interest(s) of authorizing Secured Party, check box 2. See Instruction 9 below.

3. To continue the effectiveness of the identified financing statement with respect to security interest(s) of authorizing Secured Party, check box 3. See Instruction 9 below.

4. To assign (i) all of assignor's interest under the identified financing statement, or (ii) a partial interest in the security interest covered by the identified financing statement, or (iii) assignor's full interest in some (but not all) of the collateral covered by the identified financing statement: Check box in item 4 and enter name of assignee in item 7a if assignee is an organization, or in item 7b, formatted as indicated, if assignee is an individual. Complete 7a or 7b, but not both. Also enter assignee's address in item 7c. Also enter name of assignor in item 9. If partial Assignment affects only some (but not all) of the collateral covered by the identified financing statement, filer may check appropriate box in item 8 and indicate affected collateral in item 8.

5,6,7.To change the name of a party: Check box in item 5 to indicate whether this Amendment amends information relating to a Debtor or a Secured Party; also check box in item 5 to indicate that this is a name change; also enter name of affected party (current record name) in item 6a or 6b as appropriate; and enter new name (7a or 7b). If the new name refers to a Debtor complete (7c); also complete 7e-7g if 7a was completed.

5,6,7.To change the address of a party: Check box in item 5 to indicate whether this Amendment amends information relating to a Debtor or a Secured Party; also check box in item 5 to indicate that this is an address change; also enter name of affected party (current record name) in item 6a or 6b as appropriate; and enter new address (7c) in item 7.

5,6,7.To change the name and address of a party: Check box in item 5 to indicate whether this Amendment amends information relating to a Debtor or a Secured Party; also check box in item 5 to indicate that this is a name/address change; also enter name of affected party (current record name) in items 6a or 6b as appropriate; and enter the new name (7a or 7b). If the new name refers to a Debtor complete item 7c; also complete 7e-7g if 7a was completed.

5,6. To delete a party: Check box in item 5 to indicate whether deleting a Debtor or a Secured Party; also check box in item 5 to indicate that this is a deletion of a party; and also enter name (6a or 6b) of deleted party in item 6.

5,7. To add a party: Check box in item 5 to indicate whether adding a Debtor or Secured Party; also check box in item 5 to indicate that this is an addition of a party and enter the new name (7a or 7b). If the new name refers to a Debtor complete item 7c; also complete 7e-7g if 7a was completed. To include further additional Debtors or Secured Parties, attach Amendment Additional Party (Form UCC3AP), using correct name format.

Note: The preferred method for filing against a new Debtor (an individual or organization not previously of record as a Debtor under this file number) is to file a new Financing Statement (UCC1) and not an Amendment (UCC3).

7d. Reserved for Financing Statement Amendments to be filed in North Dakota or South Dakota only. If this Financing Statement Amendment is to be filed in North Dakota or South Dakota, the Debtor's taxpayer identification number (tax ID#) — social security number or employer identification number must be placed in this box.

8. Collateral change. To change the collateral covered by the identified financing statement, describe the change in item 8. This may be accomplished either by describing the collateral to be added or deleted, or by setting forth in full the collateral description as it is to be effective after the filing of this Amendment, indicating clearly the method chosen (check the appropriate box). If the space in item 8 is insufficient, use item 13 of Amendment Addendum (Form UCC3Ad). A partial release of collateral is a deletion. If, due to a full release of all collateral, filer no longer claims a security interest under the identified financing statement, check box 2 (Termination) and not box 8 (Collateral Change). If a partial assignment consists of the assignment of some (but not all) of the collateral covered by the identified financing statement, filer may indicate the assigned collateral in item 8, check the appropriate box in item 8, and also comply with instruction 4 above.

9. Always enter name of party of record authorizing this Amendment; in most cases, this will be a Secured Party of record. If more than one authorizing Secured Party, give additional name(s), properly formatted, in item 13 of Amendment Addendum (Form UCC3Ad). If the indicated financing statement refers to the parties as lessee and lessor, or consignee and consignor, or seller and buyer, instead of Debtor and Secured Party, references in this Amendment shall be deemed likewise so to refer to the parties. If this is an assignment, enter assignor's name. If this is an Amendment authorized by a Debtor that adds collateral or adds a Debtor, or if this is a Termination authorized by a Debtor, check the box in item 9 and enter the name, properly formatted, of the Debtor authorizing this Amendment, and, if this Amendment or Termination is to be filed or recorded in the real estate records, also enter, in item 13 of Amendment Addendum, name of Secured Party of record.

10. This item is optional and is for filer's use only. For filer's convenience of reference, filer may enter in item 10 any identifying information (e.g., Secured Party's loan number, law firm file number, Debtor's name or other identification, state in which form is being filed, etc.) that filer may find useful.

UCC FINANCING STATEMENT ADDITIONAL PARTY

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

19. NAME OF FIRST DEBTOR (1a or 1b) ON RELATED FINANCING STATEMENT

19a. ORGANIZATION'S NAME

OR

19b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME,SUFFIX

20. MISCELLANEOUS:

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THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

21. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one name (21a or 21b) - do not abbreviate or combine names

21a. ORGANIZATION'S NAME

OR

21b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

21c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

21d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	21e. TYPE OF ORGANIZATION	21f. JURISDICTION OF ORGANIZATION	21g. ORGANIZATIONAL ID #, if any
				☐ NONE

22. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one name (22a or 22b) - do not abbreviate or combine names

22a. ORGANIZATION'S NAME

OR

22b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

22c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

22d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	22e. TYPE OF ORGANIZATION	22f. JURISDICTION OF ORGANIZATION	22g. ORGANIZATIONAL ID #, if any
				☐ NONE

23. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one name (23a or 23b) - do not abbreviate or combine names

23a. ORGANIZATION'S NAME

OR

23b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

23c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

23d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	23e. TYPE OF ORGANIZATION	23f. JURISDICTION OF ORGANIZATION	23g. ORGANIZATIONAL ID #, if any
				☐ NONE

24. ADDITIONAL SECURED PARTY'S NAME (or Name of TOTAL ASSIGNEE) - insert only one name (24a or 24b)

24a. ORGANIZATION'S NAME

OR

24b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

24c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

25. ADDITIONAL SECURED PARTY'S NAME (or Name of TOTAL ASSIGNEE) - insert only one name (25a or 25b)

25a. ORGANIZATION'S NAME

OR

25b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

25c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

Instructions for UCC Financing Statement Additional Party (Form UCC1AP)

Use this form to continue adding additional Debtor or Secured Party names as needed when filing a UCC Financing Statement (Form UCC1).

19. Insert name of first Debtor shown on Financing Statement to which this Additional Party relates, exactly as shown in item 1 of Financing Statement.

20. Miscellaneous: Under certain circumstances, additional information not provided on Financing Statement may be required. Also, some states have non-uniform requirements. Use this space to provide such additional information or to comply with such requirements; otherwise, leave blank.

21-23. If this Additional Party adds additional Debtors, complete items 21, 22, and 23 in accordance with Instruction 1 of Financing Statement and give complete information for each additional Debtor. Be sure to complete either the organization's name or individual's name items.

24-25. If this Additional Party adds additional Secured Parties, complete items 24 and 25 in accordance with Instruction 3 of Financing Statement and give complete information for each additional Secured Party.

[redacted]

The filing of this Statement does not amend any UCC record. This Statement is for informational purposes only.

CORRECTION STATEMENT (Inaccurate or Wrongfully Filed Record Statement)

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF PERSON FILING THIS STATEMENT [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

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THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. Identification of the RECORD to which this CORRECTION STATEMENT relates.

1a. TYPE OF RECORD	1b. FILE # OF INITIAL FINANCING STATEMENT

2a. ☐ RECORD is inaccurate.
Provide the basis for the belief of the person identified in item 4 that the RECORD identified in item 1 is inaccurate and indicate the manner in which the person believes the RECORD should be amended to cure the inaccuracy.

2b. ☐ RECORD was wrongfully filed.
Provide the basis for the belief of the person identified in item 4 that the RECORD identified in item 1 was wrongfully filed.

3. If this CORRECTION STATEMENT relates to a RECORD filed [or recorded] in a filing office described in Section 9-501(a)(1) and this CORRECTION STATEMENT is filed in such a filing office, provide the date [and time] on which the INITIAL FINANCING STATEMENT identified in item 1b above was filed [or recorded].

3a. DATE	3b. TIME

4. NAME OF PERSON AUTHORIZING THE FILING OF THIS CORRECTION STATEMENT — The RECORD identified in item 1 must be indexed under this name.

4a. ORGANIZATION'S NAME

OR

4b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

Instructions for Correction Statement (Inaccurate or Wrongfully Filed Record Statement) **(Form UCC5)**

Please type or laser-print this form. Be sure it is completely legible. Read all Instructions, especially Instructions 1a and 1b; correct identification of the initial Record to which this Correction Statement relates is crucial. Follow Instructions completely.

Fill in form very carefully. If you have questions, consult your attorney. Filing office cannot give legal advice.

Do not insert anything in the open space in the upper portion of this form; it is reserved for filing office use.

When properly completed, send Filing Office Copy to filing office. If you want an acknowledgment, complete item B and, if filing in a filing office that returns an acknowledgment copy furnished by filer, you may also send Acknowledgment Copy; otherwise detach. Always detach Debtor and Secured Party Copies.

A. To assist filing offices that might wish to communicate with filer, filer may provide information in item A. This item is optional.

B. Complete item B if you want an acknowledgment sent to you. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form a carbon or other copy of this form for use as an acknowledgment copy.

General — You must always complete items 1 and 4 and either 2a or 2b. You may also be required to complete item 3.

1a. Indicate type of Record to which this Correction Statement relates (e.g., Financing Statement or Amendment). You may also insert additional information that you believe will assist in identifying the Record (e.g., the filing date and/or record number of the Record).

1b. **File number:** Enter file number of initial financing statement to which the Record that is the object of this Correction Statement relates. Enter only one file number.

2. If this Correction Statement is filed based on the filer's belief that the Record identified in item 1 is inaccurate, check box 2a, provide the basis for that belief, and indicate the manner in which the Record should be amended to cure the inaccuracy.

   If this Correction Statement is filed based on the filer's belief that the Record identified in item 1 was wrongfully filed, check box 2b and provide the basis for that belief.

3. If this Correction Statement relates to a Record filed [or recorded] in a filing office described in Section 9-501(a)(1) and this Correction Statement is filed in such a filing office, provide the date [and time] on which the Initial Financing Statement identified in item 1b above was filed [or recorded].

4. Always enter name of the person who authorized the filing of this Correction Statement. This name must be the same as the name under which the Record is indexed.