Implementation Guide and Commentary to the Revised Model Tribal Secured Transactions Act

Uniform Law Commission

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Center for Indian Country Development

FEDERAL RESERVE BANK *of* MINNEAPOLIS

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This 2017 Revised Implementation Guide and Commentary is a companion to the 2017 Revised Model Tribal Secured Transactions Act (Revised MTSTA) which updates the Model Tribal Secured Transactions Act (MTSTA) originally published in 2005 by the Uniform Law Commission (ULC). The ULC's Drafting Committee to Revise the Model Tribal Secured Transactions Act was chaired by Commissioner Gerald Bepko of Indiana. The reporter was Stephen L. Sepinuck, Professor and Associate Dean for Administration, Gonzaga University School of Law.

The original Act was drafted by the ULC's Committee on Liaison with Native American Tribes and Nations. The chair of that committee was Commissioner Timothy Berg of Arizona, and the final reporter for the Act was Commissioner Carl S. Bjerre of Oregon. Professor Maylinn Smith of the University of Montana Alexander Blewett III School of Law served as the original reporter for the Act.

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I. INTRODUCTION

This Implementation Guide and Commentary to the Revised Model Tribal Secured Transactions Act ("Revised MTSTA"), drafted by the Uniform Law Commission (ULC) and the Center for Indian Country Development at the Federal Reserve Bank of Minneapolis, was developed for four purposes: (1) for tribes that have previously adopted the 2005 Act, to assist their tribal councils or legislative bodies in the review, adaptation and enactment of the 2017 revisions to the MTSTA; (2) for other tribes, to assist their tribal councils or legislative bodies in the review, adaptation and enactment of the Revised MTSTA; (3) to assist lenders, businesses and other interested parties in understanding the provisions of the Revised MTSTA, including similarities and differences between the Revised MTSTA and corresponding provisions of the Uniform Commercial Code (UCC); and (4) to facilitate the use and understanding of the Revised MTSTA by tribal judges, legal counsel and individuals promoting economic development in Indian Country.

The Revised MTSTA 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 among the laws of different tribes, and among the laws of tribes and states. A material degree of consistency with UCC Article 9, the principles of which largely inform the secured transactions laws of many nations, will also help to facilitate international transactions as increasing numbers of tribes are becoming involved in global trade.

In order to accommodate the business, legal, and cultural environments of tribes, the Revised MTSTA differs from UCC Article 9 in a number of respects. However, the core principles, terminology, and rules of the Revised MTSTA 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, as well as within the jurisdictions of many other countries with which tribes may do business.

Section I of this Guide discusses secured transactions law generally and provides background about the ULC's MTSTA initiative. Section II contains a list of special considerations and recommendations for tribal councils, legislatures, tribal courts and practitioners, including section subheadings and numbering;

[1] All references to the various Articles and provisions of the Uniform Commercial Code refer to the 2010 Official Text unless otherwise specified.

the use of references to the Official Text and Commentary of the UCC and other state law; the role of tribal customs and traditions; and other tribal laws to be considered when adopting the Revised MTSTA. Section II also discusses special policy considerations for tribes to consider such as the treatment of cultural property. Section III contains special revision guidance for tribes that have enacted the MTSTA and desire to adopt the 2017 amendments to the Act. Section IV contains a section-by-section commentary that explains the Revised MTSTA's provisions. Section V discusses public filing systems which are an essential component of any secured transactions law, and options for tribes to consider. Section VI discusses the importance of making tribal laws and court decisions readily accessible to the public. Section VII contains suggestions for transitional rules, including options depending on the tribal jurisdiction's current laws. Finally, Section VIII contains guidance for joint sovereign filing system arrangements and a model joint sovereign filing system agreement.

II. BACKGROUND AND PURPOSE

Many American Indian tribes, tribal entities, tribal member-owned businesses and Native American consumers have encountered significant barriers when seeking loans or other financing from regulated financial institutions, such as commercial banks and credit unions. 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 or consumer transaction that would or might 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 lenders increase. When the risk associated with a transaction increases, the lender may either refuse to lend or may increase the interest rate or 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 transactions laws provide some of these rules. Secured transactions are agreements that involve using property, other than real estate, as collateral for loans or other financial obligations (*e.g.*, an obligation to pay a seller the purchase price of an asset bought on credit). The kinds of transactions that come within the scope of secured transactions law are as varied as bank loans for business start-ups or expansion, 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 transactions 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 transactions laws a priority in order to jumpstart their economies. More importantly, these nations are modeling their secured transactions laws and systems on those of their primary international trading partners in order to help eliminate barriers to doing business across borders.

Secured transactions laws in the United States generally fall within the jurisdiction of the states and not the federal government, and are largely encompassed in UCC Article 9, entitled *Secured Transactions*. The UCC was drafted in the 1940s by the ULC and the American Law Institute (ALI) primarily 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 has adopted the UCC, although most have modified the various articles in some 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, the state enactments are uniform with respect to the UCC's 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 have been increasingly interacting commercially with lenders and other businesses located outside of their respective jurisdictions. Like the in-transition and developing nations mentioned earlier, many tribes have been seeking ways to build sound legal and business infrastructure to accommodate their growing cross-border commercial activity. By the late 1990s, the ULC had recognized that there was 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 ULC charged the Committee on Liaison with Native American Tribes and Nations (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 UCC Article 9, few had amended their versions to incorporate the significant revisions made to Article 9 in 1999. It appeared that the majority of tribes had not adopted any type of secured transactions law or commercial code.

Against this background, the Committee began drafting a model tribal secured transaction law in 2001. Representatives of several tribes participated in the drafting efforts over the four-year process, including Sac and Fox Nation of Oklahoma, the Chitimacha Nation, the Oneida Nation, the Crow Nation, the Confederated Tribes of Warm Springs, the Chickasaw Nation, the Little Traverse Bay Band 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 would be, to the extent reasonable, consistent with the core principles of revised UCC Article 9. The Committee recognized, however, that concerns regarding tribal sovereignty and immunity as well as

tribal customs and traditions required modifications to the uniform version of 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 then-foreseeable future, and would add unneeded complexity if they were included in a tribal secured transactions law. The second objective, therefore, was to draft a shorter and less complex law that would facilitate the enactment process in the immediate future, but would allow for amendments as needed as a tribe's business environment developed. The third objective was to create a model tribal commercial law that would readily accommodate differing approaches to various issues and situations arising under the scope of this law, recognizing that the legal, business and cultural environments of tribes differ from region to region and from tribe to tribe. With the publication of the MTSTA in 2005, the Committee believed it had achieved these objectives, and that the MTSTA would meet the needs of many tribes. The Committee agreed that it would continue to monitor the uniform laws that formed the basis of the MTSTA and, if those laws were subsequently revised by the ULC, the Committee would review the revisions to determine their possible applicability and/or appropriateness for the MTSTA and adapt those changes accordingly.

Since the publication of the MTSTA, the Federal Reserve Bank of Minneapolis, supported by and in partnership with members of the ULC, other Federal Reserve banks, federal agencies, Native community development financial institutions ("CDFIs") and other organizations, has provided extensive outreach, training and technical assistance related to the Act to tribes, Native American organizations, tribal judges and legal counsel across the country. Many tribes have adopted the MTSTA over the last decade. It is difficult, however, to accurately assess just how many tribes have done so as there is no comprehensive, centralized location to seek up-to-date information about the enacted laws of all federally recognized tribes. Nevertheless, input from across Indian Country about the MTSTA and its efficacy has been encouraging.

In 2010, the ULC and ALI proposed amendments to UCC Article 9. Since then every state of the United States as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands has enacted those amendments. As a result, the ULC decided to review the 2010 revisions to Article 9 to determine which of those revisions should be incorporated into the MTSTA. In 2015, the ULC appointed a Drafting Committee to Revise the Model Tribal Secured Transactions Act ("Revision Committee"). Several members of and advisors to the original Committee participated on the Revision Committee, as well as a

number of other commissioners and advisors that include some of the most accomplished legal analysts of Article 9 in the country.

In addition to reviewing the ULC's 2010 revisions to Article 9 for possible inclusion in the MTSTA, the Revision Committee reviewed other provisions of the Act that have been the subject of questions or concerns, and revisited the issue of whether provisions originally excluded from the Act are now appropriate for inclusion (for example, agricultural liens). The Revised Act is the product of thoughtful deliberation, and the Revision Committee hopes this Guide will be useful both to tribal councils or legislatures in their consideration and adoption of the Revised Act, to tribal judiciaries for interpretive guidance, and to tribal members and others who engage in transactions subject to the Act.

III. SPECIAL CONSIDERATIONS

Adapting the Act to Accommodate Tribal Environments

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 Revised Model Tribal Secured Transactions Act Sections

The text of this Guide generally refers to the Revised Model Tribal Secured Transactions Act as "the Act." However, reference to specific sections of the Act will be cited using the acronym "MTSTA."

> ***Example***: Section 9-102 of the Model Tribal Secured Transactions Act will be cited as follows: **MTSTA 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 the numbering 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 Business Code section corresponding to MTSTA 9-102, for example, could be numbered as 21-9-102.
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> ***Example 2:*** Tribe's current Business Code is Part 205. The Act could be incorporated as Chapter 205.9. The Business Code section corresponding to MTSTA 9-102 could be numbered as Section 205.9.102.

Section Headings and Subsection Headings

The Committee recommends that an enacting Tribe retain the Act's section and subsection headings in its enacted version of the Act. The headings are generally consistent with the headings of UCC Article 9, and will assist readers in identifying the subject matter of each section and subsection, as well as corresponding sections and subsections in the UCC.

Example 1* (Section heading)*:

MTSTA 9-308 WHEN SECURITY INTEREST OR AGRICULTURAL LIEN IS PERFECTED; CONTINUITY OF PERFECTION

The Committee recommends that an enacting Tribe retain, if possible, the Act's subsection headings. These, too, can assist readers in locating relevant provisions.

***Example 2* (Subsection heading)**:

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

References to Official Text and Commentary of UCC

Each section of the MTSTA Commentary set forth in Section IV of this Guide provides the section numbers for the corresponding or complementary sections in the UCC for reference purposes. These cross-references can be useful because the Official Comment to many UCC sections contains explanations and illustrations that may be useful in understanding and interpreting corresponding sections in the Act.

The Committee has omitted from the MTSTA several provisions of UCC Article 9 that appeared to have no or limited applicability for Tribes, and it modified some provisions to reduce complexity, thus making the Act easier to use. If issues should arise that are not covered by the Act but would otherwise be covered by Article 9, 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 MTSTA sections notated as "*Reserved*."

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.

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 law that can be adopted by a Tribe whether or not it the Tribe has adopted a counterpart to the entire 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 IV of this Guide.

> ***Example:*** MTSTA 9-107, entitled "Notice: Knowledge," is substantially modeled after UCC 1-202. For additional assistance in interpreting MTSTA 9-107, the Official Comment 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 a portion thereof) that is not consistent with the current version of the UCC as promulgated by ULC, the Tribe should review its version to ensure that it is 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 or inconsistency.

Example 2: Tribe has a certificate of title law that requires vehicles owned by persons residing within the Tribe's jurisdiction to be registered with the Tribe and to carry Tribal license plates. If any security interest in such a vehicle is required by the Tribe's 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 MTSTA 9-311.

Tribal Customs and Traditions

In drafting the Act, the Committee 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 of tribal customs and traditions. The Committee recommends that in adopting, interpreting and applying the Act, due consideration be given to those customs and traditions. 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 1: 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 2: Tribe upholds the custom of give-aways on certain important events in which tribal members give away items or personal property. If property that might be given away is made of collateral subject to a security interest, the security agreement should provide that the donees take the property free of security interests and, if necessary, afford some other type of protection for the secured party for the loss of the collateral.

Addressing Future Amendments to Federal Law Incorporated into the Act

When referencing a federal statute, the Act gives a citation to the statute and then states "as amended." A Tribe should consider whether the quoted language constitutes an unlawful delegation of authority to Congress to change tribal law by amending federal law. If it is an unlawful delegation, the Tribe should

delete “as amended” wherever it appears in connection with a citation to a federal statute. Deleting "as amended" will make tribal law different than the changed federal law. The tribe should then consider whether that is preferable to the changed federal rule or whether tribal law should be amended to conform to the new federal rule.

“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 correspond as closely as feasible to that of the UCC.

IV. REVISION GUIDANCE FOR TRIBES THAT HAVE PREVIOUSLY ENACTED THE 2005 MTSTA

The work of the drafting committee to revise the MTSTA was launched in 2015. The committee framed its work to meet two broad objectives. First, since the MTSTA that was approved in 2005 was built upon UCC Article 9, it was agreed that the drafting of the revised MTSTA should begin with an examination of the 2010 amendments to Article 9 to consider their applicability to or desirability for inclusion in the MTSTA. Second, it was also agreed there should be a correlated effort to ensure that the revised MTSTA addresses issues and concerns that have arisen in the various adoption discussions over the last decade, and changes in tribal environments necessitating the inclusion of provisions previously omitted in the MTSTA. The drafting committee believes it has achieved these objectives in the Revised MTSTA, which was completed and published in 2017.

The amendment guidance set forth in this section is for tribes that have enacted the 2005 MTSTA. The amendments are set forth in three parts:

- **Agricultural liens**: This part addresses provisions to be added or amended to incorporate agricultural liens into the Act. For Tribes that do not wish to include agricultural liens in their Act, the provisions listed in this part should not be adopted. For those Tribes that wish to include agricultural liens in their Act, all of the provisions in this part should be adopted.

- **New Definitions**: This part sets forth new definitions that correspond to revised definitions in the 2010 UCC Article 9. It also includes a definition of "Tribe" that conforms to the federal legislative definition.

- **Other Amendments**: This part is a catch-all that includes a wide range of amendments that provide corrections, clarifications, additions and deletions that correspond to the 2010 UCC Article 9 revisions, resolve drafting issues in the 2005 Act, correct improvident omissions from the 2005 Act, or otherwise clarify existing provisions.

Amendments to Incorporate Agricultural Liens into the Act

Agricultural liens, which are a type of statutory lien, were omitted from the original MTSTA based on a determination at that time that few or no Tribes had agricultural lien laws. Over the last decade, some

Tribes have become increasingly sophisticated in their business dealings and have enacted or incorporated agricultural lien laws. Accordingly, the drafting committee has added agricultural liens to the Revised MTSTA. For Tribes that do not currently have an agricultural lien law there is no danger in nevertheless including the references to them in the adoption of the Revised MTSTA in their respective Acts. Such references would do no harm and would make revision of the Act unnecessary if a Tribe later enacts an agricultural lien law.

For Tribes that choose to incorporate agricultural liens into their existing Act, the following provisions should be adopted:

9-106(a)(6): Adds definition of agricultural lien. **NOTE:** current subsections (6) and (7) must be renumbered as (7) and (8), respectively.

9-106(a)(51)(B): Amends definition of "secured party" to include holder of agricultural lien. **NOTE** that subsections (B) through (E) must be re-lettered as (C) through (F).

9-110(a)(2): Clarifies that agricultural liens are included in the scope of the Act.

9-111(a) and (b): Clarifies that agricultural liens are not included in the landlord's and other liens exclusion.
9-301(2)(C): Clarifies which jurisdiction's law governs the perfection, effect of perfection or non-perfection, and the priority of an agricultural lien.

9-308: Adds agricultural lien to the section heading.
9-308(b): Addresses perfection of an agricultural lien.

9-310: Adds agricultural liens to the section heading.

9-310(a): Adds agricultural liens to the general rule of filing to perfect.

9-315(a) and (a)(1): Addresses continuation of an agricultural lien upon disposition.

9-317: Adds agricultural lien to the section heading.

9-317(a)(C), (c)(1), (c)(2) and (c)(3): Adds agricultural liens to rules pertaining to subordination and priority.

9-318(k): Includes agricultural liens in the priority rule for possessory liens.

9-402: Includes agricultural liens in the rule regarding non-liability of secured party in tort or contract.

9-501(a): Includes agricultural liens in provision addressing place to file.

9-502(a), and (h)(1) and (2): Addresses sufficiency of information to perfect an agricultural lien, and the continuing effectiveness of an agricultural lien financing statement upon disposition or name change. **NOTE**: The revisions add subsections (h)(1) and (h)(2) to the Act.

9-601(a)(1), (d)(1), and (e): Includes agricultural liens in rules addressing rights after default, judicial enforcement, and execution sales.

9-606: Adds a new provision addressing time of default for agricultural lien.

9-608(a): Includes agricultural liens in provision addressing rules for applying proceeds, surplus and deficiencies.

9-615(f): Includes agricultural liens in provision addressing receipt of cash proceeds in good faith and without knowledge by a junior secured party.

9-617(c)(2): Includes agricultural liens in provision clarifying rights of certain transferees.

9-620(d)(3): Includes agricultural liens in provision addressing rule regarding the effect of acceptance.

New Definitions

9-106(a)(45B): Adds definition of "publicly searchable record." The term is used in the definition of "registered organization" in MTSTA § 9-106(a)(49A).

9-106(a)(49A): Adds definition of "registered organization." The term is used in MTSTA §§ 9-316(d) and (e).
9-106(a)(57B): Adds definition of "supporting obligation." The term is used in MTSTA §§ 9-202(d) and 9-302(d).

9-106(a)(59A): Adds definition of "tribe" with reference to legislative definition of "federally recognized tribe." The term is use throughout the MTSTA.

Other Amendments

9-106(a)(11): Clarifies definition of "certificate of title."

9-106(a)(22A): Amends definition of "control" by replacing "purchaser" with "secured party."

9-106(a)(38): Replaces section sign with the word "Section."

9-106(57A): Edits the word "state."

9-113: Corrects prior version by clarifying that both performance and enforcement are considered with regard to a party's obligation of good faith. This is consistent with the approach taken by UCC § 1-304.

9-115(h): New subsection that adopts the rule of UCC § 9-103(h), thereby authorizing tribal courts to fashion an appropriate rule for the treatment of purchase-money security interests in the context of consumer-goods transactions.

9-116(b): New subsection that adopts a simplified version of UCC § 9-108(b), thereby clarifying what constitutes reasonable identification of collateral. **NOTE:** subsequent subsections should be re-lettered respectively.

9-117(a) and (b)(3): Edits the words "tribe" and "state."

9-201(b)(1): Edits the word "state."

9-202(d): Adds language that adopts the rule of UCC § 9-203(f), which provides that attachment of a security interest in collateral is also attachment of a security interest in a supporting obligation for that collateral.

9-206: New section that adopts a clarified version of UCC § 9-318 dealing with rights to payment that are sold.

9-308(d): New subsection that adopts the rule of UCC § 9-308(d) that perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral.

9-311(a)(2) and (3): Technical amendments that were part of the 2010 amendments to UCC Article 9 regarding property covered by a certificate–of-title statute.

9-313(b): Edits the word "state."
9-316(d)(3)(B): Deletes definition of "registered organization." The definition has been moved to § 9-106(a).

9-316(f): New subsection that adopts a modified version of UCC § 9-316(h), providing a four-month grace period to perfect a security interest in collateral acquired after a change in governing law.

9-501(g): Deletes as unnecessary the express authorization of the tribal legislative body to delegate administration of the filing system to the office of another jurisdiction. A legislative body's authority to delegate is unlikely to be affected by the legislature's own enactments.

9-502(b): Removes the filing office's authority to require that specific information pertaining to an organization be included in a financing statement. *Cf.* UCC § 9-516(b).

9-502(f): Deletes "or secured party of record" because that term is not used in the MTSTA**.**

9-502(g)(1) and (2): Adds language clarifying who is authorized to file a financing, termination or amendment statement.

9-502(h)(1): Amends the subsection heading and reorders its provisions to more closely resemble UCC § 9-507.

9-502(h)(2): Renumbers this section, and puts in the passive voice the rule about the effectiveness of a financing statement after a change in the debtor's name. This change allows the rule to apply when the debtor's name changes even though the debtor might not have done anything to effect that change. *Cf.* UCC § 9-507(c).

9-503: New section that addresses inaccurate or wrongfully filed records. *Cf.* UCC § 9-518.

9-619(a): Replaces "authenticated" with "signed," and thereby conforms this provision to other parts of the MTSTA.

9-620(c)(1)and (2): To protect debtors, adds a rule requiring that the debtor's consent to an acceptance of collateral in satisfaction of the secured obligation, if on a form provided by the secured party, be separately signed; adds the word "and" to clarify the conditions in subsections (1), (2) and (3) must all be met.

9-620(f): New subsection that adopts the consumer-protection rule of UCC § 9-620(g) that a secured party may not accept collateral in partial satisfaction of an obligation in a consumer transaction.

9-626(a)(3), (a)(4) and (b): Creates an absolute bar to the recovery of a deficiency if the secured party fails to comply with specified rules in a consumer transaction.

V. COMMENTARY

This section provides explanatory 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

Comment to MTSTA § 9-101 SHORT TITLE

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

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

Comment to MTSTA § 9-102 NO WAIVER OF SOVEREIGN IMMUNITY

MTSTA 9-102 makes clear that the Tribe's sovereign immunity from suit is not waived with respect to any transaction or provision of a transaction that is subject to the Act without an express and unequivocal waiver of such immunity by the authorized governing body of the Tribe and appropriately recorded in writing.

Comment to MTSTA § 9-103 PURPOSE

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, MTSTA 9-103 states that the Act should be interpreted and applied in a manner that best supports this purpose.

Comment to MTSTA
§ 9-104 NO APPLICATION TO PROPERTY NOT ALIENABLE

MTSTA 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 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. Similarly, to the extent that federal law restricts or prevents transfer of cultural property, the Act does not apply.

Comment to MTSTA
§ 9-105 [RESERVED]

UCC 9-105 deals with control of electronic chattel paper, such as an electronic version of a lease of personal property or an electronic version of a contract that indicates the sale of goods on credit with the seller retaining a security interest in the goods. 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.

Comment to MTSTA
§ 9-106 GENERAL DEFINITIONS

The following comments to the definitions set forth in MTSTA 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 person that holds an agricultural lien, 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 secured party, that may have an interest in a secured transaction. A **debtor** is typically the party that provides the collateral. The term includes any party with an ownership or other non-lien property interest in the collateral, such as a joint tenant. The debtor may or may not be the person obligated on the transaction for which the collateral serves as security. The term **debtor** includes a consignee as well as a seller of accounts, chattel paper, payment intangibles or promissory notes. It also includes a transferee that acquires a property interest in the collateral after the creation of the security interest. An **obligor** is the party that owes payment or performance of the secured obligation, typically the borrower, and may or may not be the debtor. A **secondary obligor** is an obligor that is not principally liable for the secured obligation, 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 an "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 an "obligor," B is the "debtor," and C is both an "obligor" and a "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 an "obligor." C is an "obligor" and a "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 of the definition 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 (a term that includes 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.

"**Registered Organization**." A business entity, such as a corporation, limited partnership, or limited liability company, that is created under the law of the United States or of a single Tribe or state by the filing of a publicly searchable record (e.g., articles of incorporation for a corporation, certificate of formation for a limited liability company). A general partnership is not a registered organization because it is formed by the agreement of the partners rather than by the filing of a publicly searchable record.

"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 MTSTA § 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, or provides for the creation of, a security interest in the debtor's designated property in favor of the secured party. Although there are limited formal requirements, unless the secured party takes possession of the collateral, the agreement must be signed 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 held for sale in a store would likely be *inventory* but after purchase by a professional hair stylist for business use would likely be *equipment* and after purchase by a consumer would likely be *consumer goods.* Second, sometimes the use of goods will be "mixed." For example, a vehicle that is used both for business and personal use could be either equipment or consumer goods. 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."

"Consumer," "Consumer Goods," "Consumer Transaction," "Consumer Goods Transaction."
A **consumer** is an individual 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 an individual 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** because 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 MTSTA §§ 9-203(b)(1), 9-612(b)(i), 9-625(c)(2), 9-626(b), and 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 also uses the oranges to produce and sell orange marmalade, the oranges cease to be farm products after they undergo the marmalade manufacturing process. At this point, the goods become inventory. If the oranges are purchased from the fruit grower by an 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 goods are determined to be a fixture will determine how and where to file a financing statement to perfect a security interest in the fixture, 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.

"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 goods that are attached to or united with other goods yet retain their individual identity and can be removed from the other goods without causing damage to the other goods. For example, when a hard drive is installed in a computer the hard drive becomes an accession to the computer and the computer becomes an accession to the hard drive. To draw a rough analogy, accessions are to goods what fixtures are to real property.

"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 MTSTA § 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 MTSTA § 9-301(3) (regarding the law governing perfection and priority) and MTSTA § 9-502(a) (regarding filing requirements). The terms "at the wellhead" or "at the minehead" referenced in MTSTA § 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 MTSTA § 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. MTSTA § 9-106(a)(2)(A) lists the types of rights to payment that fall within the definition of *account*. MTSTA § 9-106(a)(2)(B) includes in the definition a special subset of accounts called health-care-insurance receivables. MTSTA § 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*, the purchaser of the *account* must normally file a financing statement in order to perfect its interest. If the payment right is a payment intangible or promissory note, a buyer would not need to file a financing statement (although a secured party that was not a buyer would need to file as to a payment intangible and either file or take possession as to a promissory note). *See* MTSTA § 9-309(3).

"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 franchise agreement is a general intangible. If either the franchisor or the franchisee used its franchise agreements rights as collateral, the other party to 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 MTSTA § 9-403 and MTSTA § 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. There is also an automatic perfection rule for a security interest created when a health-care insurance receivable is assigned to a provider of health-care services or goods (*e.g.*, when a doctor takes an assignment of a patient's rights under a private health-insurance policy). *See* MTSTA § 9-309(4).

"Chattel Paper." Chattel paper is a record or group of records that include a right to payment of a monetary obligation coupled with either a security interest in or lease of specific goods. For example, a buyer purchases a home appliance from a seller on an installment plan, and grants the seller a security interest in the appliance to secure the unpaid portion of the purchase price. This transaction is effected by one record which combines both a right to payment and a security interest. 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 and promissory notes. What constitutes a nonnegotiable instrument is not so clear, but nonnegotiable promissory notes and certificates of deposit normally qualify as instruments.

"Promissory Note." A promissory note is an instrument that evidences a promise to pay, *e.g.*, a loan document. The Act governs security interests in all instruments and sales of promissory notes, but not sales of 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 rights often have value and can be used as collateral. Software (MTSTA § 9-106(a)(57) and payment intangibles (MTSTA § 9-106(a)(42) are subsets of general intangibles.

"Payment Intangible." Payment intangibles are a subset of general intangibles where the principal 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.

"Supporting Obligation." A supporting obligation is an obligation to answer for the debt of another. It includes a guaranty and the duties of the issuer of a letter of credit.

Definitions related to Filing

"Financing Statement." A financing statement is a form that a creditor completes and then files in an appropriate public filing office to provide notice to other interested parties about a security interest in the personal property of a debtor. The filing of a financing statement is the method to *perfect* (make the interest effective against most 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.

"Continuation Statement." The effectiveness of a filed financing statement is limited to 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 goods that have 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.

"Information Statement." On occasion, someone who is not authorized to do so files a financing statement, an amendment to a financing statement, or a termination statement. Such an unauthorized filing has no legal effect but it nevertheless can render the information in the public record incorrect or confusing. To help address this problem and alert users of the filing system to the unauthorized filing – or to filings that contain an error – the person adversely affected may file an information statement.

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.

"Publicly Searchable Record." A record that is available for public inspection and is, in most cases, filed with the United States, a tribe, or a state. The term is used in the definition of "registered organization" to distinguish registered organizations from other types of entities. The most common

examples of publicly searchable records are the articles of incorporation of a corporation and the certificate of formation of a limited liability company.

"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.

"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

"Agricultural Lien." A lien on farm products created by a statute other than the MTSTA to secure an obligation incurred in producing those farm products. For example, a tribe might have a law giving a landlord a lien on crops for unpaid rent. The Act covers the perfection and priority of an agricultural lien even though the lien is not created by agreement, and thus is not a "security interest" covered by the MTSTA. Once the lien is created under the other law, it receives essentially the same treatment as a security interest created under the MTSTA.

"Consignment," "Consignee," and "Consignor." A **consignment** exists where the owner of goods (the **consignor**) delivers the goods to 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.

Comment to MTSTA
§ 9-107 NOTICE; KNOWLEDGE

Notice, and when notice is considered to have occurred, is important for many purposes under the Act. For example, under MTSTA § 9-611, a secured party must give *notice* to a debtor before selling or otherwise disposing of collateral. Similarly, under MTSTA § 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 a person "notifies" or "gives notice or notification" by taking such steps as may be reasonably required to inform the other person whether or not that person actually learns of the information, and thus actual receipt is not necessary unless receipt is specifically required by the Act. The provision contains special rules that define when receipt occurs. See UCC § 1-202.

Comment to MTSTA
§ 9-108 VALUE

When and if "value" is given is important because value is one of three prerequisites for the creation of an enforceable security interest. The three prerequisites, in general, are: (1) a security agreement (which must be signed and contain a description of the collateral unless the secured party is in possession or control of the collateral), (2) *value* given by the secured party (creditor), and (3) the debtor has rights in the collateral, typically an ownership interest (or the power to transfer rights to a third person). When these three conditions are met, the security interest is deemed to have "attached," which means it is enforceable.

MTSTA § 9-108 describes four situations in which a person is deemed to have *given value* in exchange for a security interest in collateral:

(1) Value is given when 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 services (or a promise to provide money, goods, or services), that under contract law would make a contract valid or enforceable. See UCC § 1-204.

Comment to MTSTA
§ 9-109 LEASE DISTINGUISHED FROM SECURITY INTEREST

A transaction in the form of a lease of goods is, sometimes, actually a sale of the goods in disguise; the "lessor" is in fact a "seller" that retains a security interest in the goods that are the subject of the transaction. The distinction is important because the rights and remedies of both the parties to the transaction and third parties will differ depending on whether a transaction is a true lease or a sale with a security interest. MTSTA § 9-109 provides guidance on how to draw the distinction. The basic rule, implied but not expressly stated in MTSTA § 9-109(a), is whether the person referred to as the "lessor" in the transaction-related documents retains a meaningful residual economic interest in the goods. In other words, if there is no reasonable chance that the lessor will get the goods back when they still have economic value, then the transaction is really a sale with a retained security interest, not a lease. MTSTA § 9-109(b) then provides some specific rules – creating definitive result for several specific circumstances. A transaction is a sale with a security interest (and, 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) the lease term exceeds the economic life of the goods or the lessee is obligated to buy the goods at the end of the lease term. See UCC § 1-203.

Comment to MTSTA
§ 9-110 GENERAL SCOPE

Under § 9-110(a)(1) through (4), the MTSTA applies to: a transaction that creates a security interest in personal property or fixtures by contract; (2) an agricultural lien; (3) a sale of accounts, chattel paper, payment intangibles, or promissory notes; and (4) a consignment. In each instance, a "security interest" is created in favor of a "secured party," a term that includes a buyer of accounts, etc., and a consignor. See § 9-106(a)(54) (security interest) and (51) (secured party).

§ 9-110(a)(5) provides that the MTSTA also governs "any other commercial activities…to the extent those commercial activities are implicated in clauses (1), (2) or (3)." This is a reference to other types of commercial activities governed by a law of the tribe other than the MTSTA that have the effect of creating the equivalent of a security interest arising under the MTSTA. For example, under Article 2 of the Uniform Commercial Code (UCC), which is the law in every state except Louisiana and has been enacted by some tribes, a buyer of goods that rejects the goods because they do not conform to the contract of sale has a security interest in them as collateral if the buyer has prepaid all or part of the purchase price or has incurred expenses in their receipt, inspection, storage, or the like. See UCC § 2-711(3). Similarly, under Article 7 of the UCC, enacted in every state, a warehouse that stores goods pursuant to a warehouse receipt has a security interest in the goods as collateral for unpaid storage charges. See UCC § 7-209(a).

If a security-interest-equivalent arises from a commercial activity conducted under other tribal law, the security interest aspect of the transaction is governed, at least to some extent, by the MTSTA, while the remainder of the transaction is governed by the other law. For example, if a tribal law other than the MTSTA creates the equivalent of a security interest in favor of a rejecting buyer that is similar to the security interest created under Article 2 of the UCC and described above, the rules of the MTSTA on creation of the security interest (attachment) would not apply because it arises and becomes enforceable under the other law, but the rules of the MTSTA on perfecting the security interest and on the procedures to be used to enforce it would be applicable if they make sense in the context of the transaction and are not preempted by the other law. In this regard, note that the term "secured party" includes "a person that holds a security interest arising under other applicable law." See UCC § 9-106(a)(51)(E).

Comment to MTSTA
§ 9-111 EXCLUDED TRANSACTIONS

The scope of the Act is deliberately broad (see MTSTA § 9-110), so that all transactions that create a security interest in personal property are included, as well as certain sales of personal property if it makes sense to subject those transactions to the Act's perfection and priority rules. To make an inclusive list would risk an omission. Rather, the purpose of MTSTA § 9-111 is to narrow that scope by describing transactions that clearly should not be covered by the MTSTA and are thus excluded. These include, for example, liens other than agricultural liens created by statute 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).

Comment to MTSTA
§ 9-112 ADMINISTRATION OF ACT; AUTHORITY TO PROMULGATE REGULATIONS

Technical details of some components of the Act are best left to regulation, and MTSTA § 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). Moreover, a Tribe that enacts the Act may not have the guidance of decisional law like states that have enacted 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.

Comment to MTSTA
§ 9-113 OBLIGATION OF GOOD FAITH

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 a breach of the agreement, leading to an award of damages or other appropriate remedy. See UCC §§ 1-304, 1-201(b)(20).

Comment to MTSTA
§ 9-114 COURSE OF PERFOMANCE; COURSE OF DEALING; AND USAGE OF TRADE

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 the transaction, the parties can reasonably expect in their course of dealing or performance, and any trade usage, custom or tradition will be observed even if they do not explicitly state as such in their agreement. MTSTA § 9-114 recognizes and provides for this, unless the parties have expressly agreed that the course of dealing, course of performance, or trade usage does not apply. MTSTA § 9-114 also sets up a priority as to which of these implicit parts of the parties' agreement controls if more than one exists. See UCC § 1-303.

Comment to MTSTA
§ 9-115 PURCHASE-MONEY SECURITY INTEREST

A "purchase-money security interest" is one granted to a seller to secure the purchase price of goods or to a third-party who has loaned money to enable a buyer to purchase goods. In both instances, the goods being purchased are the collateral for the obligation to pay the price or repay the loan. Purchase-money security interests often have a higher priority, see MTSTA § 9-318(h), and in some cases are subject to automatic perfection, see MTSTA § 9-309(1). Questions occasionally arise about whether the purchase-money status of a security interest is lost if other collateral secures the purchase-money obligation or the purchase-money collateral secures other indebtedness MTSTA § 9-115 answers those questions when the transaction is not a consumer transaction. It also provides guidance on how payments are to be allocated between the purchase-money obligation and other indebtedness secured by the purchase-money collateral.

> ***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. MTSTA § 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.

MTSTA § 9-115 does not answer these questions in connection with a consumer transaction, and instead leaves the matter for resolution by the courts.

Comment to MTSTA
§ 9-116 SUFFICIENCY OF DESCRIPTION

To have a valid security interest, a security agreement must (unless the secured party is in possession or control of the collateral) describe the collateral so that it can be distinguished from other property in which there is no security interest. A financing statement must also describe the collateral so that a person examining public records is put on notice that the described assets might be subject to a security interest. This section details the requirements for those descriptions. A description need not be specific (*e.g.*, a serial number for goods is not required), but it must reasonably identify the collateral. The reasonableness of a description is affected by the purpose of the document in which it appears. A description in a security agreement is intended to allow the parties to identify what is and what is not collateral, perhaps after making reference to other objectively verifiable information. In contrast, a description in a financing statement is intended to give a searcher inquiry notice about what property might be encumbered. Consequently, a description by one or more of the Article 9 types of collateral – such as "inventory" or "accounts" is sufficient in both a security agreement and financing statement. A more generic description, such as "all assets of the debtor" is sufficient in a financing statement but not in a security agreement. A description such as "some inventory" would be also be sufficient in a financing statement but would not be sufficient in a security agreement unless accompanied by some other language that can be used to distinguish the covered inventory from the noncovered inventory. See UCC § 9-108.

Comment to MTSTA
§ 9-117 PARTIES' POWER TO CHOOSE APPLICABLE LAW

Suppose a transaction involves a loan to a Tribe or tribal entity by a state chartered bank. In this circumstance, without an agreement as to what law governs, 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 select the law that governs the transaction as a matter of contract. MTSTA § 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. However, because perfection and priority affect the rights of third parties, a choice of law made in the agreement between the debtor and the secured party has no effect on perfection or priority. If the Act would otherwise apply to a consumer transaction, the parties may not opt out of its application by agreement. See UCC § 1-301.

PART 2. Effectiveness, Attachment, and Rights of Parties

Comment to MTSTA
§ 9-201 GENERAL EFFECTIVENESS OF SECURITY AGREEMENT

MTSTA § 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.

MTSTA § 9-201(b) recognizes the Tribe or other law may provide certain consumer protections to its members in addition to those in the Act. MTSTA § 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).

Comment to MTSTA
§ 9-202 ATTACHMENT AND ENFORCEABILITY OF SECURITY INTEREST; PROCEEDS; FORMAL REQUISITES

MTSTA § 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 of 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).

MTSTA § 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 signature and description requirements. 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, a consignee of goods has the power to create a security interest in the consigned goods even though as between the consignee and the consignor, it is the consignor who has property rights in the goods.

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.

MTSTA § 9-202(c) creates an exception to the requirements set forth in MTSTA § 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).

MTSTA § 9-202(d) provides that the attachment of a security interest in collateral also gives the secured party the right to any identifiable proceeds of the collateral. Thus, for example, if the collateral is sold, the security interest in the collateral will automatically attach to whatever property the debtor receives in exchange, provided the MTSTA applies to such property. See UCC §§ 9-203(f), 9-315(a)(2). In addition,

subsection (d) provides that a security interest in collateral automatically attaches to any supporting obligation for such collateral. Thus, for example, if a security interest attaches to a promissory note or account, and either at that time or subsequently the note or account is supported by a guaranty, the security interest automatically attaches to the guaranty.

MTSTA § 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 obligation represented by the promissory note. Seller then borrows money from Bank and grants Bank a security interest in the promissory note. The attachment of the security interest in the promissory note is also an attachment of the security interest in the mortgage on Blackacre.

MTSTA § 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).

Comment to MTSTA
§ 9-203 AFTER-ACQUIRED COLLATERAL; FUTURE ADVANCES

A debtor cannot give a security interest in property in which the debtor does not have a property interest or the power to convey a property interest. However, to facilitate commercial transactions, MTSTA § 9-203(a) recognizes that a debtor can convey a security interest in future, or "after acquired," property. If a security agreement provides that a debtor's existing and after-acquired property will serve as security for an obligation and attachment occurs with regard to the existing property, the security interest in the after-acquired property attaches as soon as the debtor acquires rights in that property. The ability to have a single security agreement cover existing and after-acquired property is especially important in inventory and accounts financing. It obviates the need for the parties to enter into a new security agreement every time the debtor acquires new inventory or accounts, which for some businesses occurs on a daily basis. See UCC § 9-204(a).

MTSTA § 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. MTSTA 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 description of existing collateral) that states "all consumer goods" is ineffective as a matter of policy. See MTSTA § 9-116(c)(2).

Similarly, MTSTA § 9-203(b)(2) provides, as a matter of policy, that a security interest will not attach under an after-acquired clause to a future commercial tort claim that the debtor acquires. See UCC § 9-204(b)(2). Note, however, a security interest will attach to a future tort commercial claim to the extent that the claim is identifiable proceeds of other collateral. See MTSTA §§ 9-106(a)(44)(D), 9-315(a)(2).

MTSTA § 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 MTSTA § 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 both the remaining original collateral and the "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.

Comment to MTSTA
§ 9-204 RIGHTS AND DUTIES WHEN COLLATERAL IS IN SECURED PARTY'S POSSESSION OR CONTROL

MTSTA § 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. This 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), (d).

Comment to MTSTA
§ 9-205 ADDITIONAL DUTIES OF CERTAIN SECURED PARTIES

MTSTA § 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 an 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), (b)(4).

Comment to MTSTA
§ 9-206 NO INTEREST RETAINED IN RIGHT TO PAYMENT THAT IS SOLD; RETAINED POWER OF SELLER OF ACCOUNT OR CHATTEL PAPER

MTSTA § 9-206 contains rules that relate to the fact that the Act applies to sales of accounts and chattel paper, *see* MTSTA § 9-110(a)(3). Subsection (a) states the basic property rule that, after selling accounts or chattel paper, the seller (*i.e.*, the debtor for purposes of the MTSTA) retains no interest in the sold assets. However, subsection (b) provides that, despite having no interest in the property sold, the debtor has the power to transfer rights in such property: (i) to anyone, if the buyer has not perfected its interest; or (ii) to a person who prior to the sale had filed a financing statement covering the property sold. This rule supports the requirement that the buyer perfect its interest and ensures that the filing system plays a central role in determining priority.

Comment to MTSTA
§ 9-207 REQUEST FOR ACCOUNTING; REQUST REGARDING LIST OF COLLATERAL OR STATEMENT OF ACCOUNT

MTSTA § 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).

MTSTA § 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 MTSTA § 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), (e).

PART 3. Perfection and Priority
Subpart 1. Law Governing Perfection and Priority

Comment to MTSTA
§ 9-301 LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS

MTSTA § 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 what law governs enforcement or other aspects of a secured transaction, such as attachment.

MTSTA § 9-301 must be read in conjunction with MTSTA § 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 MTSTA § 9-301(1) is consistent with this approach; the Act 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.

MTSTA § 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 MTSTA § 9-301(2) and (3).

See UCC § 9-301.

MTSTA § 9-302 [RESERVED]

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Comment to MTSTA
§ 9-303 LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN GOODS COVERED BY A CERTIFICATE OF TITLE

Certain goods, most commonly automobiles but often other assets such as boats and manufactured 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 MTSTA § 9-106(a)(11). The mechanisms by which perfection is achieved under these types of laws are discussed in the comment to MTSTA § 9-311.

MTSTA § 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 law, another Tribe that has adopted such a law, or a state of the United States.

MTSTA § 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 until the secured party's interest is indicated on a certificate. These distinctions are irrelevant for purposes of MTSTA § 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 MTSTA § 9-316(b), (c).

The following examples illustrate the effect of MTSTA § 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. Upon submission of the application for a new certificate, the car ceases to be covered by Jurisdiction A's certificate. See MTSTA § 9-303(b). Accordingly, the law that determines perfection, the effect of perfection or nonperfection, and priority is now Jurisdiction C. See MTSTA § 9-303(c).

See UCC § 9-303.

MTSTA § 9-304 through 9-307 [RESERVED]

Subpart 2. Perfection

Comment to MTSTA
§ 9-308 WHEN SECURITY INTEREST OR AGRICULTURAL LIEN IS PERFECTED; CONTINUITY OF PERFECTION

MTSTA § 9-308 sets out basic rules for determining when a security interest is perfected. Except when perfection occurs automatically upon attachment under MTSTA § 9-309, perfection requires not only attachment (see MTSTA § 9-202(a) and (b)) but also an additional step designed to give public notice of the security interest. The additional steps are set forth in MTSTA § 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. MTSTA § 9-308(a) provides that, in such instances, perfection occurs upon attachment.

MTSTA § 9-308(b) deals with perfection of agricultural liens and basically requires compliance with this Act to perfect. In essence, that means that the lienholder must file a financing statement to perfect an agricultural lien just as it must file a financing statement to perfect a security interest.
See MTSTA § 9-310(a).

MTSTA § 9-308(c) provides that a secured party may shift among methods of perfection. As long as there is not an intermediate period when the security interest or agricultural lien 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 MTSTA § 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 the secured party allows the 20 days to lapse before taking possession or filing, the security interest will be deemed perfected only as of the time of possession or filing.

MTSTA § 9-308(d) provides that a security interest in a supporting obligation is automatically perfected if the security interest in the underlying collateral is perfected. This rule should be read in connection with MTSTA § 9-202(d), which provides that attachment of a security interest in collateral also results in attachment of a security interest in any supporting obligation for the collateral. For example, if a secured party takes a security interest in a promissory note that is signed by a corporation and backed by the personal guarantee of the principal stockholder, attachment of the security interest to the promissory note constitutes attachment of a security interest to the guaranty, and perfection of the security interest in the promissory notes constitutes perfection of a security interest in the guaranty.

MTSTA § 9-308(e) 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 of a security interest in 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 MTSTA § 9-202(e), which provides that attachment of a security interest in a right to payment or performance also causes attachment in a security interest, mortgage, or other lien. The following example illustrates the application of MTSTA § 9-308(e):

> ***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. MTSTA § 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 MTSTA § 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.

MTSTA § 9-308(f) functions in a manner similar to subsections (d) and (e); 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.

Comment to MTSTA
§ 9-309 SECURITY INTEREST PERFECTED UPON ATTACHMENT

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. MTSTA § 9-309 identifies these transactions. 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 any public notice.

A purchase-money security interest in most consumer goods is automatically perfected. This situation is the only permanent exception to the general filing requirement when goods are the original collateral and 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 MTSTA

§ 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 MTSTA § 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 MTSTA § 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 MTSTA § 9-106(a)(33). The category is a subset of "account," (see MTSTA § 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 MTSTA § 9-316(a), (b).

See UCC § 9-309.

Comment to MTSTA
§ 9-310 WHEN FILING REQUIRED TO PERFECT SECURITY INTEREST OR AGRICULTURAL LIEN; SECURITY INTERESTS AND AGRICULTURAL LIENS TO WHICH FILING PROVISIONS DO NOT APPLY

MTSTA § 9-310(a) states the general rule that perfection of an attached security interest or effective agricultural lien occurs upon the filing of a financing statement. Filing is required for perfection unless another method of perfection is specified in the Act (MTSTA § 9-310(b) specifies certain other methods for perfection). Filing is not necessary in the circumstances described in MTSTA § 9-310(b). Each of these exceptions to the filing requirement contains a cross-reference to another provision of the Act. Thus, MTSTA § 9-310(b) creates the exceptions but defers to the other provisions for the details.

MTSTA § 9-310(c) provides that if a perfected security interest or agricultural lien 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 or agricultural lien perfected by filing but also to the assignment of a security interest or agricultural lien 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 MTSTA § 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.

Comment to MTSTA
§ 9-311 PERFECTION OF SECURITY INTERESTS IN PROPERTY SUBJECT TO CERTAIN STATUTES, REGULATIONS, AND TREATIES

MTSTA § 9-311 identifies situations in which perfection must be accomplished by compliance with the provisions of a law other than the Act. MTSTA § 9-311(a) through (c) must be read together to understand their effect. In the circumstances listed in subsection (a), the filing of a financing statement is neither necessary nor effective to perfect a security interest. However, MTSTA § 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 be perfected *only* by compliance with the other law. MTSTA § 9-311(b) also provides that a security interest perfected under the other law remains perfected even though there has been a change in the use or a transfer of possession of the collateral. MTSTA § 9-311(c) provides that duration and renewal of perfection are also governed by the other law.

MTSTA § 9-311(b) and (c) are subject to two exceptions. MTSTA § 9-311(d) provides that when collateral subject to a law designated in MTSTA § 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 MTSTA § 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, MTSTA § 9-313(b) and MTSTA § 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 MTSTA § 9-313.

The types of laws to which MTSTA § 9-311 apply are set forth in MTSTA § 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.

MTSTA § 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. Great care must be taken when considering the effects of a tribal statute authorizing the issuance of certificates of title. If that statute does not explicitly provide for the indication of a security interest on the certificate and provide further that following the statute's procedures for having a security interest so indicated gives the security interest priority over the rights of a lien creditor, there is a risk that a court, particularly a bankruptcy court, might set the security interest aside. A tribe that wishes to consider new legislation in this regard might consider the Uniform Certificate of Title Act as appropriately adapted for tribal needs. See http://uniformlaws.org/Act.aspx?title=Certificate%20of%20Title%20Act. Another possibility is for a tribe to make an arrangement with a state under which indication of a security interest on a tribally issued certificate of title perfects a security interest in a vehicle in much the same way as the filing of a financing statement. The Chickasaw tribe in Oklahoma has such an arrangement and for further detail that tribe should be contacted.

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

See UCC 9-311.

Comment to MTSTA
§ 9-312 PERFECTION OF SECURITY INTERESTS IN CHATTEL PAPER, DOCUMENTS, GOODS COVERED BY DOCUMENTS, INSTRUMENTS, AND MONEY; PERFECTION BY PERMISSIVE FILING; TEMPORARY PERFECTON WITHOUT FILING OR TRANSFER OF POSSESSION

MTSTA § 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.

MTSTA § 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 MTSTA § 9-318. The risk from purchasers can be eliminated if the secured party perfects by taking possession of the collateral under MTSTA § 9-313. The same risk from purchasers is present if a secured party is perfected under the temporary automatic perfection rules of MTSTA § 9-312(e), (f).

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

MTSTA § 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, MTSTA § 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 MTSTA § 9-312(a), by possession as provided in MTSTA § 9-313, or by temporary automatic perfection as provided in MTSTA § 9-312(e) and (f). A security interest may also be perfected as to the goods themselves without reference to the documents, but MTSTA § 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, MTSTA § 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.

MTSTA § 9-312(e) and (f) provide for 20-day periods of temporary, automatic perfection. MTSTA 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 MTSTA § 9-308(b).

MTSTA § 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.

MTSTA § 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 MTSTA § 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.

Comment to MTSTA
§ 9-313 WHEN POSSESSION BY SECURED PARTY PERFECTS SECURITY INTEREST WITHOUT FILING

MTSTA 9-313 governs perfection by possession. MTSTA § 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 MTSTA § 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 MTSTA § 9-318.

MTSTA § 9-313(b) deals with a limited circumstance involving goods subject to a certificate-of-title statute and must be read in conjunction with MTSTA § 9-316(c). As a rule, compliance with such a statute is the only appropriate method of perfection. See Comment to MTSTA § 9-311. Under MTSTA § 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 a purchaser of the goods for value unless within four months the secured party either perfects pursuant to the certificate-of-title statute of the second jurisdiction or takes possession as provided in MTSTA § 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. MTSTA § 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 MTSTA § 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 MTSTA § 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 MTSTA § 9-312), a secured party may perfect by obtaining "constructive possession." Under MTSTA § 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.

Under MTSTA § 9-313(e), a bailee is not required to acknowledge that it holds collateral for a secured party's benefit and, under MTSTA § 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.

Comment to MTSTA
§ 9-314 PERFECTION BY CONTROL

MTSTA § 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 MTSTA § 9-106(a)(22A) (certificated security), MTSTA § 9-106(22B) (investment security), and MTSTA § 9-106(a)(22C) (mutual fund shares not in an investment account). See UCC § 9-314.

Comment to MTSTA
§ 9-315 SECURED PARTY'S RIGHTS ON DISPOSITION OF COLLATERAL AND IN PROCEEDS

MTSTA § 9-315(a) states the basic rule that a security interest or agricultural lien 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 has authorized the disposition free of the security interest. Typically, such authorization is express but it can, in rare cases, be implied from the circumstances, such as when 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. MTSTA § 9-315(a) also states the basic rule that a security interest automatically attaches to any identifiable proceeds of collateral.

MTSTA § 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 MTSTA § 9-321. See Comment to MTSTA § 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.

A security interest attaches to identifiable proceeds as described above. MTSTA § 9-315(c) through (e) deal with perfection of a security interest in proceeds. The general rule of MTSTA § 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 MTSTA § 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 MTSTA § 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 MTSTA § 9-106(a)(9). As long as the proceeds are in this form, the secured party remains perfected.

MTSTA § 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.

MTSTA § 9-315(e) states a rule applicable only to a situation in which a secured party remains perfected under MTSTA § 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.

All of the rules in this section are equally applicable to agricultural liens.

See UCC § 9-315.

Comment to MTSTA
§ 9-316 CONTINUED PERFECTION OF SECURITY INTEREST FOLLOWING CHANGE IN GOVERNING LAW

MTSTA § 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. MTSTA § 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 MTSTA § 9-316. It is not applicable to MTSTA § 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 MTSTA § 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 subject to the Tribe's jurisdiction. If collateral is transferred to a person that is subject to the Tribe's jurisdiction, 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.

MTSTA § 9-316(b) states the effects of perfecting or not perfecting under the Act in the situations described in MTSTA § 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 Bank has perfected by filing in State A. Without Bank's consent, Manufacturer sells an item of equipment to Buyer who is subject to 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. See MTSTA § 9-317(a)(2).

Example 2: Manufacturer is located in State A. Bank has a security interest in Manufacturer's equipment which Bank has perfected by filing in State A. Manufacturer becomes subject to 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 Manufacturer became subject to the Tribe's jurisdiction, Finance Company, which was subordinate to Bank until lapse occurred, will take priority. See MTSTA § 9-317(c).

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.

MTSTA § 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 law 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 MTSTA § 9-303(b).

The basic rule of MTSTA § 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 law 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 MTSTA § 9-316(c), see Comment to MTSTA § 9-313.

MTSTA § 9-316(f) provides a grace period to perfect with respect to collateral acquired after the debtor becomes subject to the jurisdiction of the Tribe. In essence, it treats collateral acquired by the debtor after the debtor becomes subject to the jurisdiction of the Tribe the same as collateral acquired before that time.

See UCC §§ 9-316, 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. Note that persons holding agricultural liens are considered "secured parties" under MTSTA § 9-106(a)(51). Accordingly, references to lien creditors in this Subpart 3 and elsewhere in this Guide do not include persons holding agricultural liens.

MTSTA § 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, MTSTA § 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 3.

Comment to MTSTA § 9-317 INTERESTS THAT TAKE PRIORITY OVER SECURITY INTEREST OR AGRICULTURAL LIEN

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

MTSTA § 9-317(a)(1) deals with priority between a secured party and a lien creditor (defined in MTSTA § 9-106(a)(37)). The most important lien creditor is a trustee in bankruptcy. Next is an unsecured creditor that acquires lien creditor status through statutory levy or similar process. MTSTA § 9-317(a)(1) provides

that a secured party's security interest or agricultural lien 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 MTSTA § 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.

MTSTA § 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.
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> ***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)--(d).

MTSTA § 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).

MTSTA § 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.
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> ***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.

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

MTSTA § 9-317(d) states that, except as provided for purchase-money security interests in MTSTA § 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).

MTSTA § 9-317(e) states a special rule for security interests covering proceeds that have priority under MTSTA § 9-318(e) (purchaser of an instrument or chattel paper), MTSTA § 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 MTSTA § 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 MTSTA § 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 MTSTA § 9-315 (c), (d)), and the proceeds are either cash proceeds or are of the same type as the original collateral.

> ***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 MTSTA 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 MTSTA § 9-317(c)(1) would give priority in the proceeds to SP-1. MTSTA § 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 MTSTA § 9-317(c)(1) applied, SP-1 would prevail.)

All of the rules in this section are equally applicable to agricultural liens.

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

Comment to MTSTA § 9-318 PARTICULAR PRIORITY RULES

MTSTA § 9-318 contains further priority rules of particular application.

MTSTA § 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), 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.

MTSTA § 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 MTSTA § 9-315(a) and MTSTA § 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. MTSTA § 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 MTSTA § 9-313.

MTSTA § 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.

MTSTA § 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.

MTSTA § 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).

MTSTA § 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 due 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.

MTSTA § 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 MTSTA § 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.

MTSTA § 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, MTSTA § 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, MTSTA § 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.

MTSTA § 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 MTSTA § 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 MTSTA § 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 MTSTA § 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 MTSTA § 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 MTSTA § 9-315(c). Under MTSTA § 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 MTSTA § 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. MTSTA § 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 MTSTA § 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.

MTSTA § 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, 9-324.

MTSTA § 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.

MTSTA 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.

MTSTA § 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 MTSTA § 9-318(k) provides a priority rule. See MTSTA § 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 MTSTA § 9-111(a)(3).

Comment to MTSTA
§ 9-319 PRIORITY OF SECURITY INTERESTS IN FIXTURES AND CROPS

MTSTA § 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. MTSTA § 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." MTSTA § 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 MTSTA § 9-104 limits the scope of the Act to property, including fixtures, that is alienable.

MTSTA § 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.

MTSTA § 9-319(d) through (h) set forth an elaborate set of priority rules. MTSTA § 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. MTSTA § 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 MTSTA § 9-502(a).

MTSTA § 9-319(h) effectively precludes the operation of the purchase-money priority rule of MTSTA § 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.

MTSTA § 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.

MTSTA § 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 MTSTA § 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.

MTSTA § 9-319(f) provides an exception to the residual priority rule of subsection (c) in two situations. MTSTA § -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 MTSTA § 9-323. MTSTA § 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.

MTSTA § 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. MTSTA § 9-319(j) reinforces the rule of MTSTA § 9-319(i) by providing that subsection (i) prevails over the inconsistent provisions of any listed statutes. MTSTA § 9-319(j) is not necessary if the statutes that would otherwise be listed are amended to remove any inconsistent language.

MTSTA § 9-604(b), (c) and (d) should be consulted with regard to foreclosure against fixtures. MTSTA § 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 MTSTA § 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, MTSTA § 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.

Comment to MTSTA § 9-320 ACCESSIONS

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. MTSTA § 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. MTSTA § 9-321 governs commingled goods.

MTSTA § 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. MTSTA § 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.

MTSTA § 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. Assume Finance Company's security interest attaches to the new hard drive. 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 MTSTA § 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 MTSTA § 9-317(c)(1).

> ***Example 2***: 30 days 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.

MTSTA § 9-320(d) creates an exception to MTSTA § 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 MTSTA § 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 MTSTA § 9-320(e), a secured party with priority over the rights 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, MTSTA § 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.

Comment to MTSTA § 9-321 COMMINGLED GOODS

MTSTA § 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. MTSTA § 9-321(c) provides that if a security interest attaches to goods that become commingled, it also attaches to the resulting product or mass. MTSTA § 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, MTSTA § 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, MTSTA § 9-321(f) provides that any two or more conflicting perfected security interests that arise solely under MTSTA § 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 MTSTA § 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 MTSTA § 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.

Comment to MTSTA § 9-322 PRIORITY OF SECURITY INTERESTS IN GOODS COVERED BY CERTIFICATE OF TITLE

MTSTA § 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 law governing the issuance of certificates of title.***

In the circumstances described above, MTSTA § 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.

MTSTA § 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 law 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 MTSTA § 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.

Comment to MTSTA
§ 9-323 PRIORITY SUBJECT TO SUBORDINATION

MTSTA § 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.

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.

Comment to MTSTA
§ 9-401 ALIENABILITY OF DEBTOR'S RIGHTS

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

Comment to MTSTA
§ 9-402 SECURED PARTY NOT OBLIGATED ON CONTRACT OF DEBTOR OR IN TORT

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

Comment to MTSTA
§ 9-403 RIGHTS OF ASSIGNEE

MTSTA § 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 MTSTA

§ 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 MTSTA § 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. MTSTA § 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 MTSTA § 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), (c).

Comment to MTSTA
§ 9-404 RESTRICTIONS ON ASSIGNMENT

MTSTA § 9-404 elaborates on MTSTA § 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."

MTSTA § 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.

MTSTA § 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. MTSTA § 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.

MTSTA § 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 MTSTA § 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)–(j), § 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 must be supplemented by filing office regulations (or by the adoption or incorporation by reference of a state's version of Part 5 of UCC Article 9 if the Tribe enters into an agreement with the state that permits filings under the Act to be made in the state's filing system). Section V of this Implementation Guide discusses filing systems in more detail and sets forth filing system options for a Tribe to consider.

Comment to MTSTA
§ 9-501 ACCEPTANCE, REFUSAL, AND EFFECTIVENESS OF FINANCING STATEMENTS; ADMINISTRATION

MTSTA § 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.

MTSTA § 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 MTSTA § 9-501(g), then the proper state office must be identified. A model Joint Sovereign Filing System Agreement is attached in Section VIII, Exhibit A for a Tribe and state to consider to establish this agency relationship. Additional information on filing systems is set forth in Section V of this Guide.

MTSTA § 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 MTSTA § 9-502(g). MTSTA § 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.

MTSTA § 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.

MTSTA § 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 MTSTA § 9-502(a). The model regulation (see discussion of MTSTA § 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.

MTSTA § 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 MTSTA. Regulation is critical in this context because Part 5 leaves many details to be resolved by regulation.

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

Comment to MTSTA
§ 9-502 CONTENTS OF RECORDS; AUTHORIZATION; LAPSE; CONTINUATION; TERMINATION

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

MTSTA § 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. MTSTA § 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. MTSTA § 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, MTSTA § 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.

MTSTA § 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.

MTSTA § 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.

MTSTA § 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.

MTSTA § 9-502(g) provides that a person must be authorized to file a record. A financing statement, an amendment that adds collateral, or an amendment that adds a debtor must be authorized by the debtor. 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. A termination statement or other type of amendment must be authorized by the secured party.

MTSTA § 9-502(h) deals with the effectiveness of a financing statement after certain circumstances change. If a debtor's name is changed 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 MTSTA § 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), (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.

Comment to MTSTA § 9-503 CLAIM CONCERNING INACCURATE OR WRONGFULLY FILED RECORD

On occasion, someone who is not authorized to do so files a financing statement, an amendment to a financing statement, or a termination statement. Such an unauthorized filing has no legal effect but it nevertheless can render the information in the public record incorrect or confusing. To help address this problem and alert users of the filing system to the unauthorized filing – or to filings that have an error –

MTSTA § 9-503 authorizes the person adversely affected to file an information statement. Such an information statement can alert users of the filing system to the erroneous information in the (allegedly) unauthorized filing.

Of course, just as someone might file a financing statement, an amendment, or a termination statement without authorization, so too may a person may file an information statement without authorization. In part for that reason, subsection (c) provides that a filed information statement has no legal effect and subsection (d) provides that no one ever has a duty to file an information statement.

See UCC § 9-518.

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.

Comment to MTSTA
§ 9-601 RIGHTS AFTER DEFAULT; JUDICIAL ENFORCEMENT; CONSIGNOR OR BUYER OF ACCOUNTS, CHATTEL PAPER, PAYMENT INTANGIBLES OR PROMISSORY NOTES

MTSTA § 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 MTSTA § 9-106.

MTSTA § 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.
MTSTA § 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.

Comment to MTSTA
§ 9-602 WAIVER AND VARIANCE OF RIGHTS AND DUTIES

MTSTA § 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.

Comment to MTSTA
§ 9-603 AGREEMENT ON STANDARDS CONCERNING RIGHTS AND DUTIES

MTSTA § 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 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.

Comment to MTSTA
§ 9-604 PROCECURE IF SECURITY AGREEMENT COVERS REAL PROPERTY OR FIXTURES

MTSTA § 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, MTSTA § 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 MTSTA § 9-104 (no application to property not alienable). See UCC § 9-604.

Comment to MTSTA
§ 9-605 UNKNOWN DEBTOR OF SECONDARY OBLIGOR

MTSTA § 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 MTSTA § 9-628 regarding limitations on the liability of a secured party. See UCC 9-605.

Comment to MTSTA
§ 9-606 TIME OF DEFAULT FOR AGRICULTURAL LIEN

Because the remedies provided by Part 6 become available upon the debtor's "default," MTSTA § 9-606 explains when default is deemed to occur in connection with an agricultural lien. It requires one to consult the statute giving rise to the agricultural lien to determine when the lienholder is entitled to enforce the lien. Enforcement is accomplished by following the procedures set forth in Part 6 of the Act.

See UCC § 9-606.

Comment to MTSTA
§ 9-607 COLLECTION AND ENFORCEMENT BY SECURED PARTY

MTSTA § 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. MTSTA § 9-607 applies to collection rights after default, and to collection and enforcement rights even if a default has not occurred, as long as the debtor has agreed.

MTSTA § 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 MTSTA § 9-628.

See UCC § 9-607.

Comment to MTSTA
§ 9-608 APPLICATION OF PROCEEDS OF COLLECTION OR ENFORCEMENT; LIABILITY FOR DEFICIENCY AND RIGHT TO SURPLUS

MTSTA § 9-608 states the rules that apply when the security interest is in collateral covered by MTSTA § 9-607. MTSTA § 9-608(a)(1) provides that cash proceeds must be paid toward the reasonable expenses of collection and enforcement, including attorney's 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.

MTSTA § 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 MTSTA § 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, MTSTA § 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.

Comment to MTSTA § 9-609 SECURED PARTY'S LIMITED RIGHT TO TAKE POSSESSION AFTER DEFAULT

MTSTA § 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.***

Comment to MTSTA § 9-610 DISPOSITION OF COLLATERAL AFTER DEFAULT

MTSTA § 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.

Comment to MTSTA
§ 9-611 NOTIFICATION BEFORE DISPOSITION OF COLLATERAL

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. MTSTA § 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.

Comment to MTSTA
§ 9-612 TIMELINESS OF NOTIFICATION BEFORE DISPOSITION OF COLLATERAL

The time requirements for notice are set forth in MTSTA § 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.

Comment to MTSTA
§ 9-613 CONTENTS AND FORM OF NOTIFICATION BEFORE DISPOSITION OF COLLATERAL

MTSTA § 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, 9-614.

MTSTA § 9-614 RESERVED.

Comment to MTSTA
§ 9-615 APPLICATION OF PROCEEDS OF DISPOSITION; LIABILITY FOR DEFICIENCY AND RIGHT TO SURPLUS

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).

MTSTA § 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 MTSTA § 9-615(b), a secured party may request proof of the subordinate interest. MTSTA § 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.

MTSTA § 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 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.

MTSTA § 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.

Comment to MTSTA
§ 9-616 EXPLANATION OF CALCULATION OF SURPLUS OR DEFICIENCY

MTSTA § 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.

Comment to MTSTA
§ 9-617 RIGHTS OF TRANSFEREE OF COLLATERAL

MTSTA § 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.

Comment to MTSTA
§ 9-618 RIGHTS AND DUTIES OF CERTAIN SECONDARY OBLIGORS

MTSTA § 9-618 applies in situations involving a secondary obligor (defined in MTSTA § 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.

Comment to MTSTA
§ 9-619 TRANSFER OF RECORD OR LEGAL TITLE

MTSTA § 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.

Comment to MTSTA
§ 9-620 ACCEPTANCE OF COLLATERAL IN FULL OR PARTIAL SATISFACTION OF OBLIGATION; NOTIFICATION OF PROPOSAL; EFFECT OF ACCEPTANCE; COMPULSORY DISPOSITION OF COLLATERAL

MTSTA § 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 MTSTA § 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, whether or not the transaction is a consumer transaction, under certain specified circumstances. In addition, the secured party may not accept collateral in partial satisfaction of the secured obligation in a consumer transaction.

See UCC §§ 9-616, 9-621, 9-622.

MTSTA § 9-621; 9-622 RESERVED

Comment to MTSTA
§ 9-623 RIGHT TO REDEEM COLLATERAL

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 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.

Comment to MTSTA
§ 9-624 WAIVER

MTSTA § 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

Comment to MTSTA
§ 9-625 REMEDIES FOR SECURED PARTY'S FAILURE TO COMPLY WITH ACT

MTSTA § 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. MTSTA § 9-625(c) lists who may recover damages.

MTSTA § 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 MTSTA § 9-625(d).

In addition to damages recoverable under the basic remedy provision, MTSTA § 9-625(e) and (f) provide for statutory damages against a person who fails to comply with the provisions specified in (e). Subsection (f) imposes similar damages for failure to comply with a request for an accounting or a request regarding a list of collateral or statement of account under MTSTA § 9-207.

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

Comment to MTSTA
§ 9-626 ACTION IN WHICH DEFICIENCY OR SURPLUS IS IN ISSUE

MTSTA 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, in most cases, calculated based on a rebuttable presumption that, had the secured party complied with the rules, the proceeds of the disposition would equal the sum of the secured obligation, expenses and allowable attorney's fees.

There are a few exceptions to this rebuttable presumption rule. In a consumer transaction, if the secured party conducted a commercially unreasonable collection, conducted a commercially unreasonable disposition, breached the peace while repossessing the collateral, or failed to honor the right of a debtor or secondary obligor to redeem the collateral, an "absolute bar" rule applies and the proceeds of the enforcement action are conclusively deemed to satisfy the secured obligation. This not only would insulate the debtor and any other obligor from liability for a deficiency, but would also, because the secured obligation has been fully discharged, essentially free any remaining collateral from the security interest.

See UCC § 9-626.

Comment to MTSTA
§ 9-627 DETERMINATION OF WHETHER CONDUCT WAS COMMERCIALLY REASONABLE

MTSTA § 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.

Comment to MTSTA
§ 9-628 NONLIABILITY AND LIMITATION ON LIABILITY OF SECURED PARTY; LIABILITY OF SECONDARY OBLIGOR

MTSTA § 9-628(a), (b) and (c) contain exculpatory provisions that need to be read in conjunction with MTSTA § 9-625. The key factor is what the secured party knows. MTSTA § 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, MTSTA § 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, MTSTA § 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.

Comment to MTSTA
§ 9-629 ATTORNEY'S FEES IN CERTAIN TRANSACTIONS

MTSTA § 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.

PART 7. Miscellaneous Provisions

Comment to MTSTA § 9-701 EFFECTIVE DATE

In MTSTA § 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.

Comment to MTSTA § 9-702 SEVERABILITY

MTSTA § 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.

VI. 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 publically accessible *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 Recording and Secured Transaction (UCC) Filing 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.

The filings 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 the bank's

[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.

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) Tribes may collaborate to administer a multi-jurisdictional 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.

1. Utilize State Filing System

Under this model, 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. Several tribes in a number of states have formalized this arrangement by entering into compacts, joint powers agreements or memoranda of understanding with the

respective states in which their jurisdictions are located.[3] These arrangements have proved to work successfully for the tribes and creditors, whereby the states are merely providing ministerial services for the tribes while at the same time acknowledging tribal sovereignty by supporting the tribes' laws.

In some cases where 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 public searches can easily and quickly be done on-line, thus realizing significant time and cost savings for potential lenders and other creditors. Ease and timeliness of filing and lien searches are expectations in today's market place, and systems or practices that are uncertain, burdensome and/or do not allow for easy and timely access create impediments to credit access.

For many tribes, the costs of implementing and maintaining a central filing system that meets commercial expectations is 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

[3] The Crow Tribe and Chippewa Cree Tribes have entered into compacts with the Montana Secretary of State's Office to utilize the state's UCC filing system to support security interest filings under Crow and Chippewa Cree secured transactions laws. Similar arrangements are in place with the South Dakota Secretary of State's Office and the Oglala Sioux Tribe and Cheyenne River Sioux Tribe; the Minnesota Secretary of State's Office and Leech Lake Band of Chippewa; and the North Dakota Secretary of State's Office and Standing Rock Sioux Tribe. See http://sos.mt.gov/Business/UCCTribalNations/index.asp. See also https://sdsos.gov/business-services/uniform-commercial-code/ucc-efs-information/oglala-sioux-tribe-compact.aspx and https://sdsos.gov/business-services/uniform-commercial-code/ucc-efs-information/cheyenne-river-sioux-tribe-compact.aspx.

rules, 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 necessary). If a Tribe and the state in which it is located agree to this arrangement, a model agreement is set forth as an Exhibit to this Guide for the Tribe's and state's mutual consideration. In addition, the Tribe should add a provision to MTSTA 9-501(g) at the end with language similar to the following:

> **"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."**

2. Implement and Maintain 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 may 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. 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 that a Tribe that desires to set up its own system consider adapting to its needs the national filing system regulations developed by the International Association of Commercial Administrators (IACA). The Tribe should also consider utilizing the national standard financing statement forms (including financing statement addendums, amendments and corrections) developed by IACA to facilitate secured party use, again bearing in mind that some adaptation may be required. These forms are standard throughout the country and are accepted in all jurisdictions' filing offices. Standardization has been encouraged to facilitate the ease of commercial transactions across jurisdictional boundaries.

It is important to note that if a Tribe chooses this option, it must ensure that it's filing office staff are well informed and readily available to answer questions from potential creditors, and that searches for debtor and lien information by potential creditors and others are addressed in a timely manner. Information about where and how to file, how to conduct searches, time of effectiveness of lien filings and search response times should be made readily available to the public.

3. Participate in Multi-Jurisdictional Tribal 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 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.

VII. PUBLICATION OF TRIBAL LAWS AND TRIBAL COURT DECISIONS

The timely publication of tribal court decisions and tribal laws, as well as easy access to such decisions and laws, is important for practical and reputational reasons. Practically, lenders and other persons that wish to extend secured credit to businesses and persons within a Tribe's jurisdiction need access to the Tribe's secured transaction law and 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 will likely adjudicate such issues. In addition, 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 options for publishing laws and court decisions. 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 control over administration of its own site, so laws and court decisions can be updated timely 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 sites. While these sites serve as excellent repositories of such information, a Tribe should consider maintaining its own site as the primary repository, and ensure information is kept current.

A Tribe also 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.

VIII. 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 MTSTA 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.

- 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.

IX. EXHIBIT

JOINT SOVEREIGN FILING SYSTEMS

1. Guidance for Joint Sovereign Filing System Arrangements

The Model Joint Sovereign Filing System Agreement offers a model for tribes and states that desire to enter into an arrangement whereby a tribe may utilize the state's UCC filing system to support the tribe's secured transactions act. It is important to note, however, that these arrangements are likely to vary from state to state depending on two things in particular: (1) how the state delegates authority to a particular governmental division to enter into such an arrangement; and (2) whether the arrangement will be by compact, memorandum of understanding, joint powers agreement, or some other contractual arrangement. The nature of the arrangement must necessarily be reflected in the agreement.

In addition, the agreement should reflect at a minimum the following core rights and responsibilities of both parties:

Delegated Authority

In some cases, state divisions have been granted authority to enter into contractual- or compact-type arrangements by prior legislative action. The model agreement set forth below assumes such delegated blanket authority by prior legislative action. In other cases, specific state legislative action may be required to grant a state division such authority, and will need to be explored.

Nature of Agreement

Depending on the legislative, constitutional or other means of delegating authority to a state division, the form of the arrangement with a tribe may differ from state to state. Compacts, memoranda of understanding, and joint powers agreements have all been used to establish the filing system arrangement discussed herein.

Responsibilities of a Tribe

The agreement should specify that the Tribe agrees to keep on its books a secured transactions law that is consistent in its core principles with UCC Revised Article 9. In addition, the Tribe should agree to incorporate by reference into the Tribe's secured transactions law Part 5 of the state's Article 9 pertaining

to filing, as well as any supplemental regulations and administrative rules, to ensure consistency with filing processes and requirements, including fees.

Responsibilities of a State UCC Division

The agreement should clearly state that the provision of filing services on behalf of the Tribe is a ministerial function only, and that it will perform the filing services on behalf of the Tribe in the same manner and under the same terms and conditions as it performs such services under state law.

Record Preservation

The state should agree that it will preserve and manage filing records for the Tribe in the same manner and with the same care it preserves and manages filing records under state law. The state should also recognize that filings under the Tribe's law are tribal records and thus are property of the Tribe. Finally, the agreement should address disposition of the Tribe's records in the event the agreement is terminated.

No Limitation on Sovereign Immunity or Infringement on Tribal Jurisdiction

The agreement should make clear that nothing in the agreement should be construed as a waiver of the Tribe's sovereign immunity, or construed as limiting or infringing on the jurisdiction of the Tribe's courts or application of the Tribe's laws.

Other provisions to consider may include but are not limited to purpose statements; court appearance by the state division pursuant to subpoenas; duration of agreement and renewal; and termination provisions addressing notice, default, and cause.

NOTE: *If the Tribe compacts or otherwise enters into an agreement with a state to utilize the state's UCC lien filing system, and per the agreement the tribe agrees to adopt in whole Part 5 of the state's version of Article 9, then the tribe should not adopt Part 5 of the MTSTA or, if the tribe has already adopted the MTSTA, should repeal Part 5.*

2. Model Joint Sovereign Filing System Agreement

Model Agreement between
[Tribe/Nation]
and
the [state filing office division]
for a
Joint Sovereign Filing System

This Joint Sovereign Agreement is made and entered into this _____ day of _____, between the *[state division]* whose address is *[address*] and [*Tribe/Nation*] (hereinafter "Tribe") whose address is [*address*].

PURPOSE OF AGREEMENT

WHEREAS, pursuant to [*state statute, regulation or resolution reference if applicable*], the [*state division*] is the designated Uniform Commercial Code ("UCC") central filing office for the State of _____ for the filing of financing statements assignments, continuations, amendments, partial releases and terminations of UCC documents for which central filing is required; and

WHEREAS, [*Tribe/Nation*] has enacted the [*name of Tribe's Tribal Secured Transactions Act*] in [official name of *Tribe's law and order code*] (hereinafter the "Tribal Act") which was adopted in substantial conformance with the Model Tribal Secured Transactions Act as promulgated by the National Conference of Commissioners on Uniform Laws in 2005 and amended in 2017, and 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 2010 and as adopted by the State of _____ in [year], and any subsequent amendments thereto; and

WHEREAS, [*Tribe's law and order code citation for place to file*] of the Tribal Act provides that, except with respect to certain real estate related collateral (as-extracted collateral, timber and fixtures), the place to file a financing statement to perfect a security interest governed by the Tribal Act is the [*name of state division*]; and

WHEREAS, Tribe wishes to engage the [*name of state division*] to provide a central filing system ("Central Filing System") in order to serve as the place (the "Central Filing Office") for creditors to file financing statements to perfect security interests in personal property collateral that arise under the Tribal Act, and to provide certain administrative services relating thereto; and

WHEREAS, the [*name of state division*] has agreed to serve as the location and administrator for creditors to perfect a security interest in personal property collateral that arise under the Tribal Act; and

WHEREAS, the [*name of state division*] has agreed to provide the Central Filing System and serve as the Central Filing Office, and to provide certain administrative services relating thereto; and

WHEREAS, the [*name of state division]* and Tribe have expressed a desire to work together to support commercial development by the Tribe, which may include additional administrative services to be provided by the [*name of state division]* through future compacts or agreements, such as centralized filing of business entity documents, assumed business names, and similar records.

IN FURTHERANCE THEREOF, the [*name of state division*] and Tribe agree that the [*name of state division*] shall provide the Central Filing System and serve as the Central Filing Office pursuant to the terms and conditions set forth herein.

RESPONSIBILITIES OF TRIBE

1. Tribe agrees to keep on its books a secured transactions law, such as the Tribal Act, consistent in its core principles with UCC Revised Article 9, [*citation of state's code*], as adopted by the State of_____.

2. As it has in [*tribal code citation*] of the Tribal Act, Tribe agrees to adopt verbatim and incorporate by reference into the Tribal Act the rules, procedures and requirements for filing specified in [*state code citation*], Part 5 of the [*state code reference*], and Title__, Chapters ____ of the Administrative Rules of [*state*] relating thereto, as such statutes and rules may be amended from time to time (the "[*name of state*] UCC Filing Provisions") and hereby acknowledges and agrees to the scope of the [*name of state division*] filing responsibilities contained in the [*name of state*] UCC Filing Provisions.

3. Tribe agrees that the filing requirements and fees will always be identical under state law and the Tribal Act so that any creditor that wishes to perfect a security interest under either state or tribal law, or both, will be dealing with identical rules concerning filing requirements and fees.

RESPONSIBILITIES OF THE [*name of state division*]

4. The [*name of state division*] agrees to serve as the central filing office for the purpose of receiving filings under the Tribal Act, in the same manner as it performs these filing duties under the [*name of state*] UCC filing provisions, and make available the option of electronic filing under the same terms and conditions that electronic filing is available to lenders who file under state law. The parties agree that the duties undertaken by the [*name of state division*] pursuant to this Agreement are ministerial in nature and the parties further agree that all filings made under the Tribal Act with the [*name of state division*] pursuant to this Agreement are tribal records and the property of Tribe.

5. The [*name of state division*] shall have the right to reject or remove improper or fraudulent liens tendered under the Tribal Act to the same extent as provided in [*state code citation*], as enacted or amended.

6. [*Name of state division*] shall prepare a form of financing statement to be used for filing pursuant to the Tribal Act which is readily distinguishable from the financing statement forms used under the UCC and shall make such forms available, together with public information concerning the Tribal Act and the provisions of this Agreement.

7. [*Name of state division*] agrees that it will provide timely notice to Tribe of any anticipated and final amendments to the [*name of state*] UCC Filing Provisions on [*date*] of each year during the term of this Agreement.

DURATION

8. This Agreement shall be effective for *xxx* years commencing on the date of _____, and may be renewed by the parties thereafter for additional *xxx*-year periods, unless sooner terminated pursuant to this Agreement.

TERMINATION

9. This Agreement may be terminated by either party hereto without cause upon [*time period*] -days' written notice.

10. Notwithstanding the provisions of the above paragraphs, the obligations of the [*name of state division*] under this Agreement depend upon the continued legislative authority under state law [*if applicable*] to operate the Central Filing System and perform the duties and services contemplated herein. This Agreement will automatically terminate if the Legislature of the State of _____ removes the [*name of state division*]'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.

11. This Agreement may be terminated upon *xxx*-days' written notice by any party upon the substantial failure by the other party to fulfill its obligations hereunder. The defaulting party shall have *xxx*-calendar days from receipt of notice to cure such default. If such default is not timely cured, termination shall be effective *xxx* days after receipt of the initial notice by the defaulting party.

12. [*Name of state division*] 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 [*name of state division*] 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 14.

RECORD PRESERVATION AND DISPOSITION UPON TERMINATION

13. The [*name of state division*] agrees to preserve all filings made pursuant to the Tribal Act ("Tribal Act Filings") that are received in the Central Filing Office under this Agreement in exactly the same manner as it preserves UCC filings made and received under the

[*name of state*] UCC Filing Provisions. If during the term of this Agreement the [*name of state division*] in any manner upgrades or otherwise changes the method of preservation of the UCC filings under the [*name of state*] UCC Filing Provisions, the [*name of state division*] agrees to perform the same upgrades and changes as to Tribal Act Filings. In the event of termination of this Agreement, the [*name of state division*] agrees, at Tribe's sole option, to deliver duplicate copies of all records then actively maintained hereunder (the "Tribal Act Records") to Tribe. In any event, the [*name of state division*] will continue to preserve the Tribal Act Records in exactly the same manner as it would preserve similar state records for the requisite period then in effect. In addition, the [*name of state division*] agrees to provide to Tribe, at Tribe's expense, copies of any magnetically stored Tribal Act Records together with both print-out and available digital copies of such Tribal Act Records as are then available in electronic form. Tribe agrees to pay the actual costs of providing such records.

COURT APPEARANCE BY [name of state division]

14. The [*name of state division*], agrees to respond to subpoenas issued by the Tribes' court or other tribunal for the purpose of giving testimony relative to authentication of Tribal Act Records maintained by the [*name of state division*] hereunder. Tribe agrees to reimburse the reasonable expenses incurred by the [*name of state division*] in such cases. Expenses shall be deemed reasonable if they are comparable to those paid in the event a representative of the [*name of state division*] were appearing in state or federal court under similar circumstances.

15. Tribe agrees that copies of Tribal Act Records under this Agreement that are certified by the [*state division's official*] or its designee as true copies shall be admissible as evidence in Tribe's court or other tribunal without further foundation, and notwithstanding any tribal law of evidence that may be inconsistent with this provision.

FILING AND SERVICE FEES

16. Tribe agrees that the [*name of state division*], as compensation for the duties performed hereunder, may collect and retain all filing and related service fees for providing Central Filing Services and serving as the Central Filing Office for filings made under the Tribal Act. The [*name of state division*] agrees that such fees shall be the same as those required under the [*state*] UCC Filing Provisions.

SOVEREIGN IMMUNITY; TRIBAL JURISDICTION

17. Nothing in this Agreement shall be construed as a waiver of sovereign immunity of either the Tribe or the State of _____. Furthermore, nothing in this Agreement nor the provision of services hereunder shall be construed as limiting in anyway or otherwise infringing upon the jurisdiction of the Tribe's courts or application of Tribe's laws.

NO LIABILITY FOR PERFORMANCE

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

ASSIGNMENTS; AMENDMENTS; NOTICES

19. This Agreement, 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 a writing signed by the [*state division's official*] or the [*state division official]*'s designee and Tribe.

20. Any notice to be given under the terms of this Agreement shall be in writing and shall be served by certified mail, return receipt requested, directed to the party to be served at the following address: _____

[SIGNATURE BLOCK]

Implementation Guide and Commentary to the Revised Model Tribal Secured Transactions Act

National Conference of Commissioners on Uniform State Laws
Center for Indian Country Development, Federal Reserve Bank of Minneapolis