

# A4

## SAMPLE FINANCIAL ADMINISTRATION LAW

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## EXPLANATORY NOTES



First Nations  
**FINANCIAL  
MANAGEMENT  
BOARD**

**CONSEIL  
DE GESTION  
FINANCIÈRE** des  
Premières Nations

APRIL 1, 2019

# A4

## SAMPLE FINANCIAL ADMINISTRATION LAW

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# EXPLANATORY NOTES

*(Prepared to accompany A3 - Comprehensive Sample Financial Administration Law and A2 - Financial Administration Law Standards dated April 1, 2019)*



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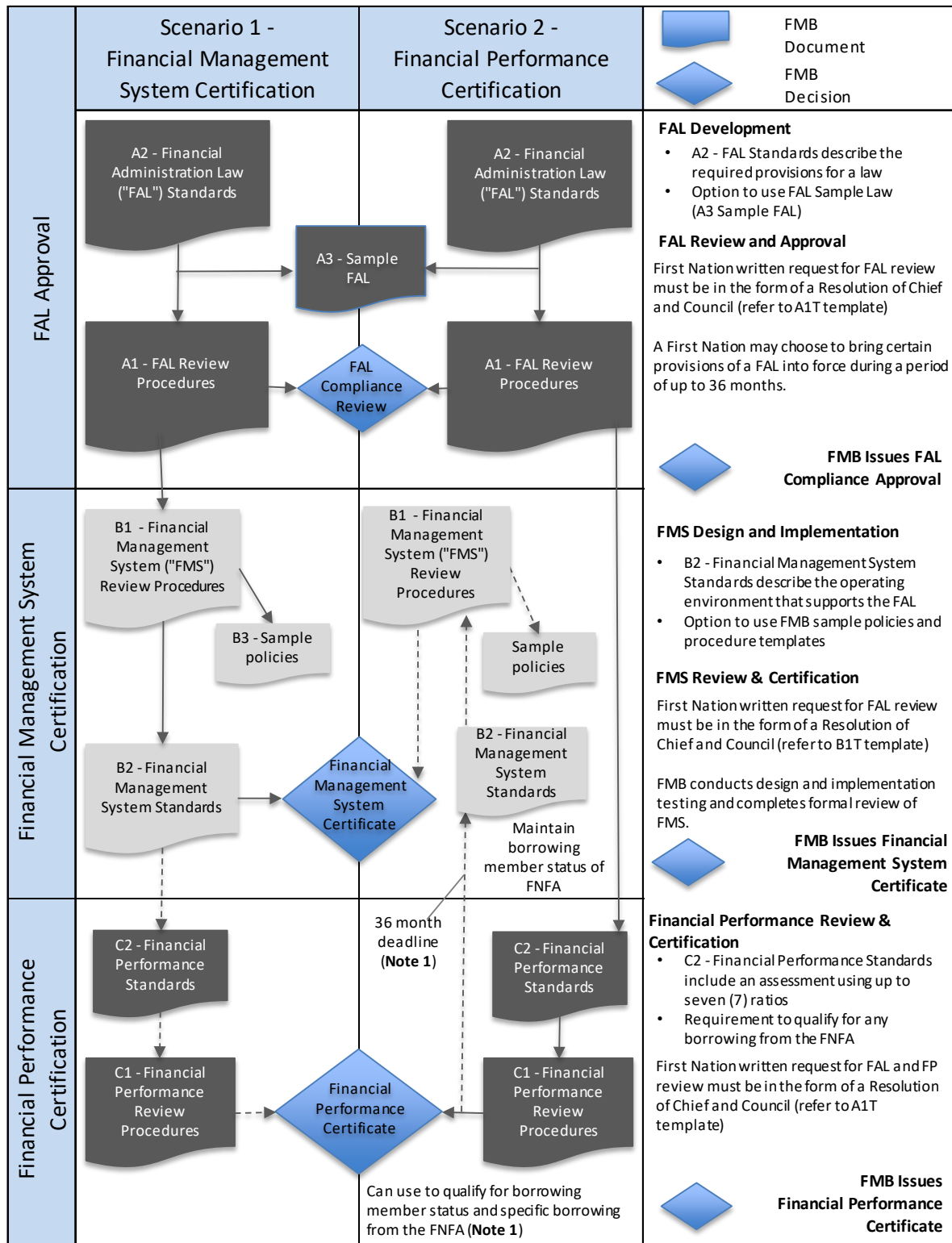
APRIL 1, 2019

**TABLE 1 - LIST OF CORE DOCUMENTS**

The following table lists the core documents made available by the First Nations Financial Management Board (“the FMB”) for First Nations to utilize in developing, implementing and improving their financial management.

<b>FINANCIAL ADMINISTRATION LAW</b>			
	A1	FINANCIAL ADMINISTRATION LAW – <b>REVIEW PROCEDURES</b>	Procedures to apply when requesting a compliance approval of the First Nation’s Financial Administration Law.
	A2	FINANCIAL ADMINISTRATION LAW – <b>STANDARDS</b>	Standards that support sound financial administration practices for a First Nation government in Canada.
	A3	<b>SAMPLE</b> FINANCIAL ADMINISTRATION LAW	Example of a law which meets the requirements of the A2 Financial Administration Law – Standards.
	A4	FINANCIAL ADMINISTRATION LAW – <b>EXPLANATORY NOTES</b>	Provides assistance on the development of a Financial Administration Law by discussing the structure and substantive content of the A3 Sample Financial Administration Law.
	A5	FINANCIAL ADMINISTRATION LAW – <b>SELF-ASSESSMENT</b>	Tool that can be utilized to compare existing or proposed Financial Administration Law(s) of the First Nation to the A2 Financial Administration Law – Standards.
<b>FINANCIAL MANAGEMENT SYSTEM</b>			
	B1	FINANCIAL MANAGEMENT SYSTEM – <b>CERTIFICATION PROCEDURES</b>	Procedures to apply when requesting a review of the First Nation’s financial management system.
	B2	FINANCIAL MANAGEMENT SYSTEM – <b>STANDARDS</b>	Standards that support sound financial practices for the operation, management, reporting and control of the financial management system of a First Nation.
<b>FINANCIAL PERFORMANCE</b>			
	C1	FINANCIAL PERFORMANCE – <b>CERTIFICATION PROCEDURES</b>	Procedures to apply when requesting a review of the First Nation’s financial performance.
	C2	FINANCIAL PERFORMANCE – <b>STANDARDS</b>	Standards that assess the historical financial performance of a First Nation over a five year period using up to six financial ratios.
<b>LOCAL REVENUE FINANCIAL REPORTING</b>			
	D1	LOCAL REVENUE FINANCIAL REPORTING – <b>STANDARDS</b>	Standards that establish requirements for the financial reporting of a First Nation’s local revenues and expenditures.
	D2	LOCAL REVENUE FINANCIAL REPORTING – <b>ILLUSTRATIVE FINANCIAL STATEMENTS</b>	Illustrative annual financial statements for a First Nation’s local revenues and expenditures designed to comply with the D1 Local Revenue Financial Reporting – Standards.
	D3	LOCAL REVENUE FINANCIAL REPORTING – <b>ILLUSTRATIVE SEGMENT NOTE DISCLOSURE</b>	Illustrative segment note disclosure for inclusion in the annual financial statements of a First Nation designed to comply with the D1 Local Revenue Financial Reporting – Standards.
	D4	LOCAL REVENUE FINANCIAL REPORTING – <b>EXPLANATORY NOTES</b>	Explanatory notes to accompany D1 Local Revenue Financial Reporting – Standards.

FIGURE 1 – STEPS TO FMB CERTIFICATION



**Note 1:** A Financial Performance Certificate is required to enter into a new borrowing agreement with the FNFA. To remain in good standing with the FNFA, a Financial Management System Certificate must be obtained within 36 months from when the first nation receives proceeds for the first time from a debenture or equivalent financial instrument issued by the First Nations Finance Authority under the terms of a Borrowing Law and a Security Issuing Council Resolution.

## Table of Contents

<b>TABLE 1 – LIST OF CORE DOCUMENTS .....</b>	<b>I</b>
<b>FIGURE 1 – STEPS TO FMB CERTIFICATION .....</b>	<b>II</b>
<b>PART I – CITATION .....</b>	<b>4</b>
<b>PART II – INTERPRETATION AND APPLICATION.....</b>	<b>4</b>
<b>PART III – ADMINISTRATION .....</b>	<b>8</b>
<i>DIVISION 1 – COUNCIL .....</i>	<i>8</i>
<i>DIVISION 2 – FINANCE AND AUDIT COMMITTEE .....</i>	<i>10</i>
<i>DIVISION 3 – OFFICERS AND EMPLOYEES.....</i>	<i>16</i>
<i>DIVISION 4 – CONDUCT EXPECTATIONS.....</i>	<i>21</i>
<b>PART IV – FINANCIAL MANAGEMENT.....</b>	<b>23</b>
<i>DIVISION 1 – FINANCIAL PLANS AND ANNUAL BUDGETS .....</i>	<i>23</i>
<i>DIVISION 2 – FINANCIAL INSTITUTION ACCOUNTS .....</i>	<i>27</i>
<i>DIVISION 3 – EXPENDITURES.....</i>	<i>28</i>
<i>DIVISION 4 – GENERAL MATTERS .....</i>	<i>32</i>
<i>DIVISION 5 – BORROWING.....</i>	<i>34</i>
<i>DIVISION 6 – RISK MANAGEMENT .....</i>	<i>37</i>
<i>DIVISION 7 – FINANCIAL REPORTING.....</i>	<i>43</i>
<i>DIVISION 8 – INFORMATION AND INFORMATION TECHNOLOGY.....</i>	<i>52</i>
<b>PART V – TANGIBLE CAPITAL ASSETS.....</b>	<b>54</b>
<b>PART VI – REPORTING BREACHES .....</b>	<b>57</b>
<b>PART VII – MISCELLANEOUS.....</b>	<b>60</b>
<b>SCHEDULE – AVOIDING AND MITIGATING CONFLICTS OF INTEREST .....</b>	<b>65</b>
<i>PART I – INTERPRETATION.....</i>	<i>66</i>
<i>PART II – COUNCILLORS AND COMMITTEE MEMBERS .....</i>	<i>68</i>
<i>PART III – OFFICERS AND EMPLOYEES .....</i>	<i>74</i>
<i>PART IV – CONTRACTORS.....</i>	<i>78</i>

## EXPLANATORY NOTES TO SAMPLE FINANCIAL ADMINISTRATION LAW

### PURPOSE OF SAMPLE FINANCIAL ADMINISTRATION LAW

All financial administration laws made under section 9 of the *First Nations Fiscal Management Act* (“the Act”) must be made in accordance with the Act, the regulations and, in all material respects, the *Financial Administration Law Standards* (“Law Standards”) of the First Nations Financial Management FMB (“the FMB”). All laws made under section 9 of the Act must be reviewed and approved by the FMB before they come into force.

Sample Laws have been developed in an effort to assist a First Nation to focus its discussions on the issues to be addressed in their financial administration law and hopefully, as a result, to reduce the human and financial resources required to be expended by a First Nation in the development of their financial administration law.

The FMB has prepared for its clients several versions of a sample financial administration law which meets the Law Standards:

- Comprehensive and baseline versions for First Nations collecting local revenues
- Comprehensive and baseline versions for First Nations not collecting local revenues

Any of these four versions may be appropriate for a First Nation that intends to become a “borrowing member” of the First Nations Finance Authority under the Act. If the First Nation intends to use its local revenues to support a loan from the Authority, then it should refer to a version of the Sample Law that includes provisions respecting local revenues. If a First Nation intends to use revenues – other than local revenues – to support a loan from the Authority, then it may at its option refer to a version of the Sample Law that does not include provisions respecting local revenues.

Comprehensive sample financial administration law versions include a recommended set of provisions which meet the Law Standards and recommended financial management practices. Baseline sample financial administration law versions contain the minimal provisions required to meet the Law Standards leaving a number of required subject to be addressed later in council established policies and procedures.

***NOTE: These Explanatory Notes relate specifically to the comprehensive version of the Sample Law that contemplates the First Nation raising local revenues under the Act. If the comprehensive non-local revenues version of the Sample Law is being used by a First Nation, any commentary in these notes respecting local revenues is irrelevant and can be ignored. Also note that the section references in these Notes follow the section numbers in the comprehensive local revenues version of the Sample Law.***

These Notes are intended to provide assistance to First Nation councils, employees and advisors on the development of the First Nation’s financial administration law by discussing the structure and substantive content of the Sample Law.



The Sample Laws are only examples of a law that meets the requirements of the Law Standards and there are expected to be many variations of financial administration laws that meet the requirements of the Law Standards. Selection of the best option in this range of variations is a matter for debate and decision by the First Nation and its council. It is anticipated that the following considerations may influence these decisions: size of the First Nation; availability of qualified personnel to carry out required functions; geographic location; plans for economic development; complexity of current financial circumstances.

### **Other Assistance**

To assist a First Nation to implement its financial administration law (“FAL”) so that its financial management system is in compliance with the *Financial Management System Standards* (“System Standards”) of the FMB, the FMB has also developed administrative check lists, draft policies and procedures which a First Nation may adopt or vary as appropriate to meet its own unique requirements under its approved financial administration law. This documentation is available at the FMB’s web site ([www.fnfmb.com](http://www.fnfmb.com)).

### **General comments on structure and style of Sample Law**

The Sample Law is organized and written in a style common to legislation enacted in Canada and is consistent with the style requirements for the publication of a First Nation’s financial administration law in the *First Nations Gazette*. Although the financial administration law of a First Nation need not be written in this style, a First Nation is strongly encouraged to adopt this approach. If the sentences are kept short and written clearly, if the subject matter is organized logically and if the terminology used has a clear meaning, the First Nation’s law will be easier to review for compliance approval by the FMB, will be easier to understand and implement, will be easier to enforce and will meet the requirements for *First Nations Gazette* publication.

The subject matter of the Sample Law has been organized logically to assist readers to locate related subjects. The Table of Contents of the Sample Law illustrates how the subject matter is organized and is a useful tool to improve reader comprehension of the Sample Law. Judicious use of parts and divisions can also assist readers to locate subject matter. Law Standard 5.5 requires the subject matter of a FAL to be organized logically.

The sentences should be kept short and should have a clear meaning. Long sentences should be avoided whenever possible as they are often difficult to understand.

A law gives direction. In most cases a sentence in a law should set out who is responsible for taking what action, within what time period and in what manner.

Obviously all of these requirements are not necessary for all provisions but if the law does not address these basic requirements it will not be a useful document. Law Standard 5.4 requires the FAL to be written in a clear and unambiguous manner.

If a law is ambiguous (capable of having more than one meaning), it cannot be enforced. When drafting a law, it is important to always use the same term to mean the same thing. Unlike writing essays and reports when variety in terminology is considered good practice, it is not good practice in writing a law.

The Sample Law uses the term “must” when a provision is required or mandatory. The term “shall” is also appropriate to use when a provision is required or mandatory. However, one should use either “must” or “shall” and not both terms in a law. The Sample Law uses the term “may” when an action is permitted or when a person is being given authority or power to do something.

The term “will” is not normally used or appropriate for use in a law. A law is considered to be always speaking – that is, whenever it is read, it is to be interpreted and applied at that moment in time – not at some point in the future – which the term “will” suggests.

The provisions of a FAL must be compatible with each other – inconsistencies between provisions must be resolved before a FAL will be approved by the FMB. Law Standard 5.6 states this requirement.

To avoid confusion in terms, the Sample Law defines commonly used terms in an interpretation section at the beginning of the Sample Law. Defined terms are merely drafting short cuts – they allow the writer of the law to use short phrases or words throughout the law rather than having to repeat long descriptions in every instance. For example, when “councillor” is defined as a member of the council of the First Nation and includes the chief of the First Nation, the term “councillor” can be used throughout without repeating the long description. Definitions should not be used for any other purpose (see Law Standards 5.2 and 5.3).

Every FAL that is given a compliance approval by the FMB under section 9 of the Act is to be published in the *First Nations Gazette* (see subsection 55(4) of the Act).

***Caution: These Explanatory Notes should not be relied upon for interpretation of the provisions they are describing. They are general descriptions of content only. Professional advice should be sought on the precise meaning of the language used in the Sample Law and what their impact will be on the affairs of a particular First Nation and its membership. The provisions of the Sample Law may not be appropriate for use by all First Nations.***



## Sample Financial Administration Law

The Sample Law includes the text of a recommended preamble. This preamble sets out the authority to make the law and expresses the intentions of the council of the First Nation to make the law.

### PART I – CITATION

**Section 1 (Citation):** sets out the short form title of the law – how it is to be referenced in other First Nation's laws.

### PART II – INTERPRETATION AND APPLICATION

This Part sets out the general rules that help a person to read and comprehend all the provisions of the Sample Law. In this case Part II defines terms, specifies how notices are to be given under the law, how time is to be calculated and how conflicts between laws are to be resolved and specifies the scope of the application of the Sample Law.

This Part is a very important element of the Sample Law providing answers to commonly asked questions about how a law is to be interpreted or applied. Law Standard 5.0 requires necessary definitions and interpretation guidelines to be included in a FAL – what those definitions and interpretation rules are however is a matter for the First Nation to determine during the preparation of its FAL.

**Section 2 (Definitions):** defines terms or phrases used in the Sample Law.

**Subsection (1):** unless a particular provision, Division or Part of the Sample Law specifies otherwise, when a term is used in the Sample Law it has the meaning defined in this subsection. While the sample definitions may be helpful, terms or phrases defined in a First Nation's FAL may differ from those in the Sample Law depending upon the language used in the other provisions of a First Nation's FAL. As a style matter, defined terms should not be capitalized or indicated in bold or italicized text in the FAL. For ease of readership, if a term or phrase is only to be used in a particular provision, division or part of the FAL, the definition should be located in that provision, division or part.

The following defined terms deserve some additional comment:

**“financial administration”** is a broadly defined phrase. It includes the management, supervision, control and direction of all matters relating to the financial affairs of the First Nation. A FAL must address financial administration using this broad definition which is based on the definition for the term set out in clause 3.0 of the Introduction to the Law Standards and the requirement in Law Standard 7.0. It is recommended that the definition for “financial administration” used in the Sample Law be used in a First Nation's FAL.

**“financial competency”** is defined to mean the ability to read and understand financial statements that present accounting issues reasonably expected to be raised by the First Nation's financial statements. This term is not the same as “financial literacy” – a term often used in the private sector corporate world.

**“First Nation’s financial assets”** is a broadly defined phrase. It would include all cash or contractual rights to receive cash, all financial claims on an outside organization and any investments including investments in business enterprises or partnerships.

**“financial institution”** includes the First Nations Finance Authority – an entity not normally defined as a financial institution. This addition allows a First Nation to invest with the First Nations Finance Authority under the FAL.

**“financial records”** means all records respecting the financial administration of the First Nation (and records are defined as anything on which information is recorded or stored by any means). This would include for example budgets, financial reports, audit records, accounts, financial statements, returns, vouchers, invoices and requisitions.

**“First Nation’s records”** is another broadly defined phrase. It includes, for example, all financial records as well as the minutes and resolutions of the council, finance and audit committee and other committees, minutes of the First Nation’s meetings including the results of any votes and any resolutions passed, the First Nation’s laws, council policies and procedures, organizational charts and job descriptions, manuals respecting systems, operations, financial administration and personnel management and agreements to which the First Nation is a party.

**“other revenues”** means other revenues as defined in section 3 of the Financing Secured by Other Revenues Regulations made under the First Nations Fiscal Management Act (“the Act”). This is a special definition which indicates the kinds of revenues, other than local revenues, which can be used to secure a loan from the First Nations Finance Authority.

If a First Nation wishes to use titles other than “chief administrative officer” or “director of finance” for people performing the functions described, those alternate titles should be defined and used instead.

**Subsection (2):** imports terms defined in the Act. Some of the terms or phrases which are defined in the Act have been repeated in subsection (1) of the Sample Law as they are used so often e.g. FMB, First Nations Tax Commission Standards, First Nations Finance Authority, local revenues and local revenue account, or if there is a possibility of confusion.

**Subsection (3):** as a default provision, imports the definitions used in the federal *Interpretation Act*. This Act, which is very similar to interpretation acts used in each province, provides definitions and general rules of interpretation that need not be spelled out in each federal enactment. In this case the Sample Law has adopted these general rules of interpretation as a drafting short cut – the rules in the *Interpretation Act* will apply unless the specific rules set out in the Sample Law specify otherwise. An example of use of a term that relies upon the *Interpretation Act* is “bank” – banks are included in the definition of “financial institution” in this section.

**Subsection (4):** clarifies that whenever there is a reference to an “enactment” i.e. an Act or regulation, the reference is to an enactment of the Government of Canada. This avoids the need to give a long title and description every time there is a reference to an enactment in the Sample

Law. See for example, the reference in subsection (3) to the *Interpretation Act*. This reference is to the Canada *Interpretation Act*.

**Section 3 (Interpretation):** states general rules of interpretation for the FAL. They are very similar to those used in most legislation and again are a form of drafting shortcuts.

**Subsection (1):** Paragraph (a) states that if a term is used in the singular, it can be read or interpreted as included the plural and vice versa. By way of example, if the term “a councillor” is used in a provision, it can be read to apply to all councillors. Or if the term “the councillors” is used in a provision to refer to all councillors, it can also be read to apply to one councillor.

Paragraph (b) clarifies that despite the use of pronouns indicating application to female persons, the provision will also apply to male persons or corporations (which are neither male nor female). The same rule applies to use of pronouns indicating application to male persons. Current legislation writing styles prefer to avoid any references to male or female pronouns whenever practical or reasonable.

Paragraph (c): clarifies that all forms of a word or expressions need not be defined – drafters can rely on one definition to include all parts or forms of speech.

Paragraph (d): clarifies that when the term “must” is used, an obligation is imposed – there is no discretion to comply. When the term “may” is used, no obligation is imposed – compliance is discretionary. If a First Nation prefers to use the term “shall” instead of “must”, this paragraph should be revised accordingly.

Paragraph (e) allows the Sample Law to use the terms “including” or “includes” without the remaining language “but not limited to” when making a list of subjects in a provision. This clarification of interpretation is required because of decisions of the court that would otherwise limit the meaning of the provision to the items specifically listed.

Paragraph (f) states that if the Sample Law refers to a law or a regulation, that reference will automatically be interpreted to include any amendments to that law or regulation that were made since the Sample Law was enacted. If this provision were not included in a FAL, any references to an act or regulation in the FAL would be limited to the act or regulation as it was on the date the FAL was enacted and would not include any revisions to it. Also note that paragraph (f) states that any reference to an enactment includes a reference to a regulation made under that enactment. Accordingly, any reference in the Sample Law to the “Act” means the *First Nations Fiscal Management Act* and all the regulations made under it.

**Subsection (2):** allows a provision of the Sample Law to be understood and applied at any time in the future after the law was enacted.

**Subsection (3):** provides administrative flexibility in the interpretation of a provision that is stated to apply to a particular officer.

**Section 4 (Posting of Public Notice):** In several instances in the Sample Law there is a requirement that First Nation members be given public notice – often notice of a meeting respecting important issues relating to financial administration. This section sets out how this public notice is to be given. The most effective manner to give public notices should be determined by each First Nation taking into account the best means of communication with members of the First Nation (see subsections 32(2), 56(2) and 106(3) of the Sample Law that refer to “posting a public notice”).

**Subsection (1):** requires a public notice to be posted by placing a written notice in a conspicuous and accessible space for public viewing in the principal administrative offices of the First Nation.

**Subsection (2):** requires that a public notice of a meeting be posted at least 15 days before the date of the meeting (see section 5 of the Sample Law for rules in calculating the 15 days).

**Section 5 (Calculation of Time):** provides rules for calculating time that are based upon those used in the federal *Interpretation Act*. Rather than setting out these rules in their FAL a first nation could state that the federal *Interpretation Act* rules for calculation of time can be relied upon.

These rules are important for determining how far in advance notice must be given for a meeting for example or for determining the time period within which an action – such as approval of a budget – must be completed. These rules will avoid many unnecessary disagreements respecting the satisfaction of time requirements in a FAL. Whether all of these rules are necessary will depend to a certain extent on the kinds of time periods incorporated in the FAL. These rules for calculating time are fairly standard across governments in Canada and so have been included for this reason.

**Paragraph (a):** uses the term “holiday”. This term is not defined in the Sample Law so the definition of “holiday” in the federal *Interpretation Act* will apply. By way of example, if a budget must be approved on March 31 and that day is a Sunday (a holiday under the federal Act), the budget must be approved no later than Monday. A First Nation may wish to include any of its customary holidays in this term. If that is the case, “holiday” must be defined in this section and given the expanded meaning.

**Paragraph (b):** by way of example, if three (3) days public notice of a meeting must be given and the meeting is on Thursday, the notice may be put up on Monday. Monday is not counted and Thursday is. (If the wording was three (3) clear days’ notice, a notice could only be given on Monday for a meeting to be held on Friday).

**Paragraph (c):** by way of example, if a provision states that members may comment on a draft budget *until* March 15, members may comment on the budget up to and including March 15.

**Paragraph (d):** by way of example, if a provision states that a councillor must file a disclosure *30 days after* the councillor’s election and the councillor is elected on October 15, the disclosure would have to be filed no later than November 14.

**Paragraph (e):** by way of example, if an annual report must be prepared *within 120 days* after the fiscal year end (i.e. March 31), the counting of the 120 days commences on April 1 and ends on July 29.

**Section 6 (Conflict of Laws):** provides rules to determine how any potential conflicts between different laws or legislation are to be resolved. These rules are required by Law Standard 6.0 and help to avoid the need to ask a court to decide which provisions apply.

**Subsection (1):** states that if there is a conflict between a provision of the FAL of a First Nation and another First Nation law, the provision in the FAL governs. This rule does not apply however if the First Nation law is a code or a local revenue law of the First Nation – see subsection (3) for the rule governing that situation (see section 1 of the Sample Law that defines “code” and “local revenue law”).

**Subsection (2):** states that if there is a conflict between a provision of the FAL of a First Nation and the Act, the provision in the Act applies. By way of example, if the FAL permitted a First Nation to include in its budget a deficit in the local revenue account, that provision would be in conflict with subsection 13(3) of the Act which requires budgets respecting local revenues to be balanced. In that case subsection 13(3) of the Act would govern.

**Subsection (3):** states that if there is a conflict between the FAL of a First Nation and a local revenue law of the First Nation, the local revenue law governs.

**Section 7 (Scope and Application):** This simple statement sets the scope and application of the Sample Law and is a necessary statement to ensure that the limits of the Sample Law are defined and understood. Law Standard 7.0 determines the required scope and application of a FAL (see the required definition of “financial administration” in subsection 2(1) of the Sample Law; also the discussion above respecting the definition of “financial administration” in the Sample Law).

## PART III - ADMINISTRATION

This Part sets out the roles and responsibilities of the people who are engaged in activities respecting the financial administration of the First Nation – the First Nation’s councillors, council officers, committee members, First Nation’s officers, employees, contractors and agents.

The effectiveness of a First Nation’s financial administration system relies heavily upon the competency and integrity of the personnel engaged in it. Accordingly, the requirements in the Law Standards for the personnel engaged in the financial administration of the First Nation are often deliberately specific and the range of permitted variations to be considered by a First Nation for its FAL may be more limited.

### DIVISION 1 – COUNCIL

This Division in the Sample Law sets out many of the general provisions respecting the qualifications of councillors, the role and functions of the council and the reporting of benefits received by councillors from the First Nation.

**Section 8 (Responsibilities of Council):** sets out the general responsibilities of the council of the First Nation.

**Subsection (1):** makes it clear that the council of the First Nation is always responsible for all matters relating to the financial administration of the First Nation whether or not the FAL makes others responsible for certain activities or the FAL gives the council the authority to delegate or assign those activities to others. In the case of assignment or delegation, the council will wish to establish appropriate methods for overseeing such activities to ensure that they are being carried out properly (see Law Standard 8.1).

**Subsection (2):** Law Standard 8.2 authorizes a FAL to include a provision permitting the council to delegate any of its financial administration functions - except those set out in paragraphs (a) to (e) of the Law Standard. This is an example of a permissive provision of the Law Standards.

A FAL need not include a delegation power but if it does it cannot include the four activities specified in the Law Standard. If authority to delegate is given it can be broadly stated as in this subsection or it can be more restrictive. If the power to delegate is more restrictive, care should be taken to clearly identify the permitted delegations or to expand the list of restricted delegations. This can be accomplished by referring to specific provisions in the FAL.

The opening words of this subsection serve as a reminder that other laws may affect the council's ability to delegate. For example, paragraph 5(1)(f) of the Act requires a law that permits council to delegate the authority to make certain laws respecting property taxation and borrowing from the First Nations Finance Authority to be approved by the First Nation Tax Commission.

**Section 9 (Council Policies and Procedures):** recognizes that council may need to make policies and procedures respecting certain detailed subjects in financial administration. This section addresses this subject in a general way. In several specific instances in the Law Standards the council is required to make policies and procedures.

**Subsection (1):** Recognizing that a law may be a blunt instrument to address the details required to manage a financial administration system, Law Standard 8.3.1 requires a FAL to give the council authority to establish policies and procedures respecting the financial administration of the First Nation.

**Subsection (2):** This subsection is an example of the FAL requiring Council to establish specific policies and procedures and is required by Law Standard 8.3.2.

**Subsection (3):** limits the authority of the council to make policies and procedures by requiring them not to be inconsistent with the FAL or generally accepted accounting principles ("GAAP") established by the Chartered Professional Accountants of Canada. With this language that is required by Law Standard 8.3.1, the council is prohibited from thwarting, over ruling or revising the requirements of the FAL or GAAP with its own policies and procedures. There is one permitted exception – where the council permits special purpose reports to be prepared on some accounting basis other than GAAP (see subsection 77(2) in the Sample Law).



**Subsection (4):** required by Law Standard 11.4.4 and intended to ensure that personnel engaged in financial administration activities are qualified to perform their responsibilities, understand their responsibilities and are accountable for their responsibilities.

**Subsection (5):** required by Law Standard 8.3.5 and intended to ensure that no procedure may be made (a function which can be delegated by the council to others) unless the procedure has been authorized by a council policy, is consistent with that policy, and has been approved by the council or the most senior official. This provision is intended to help council reduce its administrative workload while at the same time imposing controls over work done by others. Of course a council may decide to be responsible for approving all procedures as well as policies.

**Subsection (6):** requires the council to document all its policies and procedures and to make them available to any person who is required to act in accordance with them or who may be directly affected by them. This requirement brings clarity and transparency to First Nation operations and also assists in the training of new personnel and the review or auditing of the First Nation's financial administration system. The language of the subsection attempts to define who might be an "affected person" (the phrase used in Law Standard 8.3.4) in the context of most First Nations.

**Section 10 (Reporting of Remuneration and Expenses):** requires the annual reporting of remuneration and expenses received by each councillor from the First Nation, and from any entity the transactions of which are consolidated into the financial statements of the First Nation in accordance with GAAP.

**Subsection (1):** defines entity, expenses and remuneration for purposes of this standard.

**Subsection (2):** requires the director of finance of the First Nation to prepare the annual report required in Law Standard 9.2 which must list the remuneration paid and expenses reimbursed to each councillor by the First Nation and by any entity. The amounts to be reported include those paid to a councillor while acting in that capacity or in any other capacity. This reporting requirement makes the financial administration system of the First Nation more transparent and allows it to operate with more integrity.

This Law Standard sets out minimal required reporting. A First Nation may, of course, extend this reporting requirement to other persons or other types of payments. Each First Nation has the opportunity to define what additional transparency it considers necessary or appropriate.

## DIVISION 2 – FINANCE AND AUDIT COMMITTEE

This Division in the Sample Law sets out the obligation to establish a finance and audit committee, the qualifications for membership and general provisions respecting the role, functions and procedures of that committee.

**Section 11 (Interpretation):** is an example of a definition that applies only to Division 2. It is a drafting shortcut to avoid the need to repeat the complete title of the finance and audit committee wherever it is used. "Committee" has not been defined in section 2 of the Sample Law because the term "committee" is used elsewhere in the Sample Law and is not limited in meaning to the finance and audit committee.

**Section 12 (Committee Established):** sets out the requirements for establishing the finance and audit committee and eligibility for membership.

**Subsection (1):** establishes a finance and audit committee for the First Nation. Law Standard 10.1.1 requires a committee to be established for the functions and duties described although the First Nation may select any name it chooses for the committee. (Depending upon the complexity of its financial affairs and available resources, a First Nation may choose to establish more than one committee to perform the functions required in the Law Standards for the finance and audit committee. This is permissible so long as each committee satisfies the other requirements of Law Standard 10.0 and so long as all of the functions and duties of the finance and audit committee described in that Standard are allocated to these committees.)

Law Standard 10.1.2 states that the relationship of the committee to the council is that of an advisory or recommendation-making body. The committee is to provide council with advice and recommendations in order to support council's decision-making process respecting the financial administration of the First Nation.

**Subsection (2):** makes the council responsible for appointing members of the finance and audit committee, a majority of whom must have financial competency and all of whom must be independent. Law Standard 10.1.5 requires a minimum of three members to be appointed to the committee.

Law Standard 10.1.4 requires a majority of the committee members to have financial competency. The Standard does not specify how a majority is to be interpreted. A FAL could define the majority as any number greater than a simple majority if the First Nation wished to do so.

This requirement is intended to ensure that the individuals charged with detailed monitoring of the financial administration of the First Nation have the skills and ability necessary to evaluate the financial health of the First Nation. "Financial competency" is defined in section 2 of the Sample Law (and in the definition section of the Law Standards) as "the ability to read and understand financial statements that present accounting issues reasonably expected to be raised by the First Nation's financial statements". This definition may permit some variation in requirements for skills and abilities among First Nations.

This subsection also requires all members of the committee to be independent as defined in Law Standard 10.1.6.1 and as required in Law Standard 10.1.6.2.

Law Standard 10.3 allows the FAL to permit the council to appoint a councillor as an alternate member of the committee. The alternate member must meet the requirements in the FAL for committee membership. The alternate member can attend committee meetings and may vote in place of another member of the committee who is unable to attend the meeting or who is unable to vote due to a conflict of interest. This authority to appoint an alternate member is permitted but not required in the FAL. This Standard is intended to provide additional flexibility in ensuring that the business of the committee is carried out efficiently – particularly where qualified individuals for the committee may be limited.

**Subsection (3):** Law Standard 10.1.6.2 requires all members of the finance and audit committee to be independent. This subsection states that an individual is considered “independent” for purposes of being a member of the committee if the individual does not have a direct or indirect financial relationship with the First Nation government that could, in the opinion of council, reasonably interfere with the exercise of independent judgment as a member of the committee.

The independence requirement is considered to be a critical element in helping to ensure the integrity of the First Nation’s financial management system.

**Subsection (4):** requires the council to establish policies and procedures respecting the following to ensure that members of the finance and audit committee are eligible to be members of the committee and are independent:

first, to establish criteria to be used to determine if an individual is eligible to be a member of the committee and is independent;

secondly, to ensure confirmation before appointment that each potential member is eligible to be a member of the committee and is independent;

thirdly, to require each member of the committee annually to sign a statement confirming that they continue to meet the criteria for being eligible to be a member of the committee including being independent.

These requirements are set out in Law Standard 10.1.6.3.

**Subsection (5):** As the finance and audit committee is required in subsection (2) to have not less than three (3) members, this subsection follows the minimum requirements of Law Standard 10.1.3 and requires a committee

- of three (3) members to have at least one (1) councillor as a member, and
- of four (4) or more members to have at least two (2) councillors as members.

This language sets the minimal number but not the maximum number of councillors that the council must appoint to the committee – giving the council discretion to address changing circumstances and eligible members.

**Subsection (6):** Law Standard 10.2.1 requires committee members to be appointed for sufficiently long terms to permit them the opportunity to understand the First Nation’s financial administration system. The Standard also requires the overlapping of terms – to help to ensure that all the experience and knowledge of committee members is not lost at one time.

Subsection (6) of the Sample Law requires the council to stagger the terms of committee members but gives the council the discretion to appoint members for any terms it determines (subject to the terms being for not less than thirty six (36) consecutive months). Law Standard 10.2.1 does not set the required terms of office but the Sample Law recommends terms of not less than thirty six

(36) consecutive months in order to provide an opportunity for committee members to fully understand the First Nation's financial administration system.

Note as well that the terms of office under this subsection are always subject to the removal of a committee member from office by council for reasons specified under subsection (7). This cross reference in the Sample Law helps to avoid any dispute about whether an appointment may be terminated before the term of office ends.

**Subsection (7):** sets out the reasons why a committee member may be removed from office. Law Standard 10.2.2 requires a FAL to set out these reasons but does not specify what they must be. Paragraphs (a) and (b) are suggested but not necessary. The wording of paragraph (a) strengthens the obligations of committee members to attend the meetings – if they fail to do so, there are grounds for removal. Paragraph (b) on the other hand permits the council chair to recommend removal for any reason. Of course, the council must still determine if the reason given for the recommendation is acceptable to the council to justify removal.

**Subsection (8):** requires the council to replace a member of the finance and audit committee who is removed from office, resigns or dies before the member's term of office expires. Council must appoint the replacement member as soon as practicable to hold office for the balance of the first member's term of office. Law Standard 10.2.3 makes this provision mandatory and it is intended to ensure that the Committee has its full complement of members in order to conduct its business efficiently.

**Section 13 (Chair and Vice-chair):** sets the requirements for officers of the finance and audit committee.

**Subsection (1):** satisfies Law Standard 10.4.1 by requiring council to appoint both a chair and vice-chair of the committee - one of whom must be a councillor. The council has discretion as to which of these officers must be a councillor. This discretion has been built into the Standard to give council the opportunity from time to time to consider the most qualified person to chair the committee. The Standard could also be met in the FAL by specifying which of the two officers (or both) must be a councillor. If the FAL states that the chair must be a councillor, subsection (2) of the Sample Law is not required.

**Subsection (2):** sets out the circumstances that apply if the council decides to appoint a non-councillor as chair of the committee. While requiring the appointment of a councillor as chair of the committee ensures the best access of the chair to council discussions and direction and improves accountability of the committee to council, Law Standard 10.4.1 permits the chair to be a non-councillor under the circumstances set out in Law Standards 10.4.2 and 10.4.3. This subsection of the Sample Law requires council to give a non-councillor chair notices and agendas of all council meetings and to give the chair the discretion to attend those meetings and to request and be provided with the same materials and information as other councillors would have before them.

Unless the council specifies the functions of the vice-chair, the committee may adopt rules for that purpose (see subsection 14(8) of the Sample Law).

**Section 14 (Committee Procedures):** sets out the rules respecting finance and audit committee procedures.

**Subsection (1):** The quorum set out in this subsection is required in Law Standard 10.5.1. Two elements must be satisfied – first, there must be at least 50% of the committee members in attendance and second, there must be at least one councillor member in attendance. Unless the requirements for a quorum for the committee meeting are met, the committee must not conduct any business other than postponing the meeting until quorum is satisfied or to another date.

**Subsection (2):** Law Standard 10.5.2 requires a FAL to give every committee member one vote on any question before the committee unless a committee member is required to recuse him or herself due to conflict of interest. A committee member would “recuse” him or herself by withdrawing from any participation in a decision of the committee. This subsection grants each member of the committee the right to one vote (unless the council member has a conflict of interest and is not permitted to vote).

**Subsection (3):** Law Standard 10.5.3 requires a FAL to set out how a tie vote is to be managed. This subsection gives the chair a second vote in the event of a tie but there may be other options that a First Nation may wish to adopt to deal with this situation – for example, to specify that a vote that does not pass unless it passes by a majority vote.

**Subsection (4):** Law Standard 10.5.4 requires the chief administrative officer and the director of finance to attend all the committee meetings subject to reasonable exceptions. This requirement helps to ensure that committee members have access to the officers of the First Nation who have the information committee members require for their deliberations.

This subsection requires these officers to be given notices of the meetings and requires them to attend the meetings – subject to reasonable exceptions. Reasonable exceptions might include such things as annual vacation and illness and in some cases cultural activities. See subsection 14(5) of the Sample Law for another exception to Law Standard 10.5.4.

Note that these officers are not actual members of the committee. They would not be considered independent and would not be considered eligible for appointment to the committee. They are intended to be a resource to the committee only and not voting members.

**Subsection (5):** provides further exceptions to the requirement for the chief administrative officer and the director of finance to attend all committee meetings – first, to allow the committee members to discuss confidential personnel matters relating to those officers and second, to permit the auditor to have a candid conversation with the committee to discuss any concerns arising out of the roles or performance of these officers. To avoid abuse the committee must conduct a recorded vote to exclude either of these officers from all or part of a meeting. These are simply examples of when it may be reasonable to exclude these First Nation officers from a committee meeting. A First Nation may choose not to exclude these officers in the circumstances suggested or subject to being “reasonable”, may wish to specify other reasons for excluding them from the meeting.

**Subsection (6):** sets out the minimum requirements of Law Standard 10.5.5 for meetings of the committee. A First Nation may wish to specify that the committee meet more often.

**Subsection (7):** meets the requirements of Law Standards 10.1.2 and 10.5.6. The subsection does not specify a particular time period within which the committee must report to council on the subject of its meetings but states that it should be as soon as practicable after each meeting. This language provides some flexibility for dealing with uncertain committee and council meeting dates and council agendas but still stresses the urgency with which reporting must be carried out.

**Subsection (8):** grants the committee the power to set the rules for its meetings – subject to any procedural rules that are already set out in the FAL (for example, the quorum requirement) or are already specified by the council (see Law Standard 10.5.7). This subsection is not required in a FAL but may be useful.

**Subsection (9):** allows the committee to retain a consultant to assist it in the performance of its responsibilities – many of which may require professional expertise – but only after consulting with the chief administrative officer. This required consultation will help to ensure that there is budget available to retain services and that the committee is aware of other consulting services that may already be provided to the First Nation. This subject is not addressed in the Law Standards but based upon practical experience may be quite useful.

**Section 15 (Financial Planning Responsibilities):** requires the finance and audit committee to perform specified financial planning responsibilities and gives open ended authority to the committee to report to the council on any financial administration matter not specified.

**Subsection (1):** sets out the general financial planning responsibilities of the committee and except for a bit more detail as to the various kinds of plans required is almost identical to the responsibilities listed in Law Standard 10.6.1. Note that the committee may have additional planning duties to perform in other places in the Sample Law.

**Subsection (2):** satisfies Law Standard 10.6.4 which requires a FAL to permit the committee to make a report or recommendations to the council on any financial administration matter that is not otherwise specified to be its responsibility under the FAL. This open ended provision provides a safety net to ensure that no financial administration matter is falling through the cracks without the possibility of oversight or monitoring and also allows the committee to be proactive in its activities.

**Section 16 (Audit and Oversight Responsibilities):** sets out the general audit responsibilities of the finance and audit committee and is almost identical to the responsibilities listed in Law Standard 10.6.2. Note that the committee may have additional audit duties to perform in other places in the Sample Law. The First Nation may also wish to consider adding more detail about the responsibilities of the finance and audit committee - for example to review



- the audit plan, including the engagement letter, objectives and scope of the audit work, areas of professional judgment, applicable changes in accounting or auditing standards, materiality limit, areas of audit risk, audit timetable and audit fees;
- any difficulties encountered or restrictions imposed by the management of the First Nation during the audit;
- any significant accounting or financial reporting issue in respect of the audit;
- the auditor's evaluation of the First Nation's system of internal controls, policies, procedures and documentation;
- the post-audit and any internal management letter concerning material findings or recommendations of the auditor and any follow up to rectify identified internal control weaknesses;
- any other matters the auditor brings to the Committee's attention.

**Section 17 (Council Assigned Responsibilities):** Law Standard 10.6.3 permits a FAL to assign additional responsibilities to the finance and audit committee if the council considers it would benefit from the committee's involvement. This section gives the council the discretion to assign to the finance and audit committee or to another committee of council any of the activities listed in the section. The list of activities is not an exclusive or inclusive list but reflects some professional judgment about the types of issues that the council may wish to consider more fully for the benefit of the First Nation. In preparing its FAL the First Nation may wish to delete some or all of the items in the list, add to it or revise it.

### DIVISION 3 – OFFICERS AND EMPLOYEES

**Section 18 (Chief Administrative Officer):** requires the appointment of a chief administrative officer and sets out the general duties and functions of that officer.

**Subsection (1):** Law Standard 11.1.1 requires a First Nation to appoint a chief administrative officer – a person who is in effect performing the role of chief executive officer of the First Nation. Subsection (1) would not be required if the council has already hired a chief administrative officer under another First Nation law or by council resolution where that chief administrative officer is required to lead the day to day management or administration of the First Nation. If a person performing the functions of a chief administrative officer has been appointed under another First Nation law or a council resolution, the First Nation should submit this law or resolution to the FMB when it applies to the FMB for a compliance approval of its FAL. Evidence of this law or resolution is required to demonstrate compliance by the First Nation with this Standard.

The First Nation may use a different title for chief administrative officer if it wishes to do so as long as the person holding this alternate title reports directly to the council and meets the requirements of the Law Standards for a person performing the role of chief administrative officer.

The First Nation may also prefer to have more than one individual performing the duties of the chief administrative officer. That variation would also meet the requirements of the Law Standards so long as each of those individuals reports directly to the council and so long as *all* of the duties

and functions of the chief administrative officer described in the Law Standards have been allocated to these individuals (see Law Standard 11.1.3 for authority for this approach).

In this subsection the council is given the responsibility to appoint a chief administrative officer and to establish the terms and conditions of that appointment. This language permits the council to appoint the chief administrative officer as an employee or as an independent contractor. A First Nation may prefer to require the chief administrative officer to be an employee and if so, may specify that requirement in its FAL.

**Subsection (2):** satisfies Law Standard 11.1.1 by making the chief administrative officer responsible for all aspects necessary to lead the overall management of the day to day operations of the First Nation. Note that the chief administrative officer's responsibilities are not restricted to financial administration activities – they cover the full range of the First Nation's operations. This scope of activities is considered essential to ensure strong governance and accountability in the First Nation's operations. This subsection also satisfies Law Standard 11.1.2 which requires the chief administrative officer to report directly to the council. This helps to ensure that the council always has access to the best and most informed information and that the chief administrative officer is responsible for carrying out council's instructions.

This subsection also provides a specific list of duties the chief administrative officer must carry out. This is just an example of the kinds of activities that would be appropriate for the chief administrative officer to carry out. Note that the general description of the responsibilities of the chief administrative officer is followed by the text *including the following duties*. When the term "including" is used in the FAL, it means "including but not limited to" (see paragraph 3(1)(e) of the Sample Law for this rule of interpretation). This means that the list should not be interpreted to limit the broader or more general description of the chief administrative officer's responsibilities.

Paragraph (b) of the list of duties is required in Law Standard 11.4.1. Paragraphs (d), (e), (g) and (h) of the list of duties are required duties in Law Standard 11.1.4.

Paragraph (j) allows the council to require the chief administrative officer to carry out additional activities it specifies. Law Standard 11.1.5 does not require the council to be given this authority; however, if a FAL does grant council authority to require the chief administrative officer to perform additional activities, the council must not require the chief administrative officer to carry out any activities that are contrary to the requirements of the Act or inconsistent with the officer's duties under the FAL.

**Subsection (3):** From a practical point of view, it is expected that the chief administrative officer may require the assistance of other personnel to perform the chief administrative officer's duties. Law Standard 11.1.6 allows a FAL to permit the chief administrative officer to assign the performance of the chief administrative officer's duties or functions to others. If a FAL includes this authority to assign duties and functions it must also include a statement that the chief administrative officer remains responsible for ensuring that these duties or functions are carried out properly.

This subsection gives the chief administrative officer unconditional authority to assign his or her duties or functions to an officer or employee of the First Nation but only to a contractor or agent of the First Nation with the approval of the council. This limitation in the Sample Law is not required but is considered to be an appropriate limitation on this authority.

**Subsection (4):** contains the obligation set out in Law Standard 11.1.6 that the chief administrative officer remains responsible for ensuring that any duties or functions he or she assigns to others are carried out properly.

**Section 19 (Director of Finance):** requires the appointment of a director of finance and sets out the general duties and functions of that officer.

**Subsection (1):** Law Standard 11.2.1 requires a First Nation to appoint a director of finance – a person who is in effect performing the role of chief financial officer of the First Nation. The First Nation may use a different title for director of finance if it wishes to do so as long as the person holding this other title has all of the duties and functions of the director of finance and reports directly to the council or the chief administrative officer.

In this subsection the council is given the responsibility to appoint a director of finance and to establish the terms and conditions of that appointment. This language permits the council to appoint the director of finance as an employee or as an independent contractor. A First Nation may prefer to require the director of finance to be an employee and, if so, may specify that requirement in its FAL.

**Subsection (2):** Law Standard 11.2.2 requires the director of finance to report to the council or to the chief administrative officer. This subsection has the director of finance reporting to the chief administrative officer – reflecting an FMB recommendation, but not a requirement, for a particular governance structure.

Law Standard 11.2.1 and 11.2.3 specify the duties and functions which must be set out in a FAL for the director of finance. This subsection includes these mandatory duties and functions. Note that the general description of the responsibilities of the director of finance is followed by the text *including the following duties*. When the term “including” is used in a FAL, it means “including but not limited to” (see paragraph 3(1)(e) of the Sample Law for this rule of interpretation). This means that the list should not be interpreted to limit the broader or more general description of the director of finance’s responsibilities.

Paragraph (b) states the director of finance is responsible for administering and maintaining all charts of accounts of the First Nation.

Paragraph (c) clarifies that while the director of finance is responsible for preparing the draft annual budget, the director of finance will take advice from the tax administrator on the component of that budget respecting local revenues.

Paragraph (o) allows the chief administrative officer to require the director of finance to carry out additional activities the chief administrative officer may specify. Law Standard 11.2.4 does not require a FAL to give the chief administrative officer this authority but if the FAL does so the chief administrative officer must not require the director of finance to act contrary to the Act or in a manner inconsistent with the officer's duties set out in the FAL.

**Subsection (3):** From a practical point of view, it is expected that the director of finance may require the assistance of other personnel to perform the director of finance's duties. Law Standard 11.2.5 allows a FAL to permit the director of finance to assign the performance of the director of finance's duties or functions to others. If a FAL includes this authority to assign duties and functions it must also include a statement that the director of finance remains responsible for ensuring that these assigned duties or functions are carried out properly. This subsection gives the director of finance the authority to assign his or her duties or functions to an officer, employee, contractor or agent of the First Nation but only with the approval of the chief administrative officer. This limitation is not required but is considered to be an appropriate limitation on this authority.

This subsection also contains the obligation set out in Law Standard 11.2.5 that the director of finance remains responsible for ensuring that any assigned duties or functions are carried out properly.

**Section 20 (Tax Administrator):** requires the council to appoint a tax administrator if the First Nation is collecting local revenues and sets out the general duties and functions of that officer.

**Subsection (1):** The council is required to appoint a tax administrator and may set the terms and conditions of that appointment. Law Standard 11.3.1 recognizes that a First Nation may be appointing the tax administrator under its local revenue laws and has defined functions and duties under those laws and under regulations made under the Act.

**Subsection (2):** Law Standard 11.3.2 requires the tax administrator to report to the director of finance, the chief administrative officer or the council in respect of all the duties and functions being performed by the tax administrator – whether under the local revenue laws, the Act or under the FAL. The First Nation may select the senior officer as more appropriate for its administrative structure. The Sample Law has the reporting going to the chief administrative officer but the First Nation may determine the reporting relationship it prefers.

**Subsection (3):** Law Standard 11.3.3 requires the tax administrator to perform certain required functions. These particular functions are set out in the FAL in order to provide certainty respecting the division of responsibilities between the director of finance and the tax administrator. While the tax administrator has responsibility for the day to day management of local revenues and the local revenue account, the director of finance has responsibility for all aspects of the First Nation's financial management system. The tax administrator will have other duties under the First Nation's local revenue laws. The tax administrator also has duties under other provisions of the Sample Law (e.g. see for example subsections 41(9), 43(2), 59(2) and 87(1)).

**Subsection (4):** As is the case with the chief administrative officer and the director of finance, Law Standard 11.3.4 allows a FAL to permit the tax administrator to assign the performance of the tax administrator's duties or functions *under the FAL* to others. If the FAL includes this ability to assign duties and functions it must also include a statement that the tax administrator remains responsible for ensuring that these assigned duties or functions are carried out properly.

This subsection gives the tax administrator the authority to assign his or her duties or functions under the FAL to an officer, employee, contractor or agent of the First Nation but only with the approval of the chief administrative officer. This limitation is not required but is considered to be an appropriate limitation on this authority. This subsection also contains the obligation set out in Law Standard 11.3.4 that the tax administrator remains responsible for ensuring that these assigned duties or functions are carried out properly.

**Section 21 (Organizational Structure):** requires the preparation and maintenance of an organization chart

**Subsection (1):** satisfies Law Standard 11.4.2 requiring the preparation and maintenance of a current organization chart. It clarifies that the chart is to apply to the governance, management and administrative systems of the First Nation.

**Subsection (2):** sets out comprehensive requirements for the organization chart and includes information that satisfies Law Standard 11.4.2. The contents of the organization chart specified in this subsection are required but a First Nation could add other information to be included. Note again that this chart should not be limited to financial administration but must include all governance, management and administrative systems of the First Nation. Again this is a reflection of the need to ensure effective operations throughout in order to ensure an effective financial administration system. It also reflects the fact that financial administration and management of programs and services are intertwined and from a practical point of view very difficult to separate.

**Subsection (3):** Law Standard 11.4.3 requires access to be given to the organization chart but does not specify how this is to be done. This subsection requires the chief administrative officer to provide a copy of the chart on request to all the individuals referred to in the Standard. This Standard requirement could also be met by providing access to the chart on a website for example – there may be many acceptable variations that would satisfy this Standard.

**Subsection (4):** requires the chief administrative officer to recommend to the council for approval and implementation the human resources policies and procedures required in Law Standard 11.4.4. There may be many other variations possible to satisfy the requirement for design and implementation of these policies and procedures.

**Subsection (5):** Law Standard 11.4.5 requires the First Nation to hire or retain qualified and competent personnel to carry out its financial administration activities. Note that the term “personnel” is broad enough to include not only employees but also independent contractors. It has been recognized that the capacity of some First Nations to fulfill this obligation may be more limited than others.

This subsection takes a practical approach to the Standard and requires the council to “take all reasonable steps” to ensure that qualified and competent people are hired or retained by contract.

## DIVISION 4 – CONDUCT EXPECTATIONS

This Division addresses both expected behavior and appropriate conduct for councillors, council committees and officers, employees, contractors and agents of the First Nation when engaged in any financial administration activities. It also sets out requirements for policies and procedures to address the details of enforcing these behaviors and conduct. Note that these requirements are limited to financial administration activities. A First Nation may wish to broaden these expectations to include all activities conducted on behalf of the First Nation.

**Section 22 (Conduct of Councillors):** sets the general conduct obligations of councillors.

**Subsection (1):** mirrors the requirements of Law Standard 12.1. Paragraph (d) of this Standard requires a councillor to avoid any conflicts of interest and to comply with any rules of the First Nation respecting the avoidance and mitigation of conflicts of interest.

In the Sample Law the rules for avoiding and mitigating conflicts of interest (and for the additional requirement of disclosure of interests) are attached as Schedule – Avoiding and Mitigating Conflicts of Interest. The Law Standards do not require these rules to be included in a FAL. The FAL could require these rules to be established in First Nation policy and procedure.

Including the rules for avoiding and mitigating conflicts of interest in the FAL itself has advantages and disadvantages particularly for a First Nation that is or intends to become a borrowing member. If the rules are included in the FAL, any changes to the rules would require an FMB compliance approval before the changes would come into force (see subsection 9(3) of the Act). On the plus side,

- a requirement for FMB compliance approval before any changes in the FAL come into force may help to avoid manipulation of the rules for inappropriate purposes
- First Nation members will have the opportunity to be informed of or involved in any changes proposed to the rules in the FAL (See Law Standard 33.2)
- any third parties who are keenly interested in the financial stability of the First Nation may appreciate seeing these rules set out in the FAL.

Law Standard 12.3 also requires councillors to annually disclose private interests that could result in a conflict of interest. This requirement is referenced in paragraph (d) of this subsection where the annual disclosure of these private interests is a provision in the Schedule – Avoiding and Mitigating Conflicts of Interest. A FAL must contain a provision that satisfies this Standard – whether in the main body of the law or in a schedule addressing conflicts of interest as was done in this Sample Law.



**Subsection (2):** Law Standard 12.6 requires a FAL to enforce these conduct and behavior expectations. The legal options available to individual First Nations to enforce compliance may be limited and quite different – depending upon the laws under which the First Nation operates.

This subsection provides a list of possible enforcement responses to a councillor's contravention of section 22. The FAL may include all or any of these suggested responses or substitute any that are more appropriate or effective in the First Nation's community or under its laws.

**Section 23 (Conduct of Officers, Employees, Contractors, etc.):** sets the general conduct obligations of officers, employees, contractors and agents of the First Nation.

**Subsection (1):** is another example of a drafting shortcut that avoids the need to refer in each subsection to all the persons to whom the section applies.

**Subsection (2):** mirrors the requirements of Law Standard 12.2. Paragraph (c) of this Standard requires these persons to comply with the provisions of the FAL or the policies and procedures of the council respecting the avoidance and mitigation of conflicts of interest.

In the Sample Law the provisions for avoiding and mitigating conflicts of interest (and for the additional requirement of disclosure of interests) are attached as the Schedule – Avoiding and Mitigating Conflicts of Interest. The Law Standards permit these issues to be addressed in policies and procedures of the council. The minimal required content of these provisions, policies or procedures respecting the avoidance and mitigation of conflicts of interest are set out in Law Standard 12.4.

Including the provisions for avoiding and mitigating conflicts of interest in a FAL has advantages and disadvantages previously discussed above under subsection 22(2) of the Sample Law.

Law Standard 12.3 requires these persons to disclose as soon as practicable any circumstances that could result in a conflict of interest. This requirement is referenced in paragraph (c) of this subsection where the disclosure of potential conflicts of interest is a provision in the Schedule – Avoiding and Mitigating Conflicts of Interest. A FAL must contain a provision that satisfies this Standard – whether in the main body of the law or in a schedule addressing conflicts of interest as was done in the Sample Law.

**Subsection (3):** mirrors the requirements of Law Standard 12.5 except that it applies to every committee of the council or the First Nation – not just the finance and audit committee.

**Subsection (4):** satisfies Law Standard 12.6 by specifying the actions that may be taken if various persons fail to comply with their obligations in a FAL and in the rules for the First Nation for the avoidance and mitigation of conflicts of interest. There are many options available to satisfy this Standard and a First Nation will wish to choose the most effective for ensuring that these behavior and conduct obligations are taken seriously. Note that paragraphs (a) to (d) are permissive – these actions of censure may be but are not required to be taken. This permits discretion to be applied as appropriate in different circumstances.

## PART IV – FINANCIAL MANAGEMENT

This Part deals with all aspects of financial management of the First Nation – from planning and budgeting, to controls for management of funds, revenues and expenditures, to rules for borrowing, to management of risks, to financial reporting and finally to management of information and information technology.

### DIVISION 1 – FINANCIAL PLANS AND ANNUAL BUDGETS

This Division sets out the requirements for strategic plans, multi-year financial plans and annual budgets and specifies who is responsible for various required activities, how these activities are to be coordinated and when they must be completed.

**Section 24 (Fiscal Year):** Law Standard 13.1 requires the fiscal year of the First Nation to be April 1 to March 31 of the following year. This fiscal year is the same as that for governments in Canada – helping to ensure complementary fiscal planning periods.

**Section 25 (Strategic Plan):** satisfies Law Standard 14.0 which requires the First Nation to adopt and use a strategic plan to further its financial planning decisions.

**Subsection (1):** requires the council to approve a strategic plan that sets out the long-term vision for the First Nation and its members and to review and revise the plan on a regular, periodic basis.

**Subsection (2):** satisfies Law Standard 14.1 which requires the council to take the strategic plan into account when making financial decisions which will impact First Nation members or First Nation assets.

**Section 26 (Multi-year Financial Plan Process):** satisfies Law Standard 15.0 which requires the First Nation to have a multi-year financial plan including the current fiscal year and the following four years. Because this plan will also help to inform annual budgetary decisions, section 26 of the Sample Law sets out a timetable for updating the plan annually which moves in tandem with the process for setting the annual budget.

The purpose of this plan is to provide information required for informed financial decision-making and must be consistent with and supports the objectives of the strategic plan approved under section 25. Aside from requirements for the plan to be for a five-year period and to include information respecting projected revenues and projected expenditures both of which are to be segregated by significant category and anticipated surplus and authorized deficit, the Standard does not provide specifics on the content of a financial plan that would provide the information that would assist in informing decision-making. The Sample Law is an example of the type of information that would satisfy this intention.

This section requires the council to approve a five-year plan by March 31 of every year (the same date required for approval of the annual budget of the First Nation). This section sets out the information that is considered necessary to support good decision-making. A First Nation could include other information in this required plan but that information must be sufficient to support the Standard's stated intention - "to assist in informing financial decision-making".

This section is based on similar requirements for local governments in some jurisdictions in Canada (for example, section 165 of the Community Charter of the province of British Columbia). It is intended to ensure that a First Nation, on an ongoing basis, anticipates impacts of its financial decisions on the First Nation's solvency. This information will enable the council to make any forward planning adjustments as may be necessary to ensure the ongoing fiscal viability of the First Nation. For these purposes it is important that the strategic plan be reviewed and updated periodically as it will help to determine the direction of multi-year financial planning.

**Subsection (2):** sets out the required and suggested content for the plan and satisfies the requirements of Law Standard 15.2.

**Subsection (3):** satisfies Law Standard 11.2.3 - the responsibility of the director of finance to prepare and submit a draft multi-year financial plan for the next fiscal year.

**Subsection (4):** satisfies Law Standard 10.6.1 - the responsibility of the finance and audit committee to review and recommend to council for approval the multi-year financial plan.

**Subsection (5):** satisfies Law Standard 15.1 for the preparation of an annual multi-year financial plan. The date of finalizing the plan is suggested at March 31 in order to support the obligation of the council to approve an annual budget by the same date.

**Section 27 (Content of Annual Budget):** sets out the required contents of the First Nation's annual budget as required in Law Standard 16.4.

**Section 28 (Annual Budget Process):** sets out the process and schedule for the preparation and approval of the annual budget. In order to meet the requirements in Law Standards 16.5.1 and 16.5.2 to approve an annual budget by March 31 and to approve an amendment to the budget by July 31 respecting local revenues, deadlines are included in the section for preparation, planning and reviewing activities to take place.

In this Sample Law, the following schedule of activities is set out:

November 30 – inspection of all tangible capital assets

December 31 – preparation of proposed budget for routine maintenance of First Nation's tangible capital assets and for tangible capital asset projects

January 15 – review by finance and audit committee of proposed budgets for routine maintenance of First Nation's tangible capital assets and for tangible capital asset projects

January 31 – director of finance prepares draft annual budget and multi-year financial plan for finance and audit committee

February 15 – finance and audit committee review draft annual budget and multi-year plan and recommend to council

March 31 – approval by council of multi-year financial plan and annual budget

June 15 – director of finance prepares draft amendment of annual budget for local revenues for finance and audit committee

June 30 – finance and audit committee review draft amendment of annual budget for local revenues and recommend to council

July 15 – approval by council of amendment of annual budget for local revenues

Depending upon individual circumstances (e.g. different schedules or timetables for local revenue laws in each province), a First Nation may wish to vary or be required to vary these dates. The Law Standards do not require these various scheduled dates (other than the council annual budget approval on March 31) to be set out in a FAL and in some cases a First Nation may wish to set these activities out in a procedure to be adopted by the council.

**Subsection (1):** satisfies Law Standard 11.2.3 - the responsibility of the director of finance to prepare and submit a draft annual budget for the next fiscal year.

**Subsection (2):** satisfies Law Standard 10.6.1 - the responsibility of the finance and audit committee to review and recommend for approval to council the annual budget.

**Subsection (3):** satisfies Law Standard 16.5.1 - the responsibility of the council to approve the annual budget by March 31. (Note that section 26 of the Sample Law requires the council to approve the multi-year financial plan by March 31.)

**Subsection (4):** provides a process to satisfy Law Standard 16.5.2 - the responsibility of the director of finance to prepare a draft amendment of the annual budget respecting local revenues and submit it to the finance and audit committee by June 15.

**Subsection (5):** provides a process to satisfy Law Standard 16.5.2 - the responsibility of the finance and audit committee to review the draft amendment of the annual budget respecting local revenues and make a recommendation to the council by June 30.

**Subsection (6):** provides a process to satisfy Law Standard 16.5.2 - the responsibility of the council to approve the amendment of the annual budget respecting local revenues by July 15.

**Section 29 (Additional Requirements for Budget Deficits):** Law Standard 16.2 requires provisions respecting the management of and any limitations on budget deficits. There are many ways that budget deficits could be managed. For example, a FAL could prohibit all deficits or could permit deficits only within specified limits or could permit deficits in excess of specified limits only with the approval of the members of the First Nation or could permit the council to approve a deficit after taking into account the comments of First Nation members. A First Nation must determine the best approach for its community.

This section of the Sample Law regulates deficits as follows:

first, the council must ensure that no portion of the deficit relates to or originates in local revenues. Subsection 13(3) of the Act prohibits the expenditures in one year from exceeding the estimated local revenues collected.

second, the council must demonstrate how deficits are to be managed using the vehicle of the multi-year financial plan (which must be updated annually and made available to members of the First Nation);

third, the council must ensure that deficits “do not have a negative impact on the credit worthiness of the First Nation”.

**Section 30 (Amendments to Budgets):** satisfies Law Standard 16.5.3 which requires provisions dealing with amendment of the annual budget.

**Subsection (1):** states that the council must approve any changes to the annual budget.

**Subsection (2):** prohibits a council from changing the annual budget unless there is a substantial and unforeseen change in the forecasted revenues or expenses of the First Nation or in the expenditure priorities of the Council. This subsection is not required but is suggested.

Cross references: This limitation on the authority of the council to amend the annual budget is subject to subsection 28(6) of the Sample Law that requires an amendment of the annual budget to address expected local revenues that cannot be calculated until after the March 31 deadline for annual budget approval and is subject to section 38 of the Sample Law that requires the council to amend the annual budget to address any emergency expenditures authorized under that section.

**Section 31 (Local Revenues Budget Requirements):** satisfies Law Standard 16.3. If the First Nation is raising local revenues, the council of a scheduled First Nation must authorize the expenditure of local revenues in an expenditure law made under paragraph 5(1)(b) of the Act or as permitted in section 13.1 of the Act. A First Nation that has a law made under paragraph 5(1)(a) of the Act (in effect a “property taxation law”) or under paragraph 5(1)(a.1) must make an expenditure law at least once a year that establishes a budget for the expenditure of revenues raised under those laws (see subsection 10(2) of the Act).

This section confirms that the local revenues component of the annual budget must meet the requirements set out in the Act or in the standards of the First Nations Tax Commission - even if these requirements are different from those set out in a FAL. This section is an example of a possible conflict between the FAL and the Act and how that conflict is to be resolved (see also section 6 of the Sample Law).

**Section 32 (Policy for First Nation Information or Involvement):** satisfies Law Standard 17.1 which requires a FAL or council policies and procedures to provide the means by which members of the First Nation will be involved in or informed about the multi-year financial plan, the annual budget and any budget deficits or extraordinary expenditures. It is expected that there will be many acceptable methods to handle this issue among First Nations.

**Subsection (1):** requires the council to establish policies and procedures for how First Nation members will be involved in or informed about the strategic plan, the multi-year financial plan, the proposed annual budget including any budget deficits and local revenues components, any changes in the budget and extraordinary expenditures (see also subsection 26(2) of the Sample Law which requires information respecting any expected budget deficits to be set out in a multi-year financial plan).

Any policies and procedures established by the council under this subsection must be consistent with any requirements in the FAL to give a public notice of the meeting and to permit First Nation members to attend. These policies and procedures could set out however to what extent, if any, these First Nation members are to be consulted or to be allowed to participate in meeting (including perhaps voting on the budget or parts of it – for example a proposed deficit).

**Subsection (2):** requires the council to post a public notice (see section 4 of the Sample Law for how a public notice is posted) of when the matters listed in subsection (1) is on the agenda of a council meeting for approval. This is suggested text and some First Nations may wish to set this public notice requirement differently.

**Subsection (3):** is complementary to subsection (2) and confirms that First Nation members may attend that part of the council meeting when the matters referred to in the public notice are being considered.

## DIVISION 2 – FINANCIAL INSTITUTION ACCOUNTS

This Division sets out the requirements for First Nation accounts in financial institutions. This Division addresses in part the requirements of Law Standard 18.0.

Note that the provisions in the Sample Law for effective cash management (Law Standard 18.1.3) and effective management and control of all First Nation funds and revenues, including internal controls for financial institution accounts and asset management (Law Standard 18.1.1) may be omitted from a FAL if the FAL requires the council to adopt policies and procedures for these specific purposes. Recommended provisions have been included in the Sample Law to assist First Nations to work through the types of issues to be addressed under these Law Standards.

**Section 33 (Financial Institution Accounts):** sets requirements for use of accounts in financial institutions. Note that “financial institution” is defined in section 2 of the Sample Law.

**Subsection (1):** sets three controls for the receipt and deposit of First Nation money in accounts:

- the account must be opened in the name of the First Nation;
- the account must be opened in a financial institution;
- the account must not be opened unless it has been authorized by the chief administrative officer or the director of finance.



**Subsection (2):** requires separate accounts to be established in a financial institution for different purposes. Law Standard 18.1.2 requires the segregation of local revenues in a separate financial institution account (see also subsection 13(1) of the Act). This subsection is expanded however to require a separate general account, a trust account for monies held in trust, and a tangible capital assets reserve account for money set aside for purposes set out in Part V of the Sample Law. These additional financial institution accounts are suggested but not required by the Law Standards.

**Subsection (3):** permits the First Nation to open other accounts (other than those set out in subsection (2)) in financial institutions when necessary or appropriate to manage the First Nation's financial assets.

**Section 34 (Accounts Management):** allocates responsibility for managing financial institution accounts. This section is suggested as part of the financial controls for the First Nation but the First Nation may wish to adopt other controls appropriate to its circumstances. From a policy perspective it is appropriate to give significant oversight responsibilities to the director of finance as these responsibilities are consistent with the officer's responsibility for the day to day management of the financial administration system (see Law Standard 11.2).

**Subsection (1):** places the general responsibility for safekeeping all money received by the First Nation in the hands of the director of finance.

**Subsection (2):** provides more detail on the general obligation in subsection (1) and requires the director of finance to deposit all money received by the First Nation *as soon as practicable* into the appropriate financial institution account. The director of finance must not authorize any payments from a financial institution account unless the payment relates to the purposes of the account and is otherwise authorized or permitted under the FAL. This last language refers to the requirements for authorizing expenditures and payments set out in the FAL.

### DIVISION 3 – EXPENDITURES

This Division sets out the requirements for expenditures of First Nation funds. This Division addresses in part the requirements of Law Standard 18.2. Unless these explanatory notes refer to a mandatory Law Standard, these sections are only suggestions for good financial management. A First Nation may wish to use other appropriate methods to address the requirements of Law Standard 18.2.

The FAL may also omit the recommended provisions of the Sample Law (respecting the means for managing effectively all First Nation expenditures, including internal controls respecting financial institution accounts and the procurement of goods and services) and instead impose a requirement on the council to make policies and procedures for these purposes.

**Section 35 (1) – (3) (Prohibited Expenditures):** specifies the limitations on the use of money from the financial institution trust account, local revenue account and tangible capital assets reserve account (required to be established in section 33 of the Sample Law).

Because the Law Standards only require a separate financial institution account for local revenues, Law Standard 18.2.2 limits the use of funds from that account to uses authorized under a local revenue law made under paragraph 5(1)(b) of the Act (see also section 13(2) of the Act). However, the Sample Law has suggested that separate accounts also be established for trust funds, the tangible capital assets reserve fund and for general purposes. Therefore, section 35 includes limitations for the use of funds from those accounts. A First Nation should consider imposing these limitations for any special account it establishes to ensure that the purpose of segregating the funds is not compromised.

**Section 36 (Prohibited Agreements):** prohibits the First Nation from entering into an agreement or undertaking that would require the First Nation to make expenditures that are not otherwise authorized under the Sample Law, a local revenues law or the Act. This provision reinforces the financial controls in the Sample Law that require certain confirmations before any expenditures are made – for example, the expenditure must be contemplated in the annual budget; sufficient funds must be available for the expenditure; First Nation officers must approve the payments.

**Section 37 (No Expenditure Without Appropriation):** requires all expenditures from an account to be authorized by the annual budget of the First Nation.

**Subsection (1):** requires any payments out of an account to be authorized under an appropriation. An appropriation is an allocation of money under the annual budget of the First Nation for a particular purpose (see section 2 of the Sample Law for definition of “appropriation”). Before any monies are expended for any purpose the expense must have been included in the annual budget (see Law Standard 18.2.3).

Exceptions to this rule are permitted in Law Standard 18.2.3 - “to address unforeseen events for which the FAL provides”. The Sample Law contains an exception for expenditures by the chief administrative officer for an emergency purpose under subsection 38(1). (Note however that the council must amend the annual budget after the fact to include this emergency expenditure.) If a First Nation wishes to permit other reasonable exceptions to this general rule it must include them in its FAL.

**Subsection (2):** The restriction on expenditures in subsection (1) does not apply to expenditures from a trust account if the terms of the trust agreement permit that expenditure. Funds from a trust are not considered First Nation funds.

**Section 38 (Emergency Expenditures):** specifies the process and limitations on the expenditure of First Nation funds for unbudgeted and unexpected emergencies. This section is not required by the Law Standards. It has been included however to provide an example of what might be considered a reasonable exception to the rule set out in subsection 37(1) of the Sample Law – reasonable exceptions to this rule are permitted in Law Standard 18.2.3.

**Subsection (1):** gives the chief administrative officer the authority to approve expenditure for an emergency purpose not provided for in the annual budget if the particular expenditure is not prohibited by the Sample Law or under another First Nation law. The subsection does not define

“emergency”. If a First Nation wishes to limit the meaning of the term, this definition should be included in this section.

**Subsection (2):** requires the council to establish policies and procedures for emergency expenditures by the chief administrative officer. A council should not use these policies and procedures to attempt to define an “emergency”. Council policies and procedures should not be used to define a term used in a FAL. If the council attempted to do so, it could be acting beyond its legal authority.

**Subsection (3):** requires an emergency expenditure to be reported to the council as soon as practicable and requires the council to amend the budget to include the expenditure. The reporting requirement could be included in the policies and procedures for emergency expenditures referred to in subsection (2) but the obligation to amend the budget to include this emergency expenditure should be included in a FAL.

**Subsection (4):** sets out a further restriction on the authority of the chief administrative officer, on his or her own initiative, to make an emergency expenditure that is not authorized in the annual budget. The chief administrative officer is not permitted to borrow money to make such expenditures.

**Subsection (5):** clarifies that the section does not authorize an emergency expenditure from local revenues. The Act requires all expenditures of local revenues to be authorized by an expenditure law made under paragraph 5(1)(b) of the Act. Also see section 13.1 of the Act that modifies this rule in certain circumstances.

**Section 39 (Appropriations):** sets out the rules respecting use of budget appropriations (see definition of “appropriation” in section 2 of the Sample Law).

**Subsection (1):** while subsection 37 (1) of the Sample Law states that no money can be expended unless there is provision in the budget for the expenditure, this subsection states that monies cannot be expended from that appropriation unless the money is to be used for the purpose set out in that appropriation.

**Subsection (2):** prevents overspending of any appropriations in a budget.

**Subsection (3):** requires every person who is responsible for managing expenditures in a particular appropriation to keep track of any commitments made that must come from that appropriation. This provision reinforces accountability for managing an appropriation and expenditures to be made from it and will help to avoid unexpected shortfalls in the budget.

**Section 40 (Payments after Fiscal Year-end):** clarifies how funds in any appropriations may be spent after the fiscal year for which they were budgeted.

**Subsection (1):** maintains year to year control of the budget by preventing payment of monies after April 1 from an appropriation in the previous fiscal year’s budget. The only exception is if the

payment is for a financial commitment provided for in an appropriation in the previous fiscal year's budget and incurred in that previous fiscal year.

**Subsection (2):** complements subsections 39(2) and (3) of the Sample Law. If the financial commitments payable from an appropriation are greater than the unspent balance of the appropriation at the end of a fiscal year, those financial commitments must be provided for in the budget for the following fiscal year. However, those financial commitments must be reported in the financial statements of the fiscal year in which they were incurred. See also subsection 13(3) of the Act respecting local revenue account budgets.

**Section 41 (Requisitions for Payment):** establishes the process and authorities for making payments of First Nation funds.

**Subsection (1):** requires a requisition for payment of any money from a First Nation account.

**Subsection (2):** prohibits a requisition being made for payment of money unless that money is authorized for payment from a budget appropriation or the payment is authorized use of money in a trust.

**Subsection (3):** complements the policy in subsections 39(2) and (3) and 40(2) of the Sample Law. It prohibits a requisition being made for payment of money out of a trust account if the amount of the payment exceeds the unexpended balance of the trust account.

**Subsection (4):** complements the policy in subsections 39(2) and (3) and 40(2) of the Sample Law. It prohibits a requisition being made for payment of money from an appropriation or a trust account if that payment would not leave enough available money in the appropriation or trust fund for commitments already made against the appropriation or trust fund.

**Subsection (5):** permits a requisition to combine expenditures chargeable against one or more appropriations and provides some efficiency in First Nation operations.

**Subsection (6):** sets out the contents of a requisition. The required contents are intended to provide sufficient information to ensure that the requirements of the Sample Law are being met as a payment is being processed. The provision also reinforces the notion of accountability for expenditures. The requirement for certified statements is intended to reinforce the seriousness of the information being relied upon.

Paragraph (b) of the subsection is describing circumstances where the requisition is for payment from a trust fund or is for an emergency purpose described in subsection 38(1) of the Sample Law – where a budget appropriation is not required.

**Subsection (7):** provides financial controls for payment of invoices for work, supplies or services provided to the First Nation. It helps to ensure that payment for work, services or supplies is not made prematurely before the First Nation can be satisfied that it has received what it is paying for or that the payment is made in accordance with any agreement it made. To satisfy this subsection

proactive contract administration will be necessary. (See also section 43 of the Sample Law which permits advances for prepayment of expenses in certain circumstances.)

**Subsection (8):** limits the signing authority for payment out of trust funds to the chief administrative officer or the director of finance.

**Subsection (9):** limits the signing authority for payment out of the local revenue account to the tax administrator.

**Subsection (10):** gives authority to the chief administrative officer or the director of finance to approve payments or sign requisitions for payment – except for payments and requisitions out of the local revenue account which must be approved and signed by the tax administrator.

**Subsection (11):** gives authority to a person who has responsibility to manage a particular budget appropriation to approve payments or sign requisitions from that appropriation – except of course for payments or requisitions out of a trust account or a local revenue account as limited in subsections (8) and (9) above.

**Section 42 (Form of Payment):** sets out how payments can be made by the First Nation. Note that payments must be made by a method that provides some evidence of the payment made – in other words payments by cash are not authorized in this section. If the council has a petty cash policy, that policy can address controls around payments by cash. This section also specifies that two individuals must sign these payment instruments – a designated councillor plus either the chief administrative officer or the director of finance. Again the First Nation may prefer different financial controls but the recommendation in this section is that two signatures be required for payments.

## **DIVISION 4 – GENERAL MATTERS**

This Division addresses a variety of subjects that merit specific financial controls. Law Standard 18.1 is the primary authority for these recommended provisions. Again a First Nation has discretion to decide what approaches it wishes to use in its FAL to address these types of issues. A FAL may omit these provisions and replace them with a requirement on the council to make policies and procedures for these purposes.

**Section 43 (Advances):** sets the rules for prepaying First Nation expenses.

**Subsection (1):** permits the chief administrative officer or the director of finance to approve an advance to prepay expenses so long as they are provided for in a budget appropriation for the current year or the next fiscal year.

**Subsection (2):** permits the tax administrator to approve an advance to prepay expenses from local revenues so long as they are provided for in a budget appropriation for local revenues for the current year or the next fiscal year.

**Section 44 (Holdbacks):** requires any amount withheld by the First Nation for an amount payable under an agreement to be charged against the budget appropriation from which the agreement was to be paid.

A First Nation may wish to hold back payment under an agreement - for example where there is a dispute over payment or concerns perhaps over work or services performed.

**Section 45 (Deposit Money):** provides rules for application of money paid on deposit to the First Nation.

**Subsection (1):** In some cases, a First Nation may require a contractor to provide a deposit of money or a security to ensure performance of work or services. This section requires the deposit to be kept and disposed of as the agreement with the contractor requires or if there is no agreement, the deposit must be kept and disposed of in accordance with any directions or policy set by the council (see subsection (2) for required council policies and directions).

**Subsection (2):** requires the council to adopt policies and procedures to deal with the subject referred to in subsection (1).

**Section 46(1) and (2) (Interest):** stipulates where interest earned in various accounts required in the Sample Law must be deposited.

**Subsection (3):** gives the First Nation authority to charge interest on any debts or payments owed to the First Nation. If interest is to be charged, the council must set the interest rate. The *Interest Act* imposes some restrictions on how interest can be charged. Note that the ability of the First Nation to charge interest may be limited by the terms of its agreements with third parties. This subsection authorizes the First Nation to charge interest but does not – absent an agreement to do so – oblige a debtor to the First Nation to pay it.

**Section 47 (Refunds):** sets the rules for refunds from First Nation accounts.

**Subsection (1):** allows the First Nation to refund all or part of money that has been paid to the First Nation in error or collected in error by the First Nation. This refund would not be a payment out of a budget appropriation and so requires special consideration.

**Subsection (2):** requires the council to establish policies and procedures for refunding money paid to the First Nation.

**Section 48 (Write Off of Debts):** allows the First Nation to write off all or part of a debt but only if the council specifically decides to do so or the write off is done in compliance with a policy or a direction given by council. This is not the forgiving of a debt but the removal of the debt from the accounts of the First Nation. The council is not required to make a policy or direction to address this issue but if it does not a debt can be written off only by decision of the council.

**Section 49 (Extinguishment of Debts):** allows the First Nation to forgive all or part of a debt but only if it the council specifically approves the forgiveness or if it is done under a policy or direction of the council. The council is not required to make a policy or direction for this issue but if it does not a debt can only be forgiven by a decision of council.

**Section 50 (Year-end Surplus):** provides the rules for application of year end surpluses of the First Nation.

**Subsection (1):** requires any operating surplus at the end of a fiscal year to be paid into the general account that section 33 of the Sample Law required to be established. The two exceptions to this requirement are set out in subsections (2) and (3).

**Subsection (2):** requires any operating surplus in the local revenue account to be retained in that account. This provision reinforces that local revenues are not to be comingled with other First Nation funds or used for purposes not authorized in the First Nation's local revenue laws.

**Subsection (3):** requires any operating surplus in the tangible capital assets reserve account to be retained in that account. It reinforces that money from this reserve fund account is not to be comingled with other First Nation's funds or used for purposes other than those specified in Part V of the Sample Law (Tangible Capital Assets).

## DIVISION 5 – BORROWING

This Division addresses the debt and borrowing issues set out in Law Standard 18.3. There are a variety of methods that a First Nation may use to satisfy this Law Standard. The Sample Law sets out suggested provisions which cover many common situations and that would be considered fiscally responsible.

**Section 51 (Borrowing):** sets the default rules respecting the borrowing of money or granting of security by the First Nation.

**Subsection (1):** authorizes the First Nation to borrow money or grant security under the conditions authorized in the Sample Law or in a local revenue law of the First Nation. A First Nation grants security to a creditor if it gives the creditor a promissory note, a guarantee or a mortgage, for example.

**Subsection (2):** sets out conditions for borrowing money or granting security under the Sample Law:

- the council may authorize the director of finance to borrow the money or grant security on behalf of the First Nation;
- the director of finance must borrow the money or grant security in the manner specifically approved by the council or if the council does not set out these requirements, in the manner set out in the policies and procedures established by the council. If the council does not establish any policies and procedures for these purposes, the council must give specific directions on each occasion to the director of finance on how to borrow money or grant a security.

**Section 52 (Borrowing for Ordinary Operations):** sets the rules for assuming debt or granting security related to the day to day operations of the First Nation.

**Subsection (1):** permits the First Nation to have trade accounts (e.g. credit arrangements) for expenditures under an appropriation which must be paid in the current year or for expenditure for which an appropriation is not required (e.g. expenditure from a trust).



**Subsection (2):** permits the First Nation to have overdrafts or lines of credit with financial institutions under terms approved by the council.

**Subsection (3):** permits the First Nation to enter into a general security agreement or lease for the use or acquisition of lands, materials or equipment required for its operations, management or administration.

**Section 53 (Financial Agreements):** sets the rules for the First Nation to enter into financial agreements.

**Subsection (1):** specifies the general types of financial agreements that the First Nation may enter into in order to manage its financial assets more efficiently or to reduce the risks or maximize the benefits to the First Nation as a result of borrowing, lending or investing its financial assets. A First Nation will wish to determine if its financial affairs are complex enough to require this authority.

**Subsection (2):** is a default provision that gives the director of finance authority to enter into the agreements referred to in subsection (1) on behalf of the First Nation – unless the council chooses to limit or restrict this authority.

**Section 54 (Borrowing for Authorized Expenditures):** gives authority to the First Nation for short term borrowing for authorized expenditures.

**Subsection (1):** provides authority to address cash flow problems when the general account referred to in section 33 of the Sample Law has insufficient funds to meet expenditures authorized to be made from it. Before money may be borrowed for this purpose the director of finance must recommend to the council that money be borrowed to ensure that the general account is sufficient for these authorized expenditures. The council must specifically authorize this borrowing specifying any maximum amount and the time within which it must be repaid.

**Subsection (2):** prevents the First Nation from retaining borrowed monies that are no longer required to cover a short fall in the general account. Money that is no longer required must be repaid as soon as possible.

**Section 55 (Borrowing Member Requirements):** This section is not operative if the First Nation is not a borrowing member as defined in the Act. The section should be included however if the First Nation wishes to keep that option open for the future.

**Subsection (1):** This subsection is included in the Sample Law only to confirm that section 55 is relevant only if a First Nation is a borrowing member. If a First Nation is a borrowing member, its FAL need not include subsection (1).

**Subsection (2):** states that if the First Nation is a borrowing member and has obtained long term financing, secured by property tax revenues from the First Nations Finance Authority, the First Nation is prohibited from borrowing from another lender using property tax revenues to secure that loan. This is a restriction set out in section 80 of the Act.

**Subsection (3):** confirms that the First Nation borrowing member may only obtain long term financing from the First Nations Finance Authority as permitted under the borrowing member's local revenue law and as permitted under the Act.

**Subsection (4):** notes the restriction on use of money borrowed from the First Nations Finance Authority and secured by property tax revenues – section 74 of the Act limits the use of these funds for purposes specified in that Act.

**Subsection (5):** notes the restriction on use of money borrowed from the First Nations Finance Authority and secured by “other revenues” – section 4 of the *Financing Secured by Other Revenues Regulation* made under the Act states the purposes for which these borrowed moneys may be used.

**Section 56 (Borrowing for New Capital Projects):** provides the means by which members of the First Nation must be informed about or involved in consideration of borrowing for new tangible capital asset projects. Law Standard 28.0 sets out the requirements for a FAL in this area. These requirements can be set out in the Sample Law or by council policy and procedures.

**Subsection (1):** requires the council to establish policies and procedures respecting the means by which members of the First Nation must be informed about or involved in consideration of borrowing for new tangible capital asset projects described in Part V of the Sample Law.

**Subsection (2):** requires the council to post a public notice of each Council meeting when borrowing for new tangible capital asset projects described in Part V of the Sample Law is presented for approval. This is a suggested but not required provision. A First Nation should consider its own particular circumstances when determining the methods that its members would wish to have in place to provide for this information or involvement.

**Subsection (3):** permits members of the First Nation to attend that part of the Council meeting when the matters referred to in subsection (2) are being considered. Again this is a suggested but not required provision.

**Section 57 (Borrowing for Repayment of Debts):** allows a First Nation to borrow money for the repayment or financing of its debts – with one exception - it cannot borrow to refinance a debt under subsection 54(1) of the Sample Law which is only intended to be a short term solution to a temporary cash flow problem. This is a suggested but not required provision.

The authority to borrow money under this section remains subject to any other requirements of the Sample Law respecting the borrowing of money.

**Section 58 (Use of Borrowed Money):** sets the rules for use of money borrowed by the First Nation.

**Subsection (1):** restricts a First Nation from using borrowed money for any purposes other than that for which the money was borrowed.

**Subsection (2):** permits a First Nation to invest temporarily some or all of borrowed money if it is not immediately required for the purpose for which it was borrowed. However, this money may only be placed in investments specified in subsection 64(1) of the Sample Law – investments considered to be relatively free from risk.

**Subsection (3):** requires any borrowed money that is no longer required for the purpose for which it was borrowed to be used to repay the debt from the borrowing.

**Section 59 (Execution of Security Documents):** sets the rules for signing any security documents granted by the First Nation.

**Subsection (1):** requires all security documents granted by the First Nation (other than those issued in respect of local revenues) to be signed by two persons - a councillor named by the council and either the chief administrative officer or the director of finance.

**Subsection (2):** requires all security documents granted by the First Nation in respect of local revenues to be signed by two persons – a councillor named by the council and the tax administrator.

## DIVISION 6 – RISK MANAGEMENT

This Division provides for the identification and management of the types of risks that First Nations might encounter in their operations – including provisions respecting for-profit activities, guarantees and indemnities, investments, insurance and risk of fraud. Law Standard 19.0 sets out the requirements for a FAL in this area. The Sample Law sets out suggested provisions for addressing these subjects but other options may be more appropriate for particular First Nations. In some cases the Law Standards do not require substantive provisions to be included in the FAL and allow these substantive provisions to be replaced with requirements for the council to establish policies and procedures respecting those matters.

**Section 60 (Management of Business Activity):** sets out the recommended general rules for a First Nation to participate in business (for-profit) activities as contemplated in Law Standard 19.1. This Standard may also be met by a provision of a FAL requiring the council to establish policies and procedures respecting this subject matter.

First Nations that directly carry on business activities primarily for the purpose of profit – for example, a forestry, construction or marina business – expose the First Nation, potentially, to liabilities that may be recoverable from First Nation funds and assets required for its government operations. Setting guidelines for the conduct of business activities will encourage risk analysis before undertaking those activities. Carrying on such activities through corporations for example may enable a First Nation to limit exposure to the kinds of losses and liabilities common to business activities. For example, a First Nation may establish, own shares in and capitalize corporations or establish, own partnership units in and capitalize limited partnerships in order to carry on for-profit business activities.

A First Nation has many options for addressing this issue - from prohibiting for-profit activity outright to setting out the various requirements that must be met before such activity is authorized. A First Nation

should assess its capacity to manage such activities when deciding how these provisions should be developed. In this case the Sample Law sets out the provisions – rather than leaving it to a council policy and procedure.

**Subsection (1):** This subsection permits the First Nation to operate a business as an owner, to acquire an interest in a partnership as a general partner and to act as a trustee for property used in carrying on a business. These are three examples of situations where the First Nation would be principally responsible for making all the decisions relating to a business that it owns or that it operates as general partner or relating to land or other assets used in a business and for which it is responsible as a trustee under a trust. To help to manage the risks associated with these activities, they are to be carried on under the recommended conditions set out in subsections (2) and (3) of the Sample Law.

**Subsection (2):** permits a First Nation to carry on a business referred to in subsection (1) if it is closely related to or supportive of the First Nation's programs and services or other governance activities, for example a cafeteria in an administration building. This subsection also permits a First Nation to earn income from a business that leases the First Nation's property or gives a license to use its property – including property that is held in trust for the First Nation.

**Subsection (3):** permits the First Nation to carry on business referred to in subsection (1) primarily for profit so long as the council determines that the business does not result in a material liability for the First Nation or does not expose the First Nation's assets to significant risk.

**Subsection (4):** gives the council the authority to set terms and conditions on the conduct of any businesses that are permitted under this section – to help to manage or avoid the risks associated with that business. The council is not required to establish these terms and conditions but the provision will permit the council to impose specific terms and conditions for any particular business activity or activities.

**Section 61 (Guarantees and Indemnities):** sets the recommended rules for a First Nation giving a guarantee or an indemnity.

**Subsection (1):** satisfies the requirements of Law Standard 19.2 respecting the giving of guarantees ("a guarantee" is a promise to satisfy an obligation that another person has agreed to fulfill if that person fails to do so) and indemnities ("an indemnity" is a promise to "make a person whole" from specified losses or costs they may suffer or payment of compensation to make a person whole from a loss they have already suffered).

This subsection prohibits the First Nation from giving a guarantee unless the council has received an assessment from the director of finance about the impact of giving the guarantee.

**Subsection (2):** sets out the contents of the assessment report required by the director of finance before the council may approve the First Nation giving a guarantee. The director of finance must identify the risks of giving the guarantee and must assess the ability of the First Nation to fulfill the terms of the guarantee if called upon to do so.

**Subsection (3):** prohibits the First Nation from giving an indemnity except in the following three specific circumstances:

- it is an indemnity that the council has by resolution given to a named First Nation official (who is defined in subsection 102(1) of the Sample Law as a current or former councillor, officer or employee of the First Nation) e.g. the First Nation agrees to indemnify councillors for defence costs of a lawsuit brought against the councillor arising out of performance of the councillor's duties;
- it is an indemnity that is an essential part of and related to another agreement that the First Nation has entered into (e.g. a construction company requires the First Nation to give it an indemnity for any losses or damages it suffers as a result of the engineering drawings provided by the First Nation being defective);
- it is an indemnity that relates to a security given by the First Nation that is authorized under the FAL or another First Nation law.

**Subsection (4):** requires the council to make policies and procedures respecting guarantees and indemnities that address the following issues:

- specifying when an indemnity can be made without the express approval of the council (if ever);
- designating who may give an indemnity and stating the limits on the amount of any indemnity they may give;
- specifying any terms and conditions for giving a guarantee or indemnity; and
- specifying the records that must be kept of guarantees and indemnities.

**Section 62 (Authority to Invest):** sets the recommended default rules for investments by the First Nation.

**Subsection (1):** permits the First Nation to invest any of its financial assets under any conditions set out in the FAL or another First Nation law.

**Subsection (2):** if the FAL authorizes the investment of the First Nation's financial assets, this subsection allows the council to authorize the director of finance to invest the First Nation's financial assets in the manner the council specifically approves or in accordance with the investment management strategy approved by the council under section 63 of the Sample Law.

**Section 63 (Investment Management Strategy):** sets the recommended default rules for an investment management strategy for an investing First Nation and meets the requirements of Law Standard 19.3.1.

**Subsection (1):** requires the council to approve an investment management strategy for the First Nation before approving any investment of the First Nation's financial assets.

**Subsection (2):** requires the council to establish policies and procedures for the development, approval and periodic review of an investment management strategy for the First Nation's financial assets.

**Section 64 (Approved Investments):** defines and sets the recommended rules for First Nation investments. Except for subsection (4), these are only recommended provisions of a FAL. A First Nation may prefer to replace subsections (1) to (3) with a requirement for the council to make policies and procedures respecting First Nation investments. See Law Standard 19.3.3.

**Subsection (1):** permits the investment of money held in accounts that the First Nation established in section 33 of the Sample Law where the money is not immediately required. The investments listed are considered to be conservative and relatively low risk. Note paragraph (e) of the Sample Law is left blank to allow the First Nation to add any additional categories of investments it wishes to include.

**Subsection (2):** permits the investment of money held in a trust fund where it is not immediately required. The investments permitted are those that may be specified in the trust document or those allowed under the laws of the province or territory in which most of the First Nation's lands ("its reserves") are located.

**Subsection (3):** sets out how money which is specifically set aside by the First Nation in an investment account may be invested. It expands the list of permitted investments to include investments

- in entities (such as corporations or partnerships) in which the First Nation has a financial interest,
- securities issued by the First Nations Finance Authority or by a local, municipal or regional government in Canada, and
- in a program for lending money to First Nation members – the program requirements of which are set out in section 65 of the Sample Law.

**Subsection (4):** restricts the investment of funds transferred from the government to the First Nation and local revenues to those investments specified in subsection 82(3) of the Act, (namely: securities issues or guaranteed by Canada or a province; securities of a local, municipal or regional government in Canada; investments guaranteed by a bank, trust company or credit union; deposits in a bank or trust company in Canada or membership shares in a credit union and to investments in securities issued by the First Nations Finance Authority or a municipal finance authority established by a province). This subsection satisfies Law Standard 19.3.2.

**Section 65 (Permitted Loans to First Nation Members):** sets the conditions under which a First Nation may lend money to First Nation members or invest in businesses in which a First Nation member has a financial interest. This section is not required unless the First Nation wishes to consider lending First Nation funds to First Nation members (see Law Standard 19.4.2).

**Subsection (1):** limits the authority of the First Nation to lend money to a First Nation member or to an entity (i.e. company, partnership) in which a First Nation member has a financial interest unless the loan is made from a program that has been approved by the council and that meets the requirements set out in the section.

**Subsection (2):** requires the director of finance to give the council a report that outlines any risks associated with establishing a program to lend money to First Nation members and the costs of administering the program – before the council decides whether or not to establish the program.

**Subsection (3):** The Law Standard requires a program of this kind to be universally available to First Nation members, to have published terms and conditions and to be transparent. This subsection sets out the requirements of a program to lend money to First Nation members.

Paragraph (c) requires all loans from the program and all payments received to be included in a detailed annual report. Section 77 of the Sample Law requires this annual report to be prepared as a special purpose report which is audited or reviewed by the independent auditor of the First Nation and published in the annual report of the First Nation (see section 83 of the Sample Law). Taken together these provisions address the Law Standard requirement for this program to be transparent.

Paragraph (d) sets out the terms and conditions for the program – all loans must be set out in a written agreement with the member that sets out the terms for repayment of the principal amount of the loan and interest and that provides security for repayment of the loan. This paragraph addresses the requirements of Law Standard 19.4.2 for this lending program.

**Subsection (4):** requires the council to establish policies and procedures for the operation of the lending program.

**Section 66 (Administration of Investments and Loans):** sets the recommended general requirements for administering investments and loans. This section meets the requirements of Law Standard 19.4.1. The FAL may include substantive provisions addressing this subject matter or have a requirement that the council make policies and procedures for this subject matter. Section 66 combines these two approaches.

**Subsection (1):** gives the director of finance the authority for all administrative actions and decisions associated with any investments or loans that the First Nation is authorized to make under the FAL.

**Subsection (2):** requires the council to establish policies and procedures respecting the terms and conditions for First Nation loans and these must include requirements for loans to be set out in



written agreements that set out the terms for repayment of the principal amount of the loans and interest and that requires security for repayment of the loans.

**Section 67 (Risk Assessment and Management):** sets recommended provisions for the identification, assessment and management of risks.

**Subsection (1):** gives the chief administrative officer the responsibility to identify and evaluate all significant risks to the First Nation's financial assets, its tangible capital assets (see definition of "First Nation's tangible capital assets" in section 89 of the Sample Law) and its operations. The chief administrative officer must complete this process at least once a year and more often if necessary in the particular circumstances of the First Nation. These risks could include such things as flood risks, environmental hazards, liability for custody of third party property, loss of revenue streams due to economic climate or legal proceedings against the First Nation (see Law Standard 11.2.3.j).

**Subsection (2):** requires the chief administrative officer to report to the finance and audit committee on plans the chief administrative officer is suggesting for

- minimizing the significant risks that have been identified (e.g. by clearing fire fuel away from First Nation buildings or by cleaning up environmental hazards)
- managing those risks (e.g. by hiring professional advisors) or by transferring responsibility for those risks to third parties by agreement (e.g. making the risks in a construction contract the responsibility of the contractor; requiring a contractor to provide a performance guarantee bond) or by purchasing insurance (e.g. course of construction insurance or fidelity insurance).

The chief administrative officer must make this report at least once a year and more often if necessary. See the complementary responsibility of the director of finance under paragraph 19(2)(l) of the Sample Law to recommend procedures for these purposes.

**Section 68 (Insurance):** requires insurance coverage where appropriate for risks to the First Nation and satisfies the requirements of Law Standard 19.5.

**Subsection (1):** creates the additional responsibility of the finance and audit committee to make recommendations to the council on appropriate insurance coverage for the First Nation. This subsection flows from subsection 67(2) of the Sample Law in which the finance and audit committee considers the chief administrative officer's report on plans for mitigating and managing risks – including plans for insurance coverage.

The subsection requires the council to purchase and to keep in force (i.e. avoid lapses in coverage) all insurance coverage that is appropriate for addressing the risks identified in section 67 of the Sample Law (including liability insurance) and any other risks associated with property and assets that the First Nation may have under its care and control. This last category will require appropriate

coverage for property that the First Nation may not own but for which it is responsible – e.g. leased equipment; property held in trust for the First Nation etc. (see Law Standard 19.5.1).

**Subsection (2):** allows the council to obtain insurance coverage for a councillor or an officer (defined in section 2 of the Sample Law as the chief administrative officer, the director of finance, the tax administrator and any other person designated by the council as an officer) against any exposure to liability that person may have as a result of performance of their duties or functions as current or former councillors or officers. This coverage may also be extended to the personal representatives of councillors or officers (e.g. a guardian in the case of a person who is no longer able to manage their affairs or an executor of a deceased person's estate).

**Section 69 (Risk of Fraud):** requires the council to establish procedures for the identification and assessment of risk of fraud in the First Nation.

**Subsection (1):** defines fraud risks.

**Subsection (2):** requires the council to establish procedures to identify and assess these risks.

**Section 70 (Operational Controls):** satisfies the requirements of Law Standard 19.6.1. This Standard may be satisfied by setting out the requirements in a FAL for the system of internal controls for the First Nation's operations or by requiring the council to establish policies and procedures respecting these controls. This section requires the council to develop these requirements by policies and procedures.

## DIVISION 7 – FINANCIAL REPORTING

This Division addresses the requirements set out in Law Standard 20.0. Many of these Standards are mandatory and are considered necessary for good financial reporting practices. They reflect existing Canadian standards for First Nation financial reporting practices.

**Section 71 (GAAP):** This section is mandatory and requires the accounting of the First Nation to comply with GAAP (defined in section 2 of the Sample Law as generally accepted accounting principles established by the Chartered Professional Accountants of Canada). Note that this requirement is modified by the exception shown in subsection 77(2) of the Sample Law in relation to special purpose reports (see Law Standards 8.3.1 and 20.6.3).

**Section 72 (Separate Accounting):** requires separate accounting of local revenues and of “other revenues” (if the First Nation has a loan from the First Nations Finance Authority that is secured by “other revenues”).

**Subsection (1):** requires the director of finance to account for local revenues of the First Nation separately from other moneys of the First Nation and satisfies, in part, Law Standard 20.2.1.

**Subsection (2):** if the First Nation has a loan from the First Nations Finance Authority secured by other revenues, this provision requires the director of finance to account for all other revenues separately from other moneys of the First Nation and, on request, to provide the First Nations Finance Authority and the FMB with accounting information respecting those other revenues.

Note that even though a First Nation is using only specific other revenue sources to secure the loan, it is required to account for all of its other revenues separately – not just the other revenues stream that it has used to secure the loan from the Authority. Law Standards 20.2.2 and 20.2.3 are intended to ensure that information is available to the Authority and to the FMB should it be required by them in order to carry out their functions under the Act and to support the borrowing opportunities of the First Nation under the Act.

**Section 73 (Monthly Financial Information):** requires financial information to be prepared monthly and distributed.

**Subsection (1):** satisfies the requirements of Law Standard 20.3. This subsection imposes the responsibility on the director of finance to prepare financial information at the end of every month that will be provided to the council and the finance and audit committee. The form and content of this information must be approved by the council and will be based upon a recommendation from the finance and audit committee. This last element is recommended but not required in the Law Standards.

**Subsection (2):** requires the director of finance to provide the monthly financial information to the chief administrative officer within a reasonable period of time after the month end. A specific time period is not set out in the Law Standard and a First Nation may wish to specify in its FAL the time within which this report is required. Law Standard 20.3 requires the monthly report to be given to the council, the finance and audit committee or the chief administrative officer and a First Nation will wish to consider the most appropriate level of governance to provide this report.

**Section 74 (Quarterly Financial Statements):** requires quarterly financial statements to be prepared, reviewed and approved.

**Subsection (1):** satisfies Law Standard 20.4. This subsection imposes the responsibility on the director of finance to prepare financial statements at the end of each quarter of the fiscal year and to provide them to the council and the finance and audit committee. The form and content of this information must be approved by the council and will be based upon a recommendation from the finance and audit committee. This last element is recommended but not required in the Law Standards. This subsection also supports paragraph 19(2)(d) of the Sample Law that requires the director of finance to prepare the First Nation's financial statements.

**Subsection (2):** requires the director of finance to provide the quarterly financial information no later than forty-five (45) days after the end of the quarter. This 45 day period is not set out in the Law Standard but is considered a reasonable time after taking into account the resources required to prepare it and the need for timely information to be available for informed decision-making. A First Nation may wish to have this information faster and with currently available technology that is very feasible.

**Subsection (3):** requires the finance and audit committee to review the quarterly financial statements and the council to review and approve them. No time period is set out for these actions and a First Nation may wish to include such requirement. This subsection supports paragraph 15(1)(d)

of the Sample Law that requires the finance and audit committee to review and recommend these statements to the council for approval.

**Section 75 (Annual Financial Statements):** requires annual financial statements to be prepared and reviewed. This section does not apply to the financial reporting of local revenues because of the different reporting periods, the applicable provisions of the Act and the FMB's *Local Revenue Financial Reporting Standards* made under section 55 of the Act.

**Subsection (1):** states that the section does not apply to the separate annual financial statements respecting local revenues referred to in section 76 of the Sample Law.

**Subsection (2):** requires the director of finance to prepare the annual financial statements of the First Nation at the end of the fiscal year. They must be prepared in accordance with GAAP and satisfies Law Standard 20.5.2. This subsection also supports paragraph 19(2)(d) of the Sample Law that requires the director of finance to prepare the First Nation's financial statements.

**Subsection (3):** This subsection, while not specifically required in Law Standard 20.5.1, is consistent with the requirements in the Sample Law for the preparation of quarterly financial statements of the First Nation. The finance and audit committee should recommend and the council should approve the form and content of the statements. The committee's recommendation and the council's approval must be consistent however with the requirements of the FAL and with the requirements of GAAP.

**Subsection (4):** affirms that the annual financial statements must include all the financial information of the First Nation.

**Subsection (5):** requires the director of finance to provide draft annual financial statements to the finance and audit committee for review within a reasonable period of time following the fiscal year-end.

**Subsection (6):** requires the finance and audit committee to present the draft annual financial statements to the council within a reasonable period of time following the fiscal year-end.

**Subsection (7):** provides some clarification and assistance in determining what a "reasonable period of time" means in subsections (5) and (6).

**Section 76 (Local Revenues Annual Financial Statements):** sets out the requirements for separate financial reporting of local revenues. Subsection 14(1) of the Act requires local revenues to be reported on separately from other moneys of the First Nation.

**Subsection (1):** requires the director of finance to prepare separate annual financial statements respecting local revenues of the First Nation at least once each calendar year in accordance with *Local Revenue Financial Reporting Standards* of the FMB. This subsection satisfies Law Standard 20.5.3.

**Subsection (2):** requires the council to establish policies and procedures respecting the annual preparation, review, audit and approval of the annual financial statements respecting local revenues including any deadlines for completing these activities. Because these annual financial statements may be prepared and reviewed at different times than for the general purpose annual financial statements of the First Nation, the Sample Law contains this recommended provision to assist First Nations to manage these matters efficiently and effectively.

**Subsection (3):** clarifies that the policies to be made under subsection (2) should be consistent with any requirements set out in the FMB's *Local Revenue Financial Reporting Standards*.

**Subsection (4):** refers to the option that may be available to a First Nation for reporting its local revenues under the FMB's *Local Revenue Financial Reporting Standards*. Subsection 14(1.1) of the Act permits a First Nation to report on its local revenues in its audited general annual financial statements as a distinct segment of the activities that appear in those statements – if this segmented reporting is authorized in the FMB's *Local Revenue Financial Reporting Standards*. Because a First Nation's ability to use this option may vary over time the Sample Law starts with the default position that a First Nation must prepare audited annual financial statements for its local revenues.

**Section 77 (Special Purpose Reports):** complies with Law Standard 20.6 which requires the director of finance annually to prepare special purpose reports.

**Subsection (1):** meets the requirements of Law Standards 20.6.1 and 20.6.2 and lists all the special purpose reports which the director of finance is required to prepare:

- a report setting out all payments made to honour guarantees and indemnities that fiscal year;
- a report setting out the information required in section 10 (annual reporting of payments made to councillors);
- a report setting out all debts and obligations forgiven;
- a report setting out the information required in section 65 (loans program to First Nation members); and
- any other report required under the Act or an agreement with the First Nation.

**Subsection (2):** permits the director of finance to prepare a special purpose report on a basis of accounting to GAAP if that is necessary to comply with any reporting obligations under an agreement. This is an exception to the general Law Standard requirement to do all accounting on the basis of GAAP and is permitted under Law Standard 20.6.3.

**Section 78 (Appointment of Auditor):** requires the appointment of an auditor with specified qualifications.

**Subsection (1):** deals with the requirements for appointment of an auditor as set out in Law Standard 21.4.1. This subsection requires a First Nation to appoint an auditor for the First Nation for each fiscal year.

To avoid any lapse between auditor appointments and also to ensure that the auditor for a fiscal year remains in office until the council has considered the annual financial statements the auditor audited, this subsection provides that the auditor's appointment for a fiscal year ends on the last of the two following events that occurs: the first event is the end of the council meeting when the audited financial statements of the previous year are being considered and the second event is the date the next auditor is appointed.

**Subsection (2):** requires the First Nation to appoint the auditor in an engagement letter that has been approved by the finance and audit committee. The terms and conditions of the appointment are to be stated in that letter and must include the content required by Canadian generally accepted auditing standards. This provision satisfies Law Standard 21.4.3.

**Subsection (3):** sets out the eligibility requirements for an auditor that are set out in Law Standard 21.4.2.

First the auditor must be independent of the First Nation, its related bodies, councillors and officer of the First Nation and First Nation members. This independence helps to ensure that the auditor will not have a conflict of interest when performing the audit of the First Nation. Law Standard 21.4.2 only requires the auditor to be independent of the First Nation but the Sample Law has recommended provisions requiring the auditor also be independent of those involved in the administration of the First Nation as well as all members of the First Nation. This recommendation helps to support the transparency and integrity of the operations of the First Nation.

Whether an auditor is independent is a question of fact, but the person being considered for the role of auditor is *not* normally considered independent in the following circumstances:

- the person is a councillor, officer or employee or member of the First Nation or is a partner, employer, employee or member of the immediate family of a councillor, officer or employee or member of the First Nation,
- the person is a director, officer or employee of a related body of the First Nation or is a partner, employer, employee or member of the immediate family of a director, officer or employee of a related body of the First Nation,
- the person, a member of the person's immediate family, a partner of the person or a member of the immediate family of a partner of the person, beneficially owns or controls, directly or indirectly, any material interest in a security issued by the First Nation,

- the person is appointed a trustee of the estate of a related body of the First Nation under the *Bankruptcy and Insolvency Act* or is a partner, employer, employee or member of the immediate family of that trustee.

The second eligibility criterion is the auditor must be a public accounting firm or a public accountant and must be

- in good standing with the Chartered Professional Accountants of Canada and its respective counterparts in the province or territory in which the public accounting firm or public accountant is practicing, and
- licensed or otherwise authorized to practice public accounting in the province or territory in which the majority of the reserve lands of the First Nation are located.

**Subsection (4):** imposes an obligation on the auditor to advise the First Nation in writing, as soon as practicable, after the auditor becomes aware of any circumstances that have led to the auditor no longer being independent. The auditor must also advise that the auditor has eliminated the circumstances that resulted in a loss of independence or that the auditor is resigning (if removing the circumstances is not possible or acceptable to the auditor). Again this is a recommended provision of the Sample Law to help the First Nation manage the process and costs associated with its annual audits.

**Section 79 (Auditor's Authority):** sets out the authority the auditor has as required in Law Standard 21.4.5 to access all information the auditor requires to conduct the audit of the annual financial statements and permits the auditor to attend and speak at certain meetings of the finance and audit committee, the council and the First Nation membership.

**Subsection (1):** requires the auditor to be given the authority necessary to conduct the audit and includes several specific authorities which must be included in a FAL. This subsection requires the auditor to be given access to all records of the First Nation in order to look at or inspect them and if the auditor requests, to be given copies of those records. Note that "First Nation's records" is a broadly defined term in section 2 of the Sample Law. It is not restricted to the First Nation's financial records.

The auditor must also be given access to all councillors, officers, employees, contractors and agents of the First Nation to ask any questions or to request any information. Subsection (2) sets out the obligation for these people to cooperate with the auditor.

**Subsection (2):** requires the individuals referred to in subsection (1), on the auditor's request, to make all of the First Nation's records that are in their care or control available to the auditor. On request of the auditor they must also provide the auditor with complete information and explanations about the business and operations of the First Nation. Note that that disclosure also applies to contractors and agents of the First Nation.



**Subsection (3):** requires the auditor to be given notice of every meeting of the finance and audit committee and to be given notice of every meeting of the council where the annual audit, including the annual financial statements, will be considered and approved. This subsection meets the minimum requirements of Law Standard 21.4.5.d and could be expanded to require the auditor to be given notice of a broader scope of council meetings

**Subsection (4):** while subsection (3) does not require the auditor to attend finance and audit committee and council meetings, it entitles the auditor to attend a meeting for which the auditor must be notified or to which the auditor has been invited and if he or she does attend, the auditor must be given the opportunity to be heard on any issues that concern the auditor as auditor.

**Subsection (5):** gives the auditor the authority to communicate with the finance and audit committee as the auditor considers appropriate to discuss any subject that the auditor recommends be considered by the committee. The scope of this subsection could be expanded to give the auditor the discretion to request that a meeting be called to address a subject of concern to the auditor as auditor.

**Subsection (6):** this subsection allows the finance and audit committee or the council to require the auditor to leave all or a portion of a meeting that the auditor has attended if the subject matter of the meeting or that portion of the meeting is the retaining or dismissing of the auditor.

Law Standard 21.4.5 permits the auditor to be denied attendance at these meetings “for reasonable exceptions”. It seems reasonable to permit the committee or council to require the auditor to leave its meetings when they are discussing the hiring or firing of the auditor.

**Section 80 (Assurance Requirements):** sets the general requirements for the audit of the annual financial statements of the First Nation.

**Subsection (1):** requires the auditor to provide an audit report on the annual financial statements not more than 120 days after the fiscal year end. See Law Standard 21.5. This provision does not apply to the local revenues financial statements because the fiscal year end may not be the reporting period for local revenues.

**Subsection (2):** requires the separate annual financial statements respecting local revenues to be audited by an auditor at least once every calendar year. This provision reflects the requirements of subsection 14(1.1) of the Act and Law Standard 21.4.4.

**Subsection (3):** requires the audit of all annual financial statements to be conducted in accordance with Canadian generally accepted auditing standards.

**Subsection (4):** This subsection meets the requirements of Law Standard 21.4.4 which requires the auditor to provide an audit report or review engagement report on the required special purpose reports.

**Section 81 (Review of Audited Annual Financial Statements):** specifies requirements for the review and approval of the audited annual financial statements.

**Subsection (1):** states that the section does not apply to the separate annual financial statements respecting local revenues. The timing for review and approval of annual financial statements respecting local revenues will be established by council policies referred to in subsection 76(2) of the Sample Law. These requirements will be dictated by the particular circumstances of the First Nation and its property taxation cycle.

**Subsection (2):** requires the finance and audit committee to review and consider the audited financial statements within a reasonable period of time after the fiscal year-end. A First Nation may wish to set a specific time period for this review in order to permit the council to review and approve these statements no later than 120 days after the year end (see Law Standard 22.1).

**Subsection (3):** requires the council to review and approve the audited annual financial statements not later than 120 days after the fiscal year end. This deadline is set out in Law Standard 22.1 and should enable most First Nations to provide their audited annual financial statements within the time required by the federal government under any funding agreements. A First Nation may of course require the review and approval of the audited annual financial statements earlier than 120 days if the First Nation considers an earlier date to be possible.

**Section 82 (Access to Annual Financial Statements):** requires all the audited annual financial statements of the First Nation to be approved, signed and then made available for inspection.

**Subsection (1):** imposes the requirements that before the audited annual financial statements are made available to others by publication or distribution,

- they must first be reviewed and approved by the council (see Law Standard 22.1),
- they must be signed by the chief or the council chair, the chair of the finance and audit committee and the director of finance (see Law Standard 22.2), and
- they must include the auditor's audit report of the statements.

**Subsection (2):** requires all audited annual financial statements to be made available for inspection by First Nation members at the principal administrative offices of the First Nation during normal business hours. This subsection satisfies the Law Standard requirement that First Nation members be given access to these statements – in this case, to look at them. A First Nation may wish to substitute an address or a specific building in this subsection – rather than leave the description to the rather vague phrase “principal administrative offices of the First Nation”. See Law Standards 22.3.1 and 22.3.2.

**Subsection (3):** requires the financial report of local revenues (whether set out as separate audited annual financial statements or as a part of the audited general annual financial statements of the First Nation) to be made available for inspection at the principal administrative offices of the First Nation during normal office hours by any of the persons set out in subsection 14(2) of the Act. These include

- First Nation members;
- any person who has an interest in or a right to occupy or use the First Nation's reserve lands;
- the First Nations Tax Commission, the FMB, the First Nations Finance Authority; and
- the Minister of Indian and Northern Affairs and Northern Development<sup>1</sup>.

**Section 83 (Annual Report):** requires the First Nation to prepare an annual report of its operations and financial performance.

**Subsection (1):** requires the council to prepare an annual report of the First Nation that reports on its operations and financial performance for the previous fiscal year. The deadline for preparing this report is 180 days after the end of each fiscal year. These requirements in Law Standards 23.1 and 23.2 support the need for transparency and accountability in the financial affairs of the First Nation.

**Subsection (2):** complies with Law Standard 23.3 and requires a description of the services and operations of the First Nation and a progress report on any established objectives and performance measures of the First Nation..

**Subsection (3):** as required in Law Standard 23.3 the audited annual financial statements of the First Nation and any required special purpose reports (including the auditor's report) are to be either included in the annual report or incorporated by reference. By incorporating these annual statements by reference, there is likely to be a significant cost saving in production of the annual report and may make it easier for a First Nation to control access to confidential information. See subsection (4) for how First Nation members can access these referenced documents.

**Subsection (4):** the chief administrative officer must provide the annual report to a member of the First Nation as soon practicable after a request and to the First Nations Finance Authority as soon as practicable after publication if the First Nation is a borrowing member. These requirements are set out in Law Standard 23.4. Note that this subsection only sets out who must be given copies of the annual report but does not restrict to whom the First Nation may wish to give copies.

**Subsection (5):** Law Standard 23.5 requires the FAL to contain provisions or the council to establish policies and procedures respecting an accessible process and remedy available to First Nation

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<sup>1</sup> Note that as of July 15, 2019 legislation dissolving Indigenous and Northern Affairs Canada and formally establishing the mandates of 2 new departments, Indigenous Services Canada (ISC) and Crown-Indigenous Relations and Northern Affairs (CIRNAC), came into effect. The Minister responsible for this Act is, as at the date of these Explanatory Notes, the Minister of CIRNAC.

members who have requested but have not been provided with the annual report of the First Nation. This subsection requires the council to establish such policies.

**Subsection (6):** requires the policies referenced in subsection (5) to include requirements that a register be maintained for recording requests by First Nation members of the annual report and that the chief administrative officer report quarterly to the Finance and Audit Committee on the steps taken to comply with the policy. The requirements in this subsection for a register and reporting are recommended provisions but not required. Each First Nation will wish to consider the adoption of an accessible process and a remedy most appropriate for its particular context.

## **DIVISION 8 – INFORMATION AND INFORMATION TECHNOLOGY**

**Section 84 (Ownership of Records):** sets the rules for securing the ownership of First Nation records and addresses Law Standard 24.1.

**Subsection (1):** requires all records made by the First Nation or made by someone else on behalf of the First Nation and all records used or received by another person on behalf of the First Nation to be the property of the First Nation. Note that the term “record” is broadly defined in section 2 of the Sample Law.

**Subsection (2):** requires the council to make policies and procedures that will ensure that the records of the First Nation referred to in subsection (1) remain the property of the First Nation. For example, a policy could require that the statement in subsection (1) or an appropriate variation of it be included in any agreements with contractors or agents of the First Nation. Otherwise, a person who has created a document for the First Nation may argue that he or she owns copyright in that document. The provisions of the Sample Law apply only to the First Nation and to its members. It does not bind third parties except with their agreement.

**Section 85 (Record Keeping and Maintenance):** sets the general rules for keeping and maintaining the records of the First Nation’s operations to comply with Law Standard 24.2.

**Subsection (1):** imposes on the chief administrative officer the responsibility for ensuring that the First Nation prepares, maintains, stores and secures all records required under the FAL or any other law. Note that this provision is not restricted to records required by the First Nation’s laws. The chief administrative officer must carry out this responsibility in accordance with any applicable policies and procedures made by the council under subsection (4).

**Subsection (2):** prohibits the destruction or disposal of any First Nation’s records unless council policies permit it. Where such destruction or disposal is permitted, it must be carried out in accordance with any procedures approved by the council. Unless the First Nation wishes to retain all its records indefinitely, the council must make appropriate policies and procedures to govern this subject. This subsection is worded using default language – nothing can be destroyed or disposed of without permission. This approach helps to avoid the inadvertent destruction of important records or disposal of records in a manner that could result in breach of security.

**Subsection (3):** requires all financial records to be stored for at least seven years. Note that the provision is limited to financial records - a First Nation may wish to broaden the application of the provision. Also note that any council policies referenced in subsection (2) cannot over ride this storage requirement (see subsection 9(3) of the Sample Law).

**Subsection (4):** requires the council to make policies and procedures respecting access of any person's to First Nation records. A First Nation may wish to put provisions into its FAL to address this subject; however, this may be a subject better suited to a policy document that can be revised easily by the council.

Note that the Law Standard 24.2 allows the requirements for First Nation's records to be addressed completely by a simple section requiring the council to establish policies and procedures respecting the preparation, maintenance, security, storage, access and disposal of First Nation's records.

**Section 86 (Confidentiality of Information):** provides the general rules respecting the confidentiality of information in the First Nation's record.

**Subsection (1):** prohibits any person access to any First Nation's records containing confidential information unless that access is permitted and given in accordance with the policies and procedures of the council. Worded this way - as a default provision - if the council does not make any policies and procedures to permit access, no person may access those records. This default statement appears appropriate given the harm that may result from inappropriate access to highly confidential information.

This subsection deals specifically with access to confidential information. See subsection 85(4) of the Sample Law which deals with access to First Nation's records – without distinguishing between those that contain confidential information and those that do not. A First Nation may wish to require its council to make these policies and procedures.

**Subsection (2):** governs the behavior of those persons who are given access to all First Nation's records. They must comply with the policies and procedures of the council respecting confidentiality, control, use, copying or release of those records and the information contained in those records. Again, because of the wording of the subsection, if a council does not make any policies and procedures respecting these issues, there will not be any restrictions on the persons accessing these records or information. A First Nation may wish to require its council to make these policies and procedures.

Note that this subsection is not only concerned with access to First Nation's records but also to the use of the information in those records.

A First Nation may satisfy the requirements of Law Standard 24.3 respecting the confidentiality, control and release of First Nation information by requiring the council to establish policies and procedures respecting the confidentiality, control and release of First Nation information that is in

the possession of the First Nation, the council, councillors, committee members, employees, contractors or agents of the First Nation.

**Section 87 (Account Records):** establishes requirements for the keeping of records for the local revenue system and other revenues as specified in Law Standards 24.4 and 24.5.

**Subsection (1):** requires the tax administrator to keep a complete set of records for the local revenue system of the First Nation including records that may be required to be made available under *Revenue Management Implementation Regulations* made under the Act. Law Standard 24.4 permits the FAL to give this responsibility to the director of finance.

**Subsection (2):** if the First Nation has a loan from the First Nations Finance Authority secured by other revenues, requires the director of finance to keep a complete set of records respecting other revenues of the First Nation including records that may be required to be made available under *Revenue Management Implementation Regulations* made under the Act. The records must be maintained for all other revenues – not just those used by the First Nation to secure the loan from the Authority.

**Section 88 (Information Technology):** Law Standard 19.6.2 requires a FAL to have provisions respecting information technology used by the First Nation in its operations to ensure the integrity of the financial administration system and its data base. The Standard also allows these issues to be addressed by the council in policies and procedures. This section of the Sample Law requires the council to address these subjects in policies and procedures.

## PART V – TANGIBLE CAPITAL ASSETS

**Section 89 (Definitions):** defines the terms used in this Part. They are the same definitions used in Law Standard 25.1.

**Section 90 (Council General Duties):** sets out the general duties of the council in respect of the First Nation tangible capital assets:

- to record them in an asset register
- to adequately safeguard them
- to maintain them in accordance with a life-cycle management program, and
- to plan, finance, manage and construct them to acceptable community standards.

These are requirements of Law Standard 25.2.

**Section 91 (Tangible Capital Assets Reserve Fund):** The council must establish a tangible capital assets reserve fund for funding tangible capital asset projects as defined in section 89 of the Sample Law. Note that section 33 of the Sample Law requires the First Nation to establish a separate financial institution

account for these funds and section 35 of the Sample Law places restrictions on their use. These are recommended provisions.

**Section 92 (Life-cycle Management Program):** sets out the critical elements of the life-cycle management program – the primarily responsibilities for which are given to the chief administrative officer and the director of finance. The major activities in a life-cycle management program are listed and required in Law Standard 26.2. The FAL may identify additional activities or information complementary to the required activities.

**Subsection (1):** requires the chief administrative officer to keep a current register of all First Nation tangible capital assets. This register includes – for each tangible capital asset – recommended critical base line information for each asset. The register also includes information respecting insurance coverage for the asset – information which will assist in managing risks to that asset. This subsection also permits the council to add to the information that must be kept in the register.

**Subsection (2):** requires the chief administrative officer to arrange for the annual inspection and review of the First Nation tangible capital assets. This annual inspection requires information to be collected that will provide the chief administrative officer with updated information on the state of condition of each tangible capital asset with a projection of the costs of future maintenance, operation and replacement. This information will be fed into the asset register and into the schedules and budgets that the director of finance prepares under subsection (3). This subsection requires the annual inspection to be completed no later than November 30 so that the director of finance will be able to meet the deadline of December 31 set out in subsection (3). These deadlines form part of the scheduled activities that are required in order to enable the council to approve its annual budget by March 31 (see Law Standard 16.5.1). A First Nation may wish to vary these dates depending upon its own circumstances. See the schedule of activities set out in these Explanatory Notes under section 28.

The Sample Law does not include a baseline or recognition threshold for defining which tangible capital assets must be included in the register. (This threshold could be expressed for example as a dollar value.) For practical purposes the absence of a stated threshold in the Sample Law means that all tangible capital assets must be included in the asset register. A First Nation may wish (but is not required) to include in its FAL a threshold for defining which tangible capital assets it includes.

**Subsection (3):** requires the director of finance by December 31 of each year to establish a schedule of routine maintenance of tangible capital assets for the following year, to prepare medium and long term forecasts of the estimated costs of maintenance of these assets and to prepare a proposed budget for maintenance of these assets for the following year. The director of finance must also prepare a schedule for tangible capital asset projects for the next fiscal year, medium and long term forecasts for the estimated costs of these projects and the budget for this projects for the next fiscal year. These are requirements of Law Standard 26.2. The detailed information required as part of these budgets is intended to assist the finance and audit committee (and ultimately of course the council) to make informed decision when reviewing the draft budget prepared by the director of finance for the following fiscal year.



**Subsection (4):** requires the council to establish policies and procedures for the life-cycle management program and tangible capital asset projects. Law Standard 26.3 allows these matters to be addressed in the FAL itself or by policy and procedures. Given the complexity of the subject, it is recommended that this detail would be best addressed in policies and procedures.

**Section 93 (Review by Finance and Audit Committee):** defines the supervisory role of the finance and audit committee in the planning for management of the First Nation tangible capital assets. It requires the finance and audit committee to review annually the information, schedules and budgets prepared under section 92 of the Sample Law by the chief administrative officer and the director of finance. The finance and audit committee is obliged to consider means to reduce the costs included in proposed budgets and to test the impact of these budgeted amounts on future years. This review is required by Law Standard 26.2 and in the Sample Law it is recommended that it be completed by January 15. This will enable the director of finance to prepare a draft annual budget for review by the finance and audit committee by January 31 (see section 28(1) of the Sample Law). Again these reviews are scheduled activities in the process of approving the annual budget by March 31.

**Section 94 (Reports on Tangible Capital Asset Projects):** requires the chief administrative officer to report at each finance and audit committee meeting on financial issues relating to each tangible capital asset project, the budget status of each project (and any problems encountered and how they will be addressed) and steps taken to ensure that the project is being managed in compliance with policies and procedures set by council under section 95 of the Sample Law.

**Section 95 (Tangible Capital Asset Projects Management):** requires the council to provide policies and procedures respecting tangible capital asset projects to comply with Law Standard 27.1.

**Subsection (1):** requires the council to establish policies and procedures respecting procurement, contract and risk management and administration of tangible capital asset projects. (The matters expected to be addressed in these policies and procedures are expected to be a fairly comprehensive list of areas where capital projects are exposed to significant risks – i.e. technical design and engineering issues; legal risks arising out of safety and environmental laws; financial risks arising out of costing and financing issues; risks arising from tendering and contracting practices; risks which can be transferred to third parties through insurance coverage or performance guarantees (construction bonds); risks arising from lack of controls over payments.)

Law Standard 27.1 requires these subjects to be addressed in a FAL or in council policies and procedures. The Sample Law hands the responsibility to address these matters to the council. These are complex and detailed matters which are thought to be more appropriate for policies and procedures because they can be revised as necessary from time to time with changes in industry standards or with increased First Nation experience or capacity.

A First Nation may of course address all of these subjects in its FAL but note that any changes to the FAL will require FMB compliance approval.

**Subsection (2):** requires all tangible capital asset projects to be carried out in accordance with the policies and procedures made by the council.

**Section 96 (Consultants):** permits the chief administrative officer to retain specialized or professional services to assist the chief administrative officer, the finance and audit committee or the council to carry out their obligations under this Part. This section is not required or referred to in the Law Standards but seemed a prudent addition as the subjects to be addressed in this Part require highly specialized knowledge or expertise.

**Section 97 (Policy for Information or Involvement of First Nation Members):** Law Standard 28 requires a FAL to include provisions for providing information or involving First Nation members in tangible capital asset projects or to require council to address these issues in its policies and procedures.

This section requires the council to establish policies and procedures for the provision of information to First Nation members or for the involvement of First Nation members in consideration of capital projects. Note that the requirement for membership involvement or information in borrowings for the construction of tangible capital asset projects is specifically addressed in section 56 of the Sample Law.

## PART VI – REPORTING BREACHES

This Part addresses the requirements of Law Standard 32.0 which deals with a process for the reporting and consideration of reports of financial misconduct as well as enforcement issues.

**Section 98 (Reports of Breaches and Financial Irregularities, etc.):** provides for the reporting of misconduct respecting the financial affairs of the First Nation, including the reporting of breaches of the rules for avoiding and mitigating conflicts of interest.

**Subsection (1):** provides the means for any person to report a possible irregularity in the financial administration of the First Nation. Any person (whether a First Nation member, a taxpayer or any third party) may report these circumstances to the chair of the finance and audit committee. The descriptions of the range of irregularities that can be reported are comprehensive and include contravention of a provision of the FAL and the reporting of a breach of conflict of interest obligations set out in the Schedule – Avoiding and Mitigating Conflicts of Interest.

**Subsection (2):** Subsection (1) *permits* any person to report possible irregularities to the chair of the finance and audit committee; however, subsection (2) *requires* a councillor to report any circumstances described in subsection (1). If the councillor has knowledge of these circumstances and fails to report them, the councillor has contravened the Sample Law. A councillor cannot ignore such circumstances - he or she has a positive obligation to report them (see Law Standard 32.2). Also note subsection 22(2) of the Sample Law which provides the means to enforce these requirements.

**Subsection (3):** places a positive obligation on officers, employees, contractors and agents of the First Nation to report any circumstances described in subsection (1) to the chief administrative officer or to the chair of the finance and audit committee. Again, if an officer, employee, contractor or agent of the First Nation has knowledge of such circumstances and fails to report them, that person has contravened the Sample Law (see Law Standard 32.2). Also note Law

Standard 12.6 and subsection 23(4) of the Sample Law which provides the legal means to enforce these requirements.

**Section 99 (Inquiry into Report):** requires any reporting of misconduct to be inquired into.

**Subsection (1):** spells out how a report made under section 98 of the Sample Law is to be considered. It provides only the primary responsibilities for considering a report. The process or procedures to be followed in the conduct of an inquiry or investigation must be set out by the council as required in subsection 100(4) of the Sample Law.

This subsection states that if a report under subsection 98(3) of the Sample Law is made to the chief administrative officer, the chief administrative officer must look into the circumstances and report the finding to the finance and audit committee as soon as possible.

**Subsection (2):** states that if a report is made under section 98 of the Sample Law to the chair of the finance and audit committee, the chair must look into the circumstances and report the findings to the finance and audit committee as soon as possible.

**Subsection (3):** requires the finance and audit committee to receive the reports of the chief administrative officer or the chair of the finance and audit committee made under subsections (1) or (2) and to determine if a further inquiry into the facts found should be conducted or not. Regardless of the finance and audit committee's decision to inquire further, the committee must report to the council on the findings made and any recommendations it may have on how to address the circumstances.

**Section 100 (Protection of Parties):** sets the rules for protecting a person who reported misconduct from reprisals and for the fair treatment of any person against whom the allegations have been made.

**Subsection (1):** ensures that the person who reported misconduct ("the whistleblower") and the person against whom an allegation of misconduct has been made will be treated fairly and that the whistleblower will not suffer any negative repercussions or reprisals (see Law Standards 32.3 and 32.4). This subsection is intended to afford anonymity to the whistleblower by requiring the chief administrative officer, the members of the finance and audit committee and the councillors not to disclose the identity of the whistleblower. The subsection contemplates that this may be difficult to do in some cases but requires all reasonable steps to be taken to maintain confidentiality.

**Subsection (2):** affirms that a whistleblower must not be subjected to any form of reprisal by the First Nation or by a councillor, officer, employee, contractor or agent of the First Nation. In the case of an employee, reprisals could take the form of disciplinary action including dismissal, denial of promotion or denial of wage increase. In the case of a contractor, reprisals could take the form of termination of contract. In the case of any other person, reprisals could take the form for example of harassment or character assassination. This subsection notes however that a whistleblower is only subject to this protection if the whistleblower made the report "in good faith". Note Law Standard 12.6 and subsections 22(2) and 23(4) of the Sample Law which provide the legal means to enforce these requirements.

**Subsection (3):** places a positive obligation on the chief administrative officer and the chair of the finance and audit committee to take all necessary steps to ensure that a whistleblower does not suffer any reprisals and to report to the council any contraventions or suspected contraventions of that protection.

**Subsection (4):** requires the council to establish policies and procedures for the keeping of proper records of reports and inquiries, for the investigation of reports and for the fair treatment of a person against whom an allegation or report has been made.

**Section 101 (Liability for Improper Use of Money):** addresses the issue of recovery of First Nation funds that have been spent or lost due to the failure of a person to comply with the FAL or a local revenue law of the First Nation. It addresses the requirements of Law Standard 32.6 and is similar to provisions found in legislation for municipalities or local governments.

**Subsection (1):** holds a councillor personally liable to the First Nation for voting to authorize the expenditure, investment or application of First Nation funds contrary to the Sample Law or to the First Nation's local revenue laws. The result is that the subsection inferentially requires a councillor to be satisfied that any vote he or she makes respecting First Nation funds is proper and authorized.

**Subsection (2):** affords some protection from the liability imposed under subsection (1). If the councillor relied on information provided by an officer or employee of the First Nation who was (when providing this information) dishonest, grossly negligent, malicious or guilty of deliberate misconduct, the councillor has a defence against the personal liability imposed in subsection (1).

**Subsection (3):** allows the First Nation, a First Nation member or a person who holds a security granted by the First Nation to secure borrowed monies to sue a councillor who has voted for the unauthorized expenditure, investment or application of First Nation funds (see Law Standard 32.6).

**Subsection (4):** if an employee or officer of a First Nation was a defendant in a law suit for the recovery of First Nation funds, the officer or employee would be able to defend against that law suit by showing that he or she gave a written and signed warning to the council that in his or her opinion the expenditure, investment or application of the funds being proposed was unlawful. This defence is considered appropriate as the council could ignore any advice given by officers or employees of the First Nation.

**Section 102 (Indemnification Against Proceedings):** permits the giving of an indemnity to councillors and First Nation officers and employees who are being sued or prosecuted for activities arising out of their duties or functions. This provision is recommended but not required.

**Subsection (1):** defines the terms used in this section.

**Subsection (2):** allows the council on behalf of the First Nation to indemnify its past or current councillors, officers or employees. The resolution giving the indemnity can be given to a particular named person, to a category of councillors, officers or employees or to all councillors, officers or employees. The indemnity can be for the payment of the costs to defend a law suit or criminal

prosecution brought against the councillor, officer or employee in connection with the exercise of his or her duties or functions. The indemnity can also be given for the amount of money the councillor, officer or agent is required to pay to satisfy a judgment or a fine or penalty imposed on that person (see Law Standard 19.2).

**Subsection (3):** imposes a limitation on the ability of the council to indemnify a councillor, officer or employee for payment of the costs of a fine resulting from that person's conviction for an offence. A councillor, officer or employee cannot be indemnified for payment of a fine unless the fine was for conviction of a strict liability or absolute liability offence. (A strict liability offence is one where the prosecution does not have to prove that the person charged with the offence intended to commit the act that resulted in an offence being committed. The prosecution need only prove that the prohibited act took place. However, the defendant can avoid conviction by proving that he took all reasonable care to avoid taking the prohibited act. An absolute liability offence is again one where the prosecution need only prove that the prohibited act took place. Once the defendant is proven to have committed the prohibited act the defendant cannot provide evidence to show he was free from fault and should not be convicted of the charge.)

## PART VII - MISCELLANEOUS

The Sample Law is organized logically into different Parts dealing with large blocks of subject matter. Part VII contains subject matter that does not easily fall within the other groupings of subject matter. In a sense it is a part dealing with miscellaneous subjects. Whether a First Nation's FAL requires a separate Part to deal with miscellaneous matters will be largely determined by how the subject matter of the FAL is organized.

**Section 103 (FMB Standards):** establishes obligations on the First Nation required in Law Standard 29.0 to remain in compliance with FMB standards if the First Nation is a borrowing member of the First Nations Finance Authority or has a certificate issued by the FMB under the Act.

**Subsection (1):** requires the First Nation to comply with all FMB standards – these standards may be listed and identified but could change from time to time. It is recommended that they not be specifically identified in the FAL to accommodate revisions of those Standards over time.

**Subsection (2):** requires the council, as soon as it becomes aware of non-compliance with a FMB standard, to do whatever is necessary as soon as practicable to bring the First Nation back into compliance. For example, assume that the council has not appointed an auditor as required in the Law Standards (and its own FAL), once the council is aware of this failure it must appoint an auditor as required in the Law Standards and its own FAL as soon as possible. Ongoing compliance with FMB standards is also an obligation in borrowing agreements with the First Nations Finance Authority.

**Section 104 (Delegated Authority for Local Revenues):** delegates specific council authority to the FMB if the First Nation's local revenues are under third-party management in the circumstances set out in the Act. This provision is required by Law Standard 30.0.

**Subsection (1):** defines the circumstances when the council of the First Nation delegates its authority over the First Nation's local revenues to the FMB in the case of third-party management of those local revenues. The section will only apply if the First Nation is raising local revenues under subsection 5(1) of the Act or using its local revenues to secure a loan from the First Nations Finance Authority.

Third-party management may be required if, for example, the First Nation has failed to administer its local revenue laws fairly or if it has failed to meet its financial obligations to the First Nations Finance Authority. Subsection 53(2) of the Act provides that, in this event, the FMB can act in place of the council of the First Nation to manage local revenues and the local revenue account as set out in that section.

**Subsection (2):** states that if the FMB gives the First Nation notice that third-party management of local revenues is required under section 53 of the Act, the council delegates to the FMB the powers and authorities described in subsection 53(2) of the Act. These powers include the powers to make local revenue laws, to manage local revenues, to undertake any necessary borrowing on behalf of the First Nation to remedy the situation for which third-party management was required and to provide for the delivery of programs and services that are paid out of local revenues.

**Section 105 (Delegated Authority for Other Revenues):** delegates specific council authority to the FMB if the First Nation is under third-party management in the circumstances set out in the Act as adapted by the *Financing Secured by Other Revenues Regulations (FSORR)*. This provision is required by Law Standard 31.2.

**Subsection (1):** defines the circumstances when the council of the First Nation delegates its authority over the First Nation's other revenues to the FMB in the case of third-party management of those other revenues. The section will only apply if the First Nation is using its other revenues to secure a loan from the First Nations Finance Authority. Other revenues are defined in the *FSORR* and include such things as tax revenues (other than local revenues), royalties, lease payments, own source revenues and government transfer payments. Third-party management may be required if, for example, the First Nation has failed to meet its financial obligations to the First Nations Finance Authority.

**Subsection (2):** states that if the FMB gives the First Nation a notice that third-party management of its other revenues is required under section 53 of the Act, the council delegates to the FMB the powers and authorities described in subsection 53(2) of the Act as adapted by the *FSORR*. These powers include the powers to manage all other revenues, to undertake any necessary borrowing on behalf of the First Nation and to manage any assets that are providing other revenues. Note that this delegated authority applies to all First Nation other revenues – not just the type of other revenues that has been used to secure a First Nations Finance Authority loan.

**Section 106 (Periodic review and Changes of Law):** requires the FAL to be reviewed periodically to ensure that it facilitates sound financial administration of the First Nation (see Law Standard 33.0).

**Subsection (1):** requires the finance and audit committee to review the FAL on a regular and periodic basis that is established by council policy. The review is for the purposes of determining if the FAL continues to promote effective and sound financial administration of the First Nation and if any amendments are required to the FAL to achieve that result.

**Subsection (2):** Law Standard 33.2 requires provisions for the informing of First Nation members about or involving First Nation members in a proposed amendment to the Sample Law. These provisions can be included in a FAL or in council policies and procedures. This subsection of the Sample Law requires the council to make these policies and procedures.

Whether First Nation members should simply be informed about a proposed amendment or given the opportunity to participate in that decision is a matter for each First Nation to decide – either in the provisions of its FAL or by council deliberation.

**Subsection (3):** Regardless of the policy adopted by council respecting the informing or involvement of First Nation members in a proposed amendment of the FAL, this recommended subsection requires the council to notify First Nation members of a meeting when the proposed amendment of the FAL is being considered by the council for approval.

Note the requirements for posting of a public notice is set out in section 4 of the Sample Law (a written notice must be placed in a conspicuous and accessible place for public viewing in the principal administrative offices of the First Nation). This public notice and the right to attend the meeting in subsection (4) are considered fundamental to transparent governance.

**Subsection (4):** permits First Nation members to sit in on that part of a council meeting that is considering amendment of the FAL.

**Subsection (5):** if the First Nation is a borrowing member its FAL cannot be repealed unless it is replaced by another financial administration law approved by the FMB under section 9 of the Act. This is a requirement of section 9.1 of the Act.

**Subsection (6):** provides First Nation that any amendments to the FAL must also be approved by the FMB under section 9 of the Act before the amendment comes into force. This requirement is set out in subsection 9(2) of the Act.

Note that any amendments to a FAL will be required to meet current FMB's *Financial Administration Law Standards*. See section 9(2.1) of the Act.

**Section 107 (Coming into Force):** There are a variety of options available or appropriate for a particular First Nation to use to bring its FAL or provisions of its FAL into force depending upon its unique circumstances. As this is a technical legal subject, it is recommended that First Nations consult with their legal advisors before deciding on the appropriate statement. FMB officials will also be able to provide



information on how to approach this issue. The provision used in the Sample Law illustrates only one option which would be applicable when a First Nation intends to apply under the New Fiscal Relationship Grant Program.

Subsection 9(3) of the Act governs the coming into force of a FAL made under section 9 of the Act. The section states that the FAL comes into force on the latest of

- a. the day of coming into force set out in the FAL, and
- b. the day after the FMB approves the FAL.

Because of the content of subsection 9(3) of the Act, it is possible for the First Nation to delete section 107 of the Sample Law from its FAL and to simply rely on the operation of subsection 9(3) of the Act to determine the date the FAL comes into force.

Another approach is to set out in the FAL when its provisions come into force. Here are two options to consider:

*Option One:*

*This law comes into force on the day after it is approved by the FMB under section 9 of the Act.*

*Option Two:*

*This law comes into force on the later of*

- a. *[specify a day], and*
- b. *the day after it is approved by the FMB under section 9 of the Act.*

**Additional Observations on Coming into Force Provisions:** There are circumstances when a First Nation may wish to specify in its FAL the day(s) when all or some of the provisions of its FAL come into force. The only legal restriction on this option is subsection 9(3) which states that the FAL cannot come into force any *earlier* than the day after the FMB gives compliance approval of the FAL under section 9 of the Act.

#### **A. A First Nation Intends to Become an FNFA Borrowing Member**

If the First Nation is not yet a borrowing member of the First Nations Finance Authority but intends to apply to become a borrowing member, the First Nation must obtain a Financial Performance Certificate from the FMB before it may apply. (See subsection 76(2) of the Act which requires the First Nation to have a Financial Performance Certificate issued by the FMB under subsection 50(3) of the Act.) The process and requirements for this Certificate are set out in the FMB's *Financial Performance Certification Procedures* and *Financial Performance Standards*.

A First Nation intending to apply to become a borrowing member must have a minimum number of specified elements of its FAL in force in order to obtain a Financial Performance Certificate from the FMB.

The details of these requirements are set out in Standard 5.2 of the *Financial Performance Standards*. In this case section 107 of the FAL should be worded to bring into force at a minimum, certain provisions of its FAL before it applies for the required Financial Performance Certificate. The required provisions of the FAL are those which the First Nation has included in its FAL in order to satisfy Law Standards 13.1, 16.1, 16.3, 16.4 and 16.5, 20.2 – 20.5, 21.3 – 21.5, 22.1 – 22.2 and 22.3.2, 24.3 – 24.5 and 30.0 and 31.0<sup>2</sup>.

The remaining provisions of the FAL must be brought into force within a period of time which enables the First Nation to obtain a Financial Management System Certificate within 36 months after the First Nation participates in a debenture issued by the First Nations Finance Authority.<sup>3</sup>

Here are two options to consider:

*Option One:*

*This law comes into force on the day after it is approved by the FMB under section 9 of the Act.*

*Option Two:*

- (1) This section and the operative portions of sections \_\_\_, \_\_\_, \_\_\_ and \_\_\_ come into force the day after this law is approved by the FMB under section 9 of the Act.*
- (2) Subject to subsection (1), this law comes into force on the day that is thirty-six (36) months after the day when [this law is approved by the FMB/ the First Nation becomes a borrowing member of the First Nations Finance Authority].*

The sections referenced in subsection (1) of Option Two should be those which are necessary to meet the requirements of the Law Standards stated above in order to permit the First Nation to request a Financial Performance Certificate quickly and should also include any critical definition and interpretation sections of the FAL. If the First Nation is using the Sample Law without substantive changes in content or numbering, the First Nation must bring into force at a minimum sections 1-7, 24, 27, 28, 30, 31, 72-76, 78-82, 86-87, 104 & 105 under subsection (1).

Under subsection (2) of Option Two the remaining sections of the FAL do not come into force until 36 months after a specified and determinable day. Subsection (2) provides two possible days which could be used to meet the requirements of the *Financial Performance Standards*.

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<sup>2</sup> These are the Law Standard requirements as at April 1, 2019.

<sup>3</sup> For added clarity, this refers to the point in time when the First Nation receives proceeds for the first time from a debenture or equivalent financial instrument issued by the First Nations Finance Authority under the terms of a Borrowing Law and a Security Issuing Council Resolution.

## B. A First Nation Intends to Apply Under the New Fiscal Relationship Grant Program

The New Fiscal Relationship Grant Program launched in 2018 requires a First Nation to have in force certain provisions of its FAL (described as eligibility criteria respecting financial administration laws) by specified dates in order to be eligible. First Nations interested in applying under this Program should contact the FMB for information on current eligibility requirements and how section 107 of the Sample Law should be drafted to meet them. The following is an example of the wording of section 107 of the Sample Law being used in 2019 for applicants to the NFR Grant Program.

- (1) This section and the operative portions of sections 1-7, 24, 27, 28, 30, 31, 71-76, 78-82, 87 and 103-105 come into force the day after this law is approved by the FMB under section 9 of the Act.*
- (2) The operative portions of sections 8, 11, 12(1), 18(1), 19(1), 21(1), 22(1), 23(2) and (4), 25, 26, 32(1), 83, 98-101 and the Schedule come into force on January 1, 2021.*
- (3) The remaining provisions of this Law come into force*
  - a. on the day that is 36 months after the date when the First Nation becomes a borrowing member of the First Nations Finance Authority, or*
  - b. on such earlier date or dates established by resolution of the Council.*

Paragraph (3)(b) gives added flexibility to the council to permit it to bring provisions of its FAL into force earlier than the expiration of the 36 month period.

## SCHEDULE – AVOIDING AND MITIGATING CONFLICTS OF INTEREST

This Schedule provides rules to meet the requirements of Law Standard 12.0. The Schedule provides recommended rules for avoiding conflicts of interest altogether or lessening the impact of potential conflicts of interest among individuals who are engaged in the financial administration of the First Nation. A First Nation may wish to expand the scope of these rules to all activities of the First Nation – not just financial administration – although in most cases conflicts of interest will arise where a decision that is being made has some direct or indirect financial or economic component.

The rules adopted in the Schedule are based upon principles commonly accepted in the public and private sectors for defining and managing conflicts of interest. Where appropriate the rules are designed to accommodate the cultural and social context in which members of a First Nation function. There are many variations of these rules that would satisfy these commonly accepted principles.

The Schedule is divided into three substantive Parts – to permit necessary or appropriate variations in the way this subject matter is addressed for councillors, employees, contractors and agents.

Part I contains the sections that provide interpretations and definitions to be used in all Parts of the Schedule.

## **PART I – INTERPRETATION**

**Section 1 (Interpretation):** provides the rules of interpretation for the Schedule.

**Subsection (1):** Whenever the phrase “this law” is used in the Schedule, it is a reference to the FAL. While the Schedule is physically segregated from the other provisions of the FAL, the Schedule is stated to be an integral part of the FAL.

**Subsection (2):** clarifies that the same definitions used in the FAL apply to the Schedule – unless a provision in the FAL makes an exception from this rule. Please refer to section 2 of the Sample Law for these definitions.

**Subsection (3):** sections 3 and 5 of the Sample Law provide rules for interpretation and calculation of time.

**Subsection (4):** clarifies that if a provision of the Schedule and a provision of the FAL are in conflict, the provision in the FAL is to be used.

**Section 2 (Definition of conflict of interest):** defines the meaning of “conflict of interest” whenever it is used in the Schedule.

**Subsection (1):** defines when a person has a conflict of interest. Note that the definition has certain important elements:

- first, a person does not have a conflict of interest in the abstract. A conflict of interest can only arise when the person is exercising a power or performing a duty or function.
- second, a person must know or ought reasonably to have known that in the exercise of that power or performing that duty or function there is an opportunity to benefit his or her private interests. The person’s knowledge of this opportunity is an important prerequisite – although there will be an assumption that the person has knowledge of the opportunity if a reasonable person would have had knowledge in the same circumstances. Willful ignorance or failure to make reasonable inquiries into a person’s private interests will not be a defence against an allegation of conflict of interest.
- third, a conflict of interest is not dependent upon a person doing something that actually benefits the person’s private interests. A conflict of interest exists when the person has the opportunity to benefit those interests – whether or not he or she does so.

- fourth, a person could have a conflict of interest because of the personal and business interests of others who are considered to be closely associated with that person (see the definition of “private interests” in subsection (3)).

**Subsection (2):** describes the situation when a person is considered to have “an apparent conflict of interest”. This subsection deals with the issue of a perception of a conflict of interest. In this case a person is considered to have an apparent conflict of interest not because he or she has the opportunity to benefit their private interests but because a reasonably well informed person would perceive that the person’s ability to exercise a power or perform a duty or function must have been affected by the person’s private interests. In a sense this is a case of a person’s judgment being affected by the private interest without having to determine that the person had an opportunity to benefit their private interests. Note that the test for the existence of an apparent conflict of interest is the opinion of a “reasonably well informed person” – not the opinion of the person alleged to have the conflict.

**Subsection (3):** defines the private interests of an individual. Obviously they include their own personal and business interests but they also include the personal and business interests of another person with whom that individual has a close association or for whom that individual has assumed some financial responsibilities. An individual must take into account the personal and business interests of

- the individual’s spouse (note in section 1 of the Schedule that spouse is defined to include a common law partner)
- the children under 18 years of the individual or the individual’s spouse or the children under 18 who the individual or the individual’s spouse is caring for as a parent
- a person for whom the individual or the individual’s spouse is acting as guardian (this could arise for example as a result of illness or age)
- a person, other than employee, who is financially dependent upon the individual or the individual’s spouse
- a person upon whom the individual is financially dependent (this could include a person who would not fit the category of spouse but who is contributing to the finances of the person)
- a company or partnership or other legal entity in which the individual alone or that the individual together with any other person referred to in the list above holds a controlling interest. (What will constitute a controlling interest will depend upon the circumstances unless the First Nation’s rules specify when a controlling interest is held).

**Subsection (4):** sets out the exceptions to the private interests that could give rise to a conflict of interest.

The first exception is if an individual's private interest is the same as those of a broad class of First Nation members to which that individual belongs. This particular interest will not give rise to a conflict of interest. This exemption acknowledges that the interests of the individual are the same as many others and a decision that the individual may make will treat a large number of other First Nation members in the same way – there is little opportunity to confer a unique or private benefit to the individual him or herself. For example, assume the issue is the funding of a roadway that will benefit 40 of the 100 homeowners in a First Nation village and the councillor voting on the funding is an affected homeowner. Under this exception the councillor would not be considered to have a private interest that gives rise to a conflict of interest. If on the other hand, the issue was the funding of a roadway that only went to a councillor's home, the exception would not apply and the councillor would have a private interest that gives rise to a conflict of interest.

The second exception is if the individual's private interest is so insignificant (usually measured in terms of minimal value) or so remote (remoteness being measured by the ability of the individual to influence a decision) that the interest could not be reasonably regarded as likely to influence the individual in the exercise of a power or performance of a duty or function. This exception is based upon an interest being considered "trivial". Again whether an interest is insignificant or remote must be determined by an assessment of what would be "reasonably regarded" as remote or insignificant and not necessarily what the individual with the particular interest might consider to be insignificant or remote. For example, if the councillor owns mutual funds that have shares in a publicly traded company that is bidding on work for the First Nation, the councillor's interest in that company could be considered insignificant and not giving rise to a conflict of interest.

## PART II – COUNCILLORS AND COMMITTEE MEMBERS

This Part sets out the specific rules that apply to the councillors of the First Nation and to members of council committees. It sets out the rules for disclosures of private interests that have the potential to lead to a conflict of interest, for receiving benefits or gifts and for use of confidential information and sets out procedures for avoiding and managing any conflicts of interest as they arise. See subsection 22(2) of the Sample Law for the consequences of a councillor failing to comply with this Part.

**Section 3 (Application):** specifies that this Part only applies to councillors and, where specified, to members of council committees.

**Section 4 (General Obligations):** sets out the general obligations of councillors to avoid conflicts of interest or apparent conflicts of interest.

**Subsection (1):** requires councillors to avoid any situations that could result in a conflict of interest or an apparent conflict of interest. This subsection will require councillors to keep themselves informed of not only their own personal and business interests but also those of the other

individuals and entities that are included in the definition of their “private interests”. Depending upon a councillor’s particular circumstances, a councillor may be required to be particularly diligent about actively monitoring these interests.

**Subsection (2):** requires councillors to avoid placing themselves in a situation where their ability to perform their functions might be influenced by the interests of another person to whom they owe a private obligation or the interests of a person who expects some benefit or preferential treatment from the councillor.

For example, assume that a relative builds the councillor a house without expectation of payment. If the councillor feels an obligation to provide a benefit to that person by way of thanks or gratitude, the councillor should ensure that he or she is not participating in the making of any First Nation decisions that could specifically benefit that person. Another example, assume that a contractor offers to renovate the councillor’s house without any labour costs and indicates that future First Nation work would be much appreciated. In this instance the councillor should decline the contractor’s offer to do the work without payment for labour.

**Section 5 (Disclosure of Interests):** requires councillors and their spouses to make periodic disclosures of information.

**Subsection (1):** spells out the requirements for written disclosure of certain information and interests of the councillor and the councillor’s spouse and the keeping of these disclosures in a register with limited access to those involved in the financial administration of the First Nation.

This subsection defines “real property” for purposes of the section and is limited to lands normally considered to be reserve lands.

**Subsection (2):** requires a councillor to file a written disclosure with the chief administrative officer of the information set out in the subsection. The disclosure of this information has three principal purposes:

- to require the councillor to actively consider any private interests he or she has that could lead to a conflict of interest;
- to provide transparency in the financial administration of the First Nation;
- to provide information to those engaged in the financial administration of the First Nation to assist a councillor to avoid a conflict of interest or apparent conflict of interest.

**Subsection (3):** requires the councillor to file these disclosures within 30 days of being elected and on April 15 of each year after that for as long as the councillor holds office and then whenever there is a material change in the information already disclosed (see Law Standard 12.3).



**Subsection (4):** requires the chief administrative officer to keep a register with all the disclosures made by the councillors under this section and also disclosures of gifts as required in section 6 of the Schedule.

**Subsection (5):** requires the chief administrative officer to permit a First Nation member or any person working in the financial administration system of the First Nation to look at the register established under this section. This access promotes transparency and credibility of decision-making.

**Section 6 (Gifts and Benefits):** sets the rules for councillors to accept a gift or benefit. Note that this section does not address the issue of the giving of gifts and benefits by the First Nation – a subject which a First Nation may wish to consider in order to ensure that its dealings with third parties cannot be challenged.

**Subsection (1):** prohibits the councillor or any person whose interests are considered to be the councillor's private interests (for example his or her spouse or teenager) from accepting a gift or benefit that might be seen to be intended to influence the councillor in the performance of the councillor's functions. Again it is not the opinion of the councillor as to whether the gift or benefit was given to influence the councillor but rather whether it would be reasonable to assume that it was given for that purpose. Whether it is reasonable or not to make this assumption will depend almost entirely on the facts and circumstances. For example, if the gift or benefit was offered at the time the First Nation was in the midst of a tender call for work or services, it would be reasonable to assume that a gift given by a tendering contractor was given in an effort to influence the councillor's decision on award of the contract. Another example, if a gift or benefit was of significant value, it might be reasonable to reach the conclusion that it was given in an effort to obtain some preferential treatment from the councillor.

**Subsection (2):** describes the kinds of gifts and benefits that it *may* be acceptable to accept. The list includes the following:

- a gift or benefit that would be considered a normal exchange or a social obligation associated with the councillor's office (for example, the exchange of gifts between representatives of governments on the occasion of an official visit or to commemorate an important relationship event);
- a gift or benefit that would be considered normal exchange common to business relationships (for example, being a guest at a concert or sporting event or paying greens fees for golfing or being a guest for dinner. However, if the value is significant it may not be considered a normal exchange – for example if a developer flew the councillor to Phoenix for the weekend to play golf);

- a gift or benefit that is a normal exchange common at public cultural events of the First Nation. This exception takes into consideration any unique cultural context in which the First Nation functions. Note however the reference to the exchange being made in a public context. This element contributes to transparency;
- a gift or benefit that is of nominal value (for example, a book, pen, cap, etc.);
- a gift or benefit that is given by a close friend or relative “as an element of that relationship”. The language of this exception recognizes that even a gift or benefit from a close friend or relative can be problematic if it is given to attempt to influence a decision of the councillor or to obtain some preferential treatment – rather than given as a token of friendship or kinship;
- a gift or benefit that is of a type that the policies or directions of the council have determined would be acceptable if offered by the First Nation to another person. In order for this exception to have any practical meaning it would be necessary for the council to establish a policy or give a direction that set out the types of gifts that the First Nation is permitted to give to others.

**Subsection (3):** requires a councillor to make a written disclosure to the chief administrative officer of any gift over a defined amount that is given to the councillor or to any person whose interests are considered to be the councillor’s private interests (e.g. the councillor’s spouse or teenager). A minimum value has been listed in the Sample Law but each First Nation may determine the appropriate amount taking into account its own circumstances. Again the purpose of this disclosure is to provide for transparency.

Note however that this provision does not impact the prohibition under subsection (1). Written disclosure of a gift does not give the councillor (or his close associates) freedom to accept a gift that it is not appropriate to accept under this subsection (1).

A First Nation may also wish to consider a provision that any gifts received over a certain amount or of a certain kind should be considered the property of the First Nation.

**Subsection (4):** The obligation to make written disclosure does not apply to a gift received during a public cultural event. Again the purpose of the written disclosure is transparency and this principle is met because the gift was given in a public event.

**Section 7 (Confidential Information):** sets the rules for keeping information confidential. Law Standard 24.3 requires a FAL to have provisions respecting the confidentiality of First Nation information and records. This section must be consistent with those provisions however they are developed but the intention of this section is to help make councillors aware of how the inappropriate use of this information would also be considered a conflict of interest between the councillor’s private interests and those of the First Nation.

**Subsection (1):** treats all information that the councillor receives while performing his or her functions as confidential unless the information is already out in the public domain or the information is generally available to First Nation members.

**Subsection (2):** imposes an obligation on the councillor to use any information that was provided to him or her as councillor for the specific purposes for which it was given to the councillor. So for example, if the councillor was given information respecting an application for housing by a First Nation member and the information before the council suggested that the applicant was not a First Nation member, it would be inappropriate for the councillor to use that information for any other purposes.

**Subsection (3):** makes it clear that a councillor must not use any information received during the performance of his or her duties to benefit the councillor's private interests or the interests of his or her friends, relatives or associates. For example, if the councillor knew that the First Nation was considering developing some land for commercial use, it would be inappropriate for the councillor to provide that information to a company he or she owns, to his spouse, to a friend or to a business associate for the purpose of enabling that person to take a business advantage of that information by buying up the property or adjacent property.

**Section 8 (Procedure for Addressing Conflict of Interest):** provides the rules or procedures for how a councillor should deal with a situation where he or she becomes aware of a conflict of interest.

**Subsection (1):** requires the councillor to disclose any circumstances respecting a conflict of interest at the next council meeting after he or she becomes aware of the conflict. So for example, if the agenda of the next council meeting raises a matter that the councillor knows could give rise to a conflict of interest, the councillor should make that disclosure at the meeting (and before the agenda item is discussed).

**Subsection (2):** requires the councillor to "recuse" him or herself when the matter that is giving rise to the conflict of interest comes onto the agenda. The councillor recuses him or herself by leaving any part of the council meeting when that subject matter is being discussed or voted on. Note subsection (4) which makes it clear that the councillor must not take part in any of the discussions or vote on any matter in which the councillor has a conflict of interest.

**Subsection (3):** In order to protect both the councillor and the First Nation from allegations of impropriety, this subsection requires the minutes of the council meeting to record that the councillor has made the disclosure of a conflict of interest and to note the time the councillor was absent from the meeting when the subject matter was being discussed or voted on.

**Subsection (4):** prohibits a councillor from taking part in any of the discussions or to vote on any matter in which the councillor has a conflict of interest. This subsection applies whether or not the councillor has made a disclosure or left the meeting.

**Subsection (5):** makes it clear that when a councillor has a conflict of interest the councillor is prohibited from any activity designed to influence or to attempt to influence any discussions (at council or otherwise) at any time – before, during or after discussions of the subject matter in a council meeting – or to influence or attempt to influence any vote of the council.

A councillor does not overcome a conflict of interest “by doing what is best for the First Nation” without consideration of his or her own private interests. A councillor overcomes a conflict of interest by refraining from participating in any way in a decision that is being made.

**Section 9 (Procedure for Undisclosed Conflict of Interest):** This section provides guidance for councillors who believe that another councillor may have an undisclosed conflict of interest. It helps to reinforce the responsibility of all councillors to ensure that decisions respecting the First Nation are being made with integrity and cannot be challenged as being made by councillors who have a conflict of interest. It is anticipated that possible conflicts of interest could be discussed and resolved informally in most cases but this section provides a process to move forward if a councillor is not forthcoming about a potential conflict of interest.

**Subsection (1):** allows a councillor to request clarification of any circumstances at a council meeting if the councillor believes that another councillor has a conflict of interest or an apparent conflict of interest. This request for clarification is framed as a request for information rather than a confrontation or allegation of improper conduct.

**Subsection (2):** provides a means to deal with an allegation of a conflict of interest or apparent conflict of interest that arises after the councillor has responded to the request for clarification under subsection (1). If the councillor does not acknowledge a conflict of interest and leave the meeting (if the matter is under discussion), the council is given the responsibility of ruling on whether the councillor has a conflict of interest or apparent conflict of interest.

**Subsection (3):** requires the results of the council’s ruling on whether there is a conflict of interest or apparent conflict of interest to be recorded in the minutes of the council meeting.

**Subsection (4):** makes it clear that if the council rules that a councillor has a conflict of interest or an apparent conflict of interest, the councillor must comply with section 8 of the Schedule (make a disclosure, leave the meeting, not participate in any discussions or a vote, and not attempt to influence any discussions or a vote).

**Section 10 (Obligations of Committee members):** sets the rules that apply to council committee members.

**Subsection (1):** clarifies that this section applies to all members of council committees. A First Nation could extend this provision to members of all council and First Nation committees. Note that this section also applies to councillors who are members of any council committees.

**Subsection (2):** states that the previous sections 4 (general obligations) and 6 to 9 (gifts and benefits, confidential information, procedure for addressing conflict of interest, procedure for undisclosed conflict of interest) also apply to members of council committees. To help with interpretation this subsection also confirms that when those sections are read and applied to members of the council, all references to a councillor will be treated as a reference to a councillor and all references to a council meeting will be treated as references to a committee meeting.

### PART III – OFFICERS AND EMPLOYEES

This Part sets out the specific rules that apply to the officers and employees of the First Nation. The differences in the policy reflected in the principles incorporated into this Part reflect the differences in the roles of councillors (elected officials who govern the First Nation) and employees who are responsible for carrying out the instructions of the councillors. It sets out the rules for disclosures of conflicts of interest and any outside employment or business interests, for conduct of outside employment or business interests, for receiving benefits or gifts, for use of confidential information and for use of First Nation property and services.

**Section 11 (Application):** clarifies that Part III applies to all officers (see definition in section 2 of the Sample Law - chief administrative officer, director of finance, tax administrator and any other employee designated by the council) and all employees of the First Nation.

**Section 12 (General Obligations):** sets out the general duties owed by officers and employees to the First Nation including to avoid any conflicts of interest or apparent conflicts of interest.

**Subsection (1):** tracks the language of one of the obligations of councillors set out in paragraph 22(1)(b) of the Sample Law (see also Law Standard 12.1(a)) – to act honestly, in good faith and in the best interests of the First Nation.

**Subsection (2):** requires an officer or employee to avoid any circumstances that could result in the officer having a conflict of interest or an apparent conflict of interest. This mirrors the obligation of councillors in subsection 4(1) of Part II of this Schedule.

**Subsection (3):** requires an officer or employee to avoid placing themselves in a situation where their ability to perform their functions might be influenced by the interests of another person to whom they owe a private obligation or to a person who expects some benefit or preferential treatment from him or her. This mirrors the obligation of councillors in subsection 4(2) of Part II of the Schedule.

**Subsection (4):** requires the chief administrative officer to ensure that every officer and employee is informed of their obligations under this Part and also requires the chief administrative officer to take actions to ensure such compliance. Note that employees also have the obligation under subsection 98(3) of the Sample Law to report any breaches of the Schedule. Protection for whistleblowers is addressed in section 100 of the Sample Law. The potential consequences of an officer or employee failing to comply with these obligations are addressed in subsection 23(4) of the Sample Law.

**Section 13 (Disclosure of Conflict of Interest):** requires an officer or employee who believes they have a conflict of interest to do two things:

- first, to disclose the circumstances in writing as soon as possible to the chief administrative officer or if the chief administrative officer has the conflict, to the chair of the finance and audit committee
- second, to refrain from participating in any discussion or decision-making respecting the circumstances until advised by the chief administrative officer, or the chair of the finance and audit committee (if the chief administrative officer), of what actions to take to avoid or mitigate the conflict of interest.

Note that the obligation to refrain from participating in discussions or decisions is not absolute. But the immediate disclosure and the stepping back from participation permit senior management the time and the opportunity to determine the nature of the conflict of interest and the practical steps that can be taken to manage the issue.

Note also that the decision on what to do with conflict of interest is not the decision of the officer or employee who has the conflict. It is the decision of others at a more senior level who may have more information and who are better able to determine the best way to manage the circumstances. This section also provides practical comfort to an officer or employee who believes they may have a problem – by making a timely disclosure and stepping back from the issue the officer or employee has acted properly and need only wait for further instructions.

This section does not require the public disclosure of an officer or employee's private interests as is the case with a councillor – it only requires a disclosure if and when it occurs.

**Section 14 (Gifts or Benefits):** sets rules for an officer or employee accepting a gift or benefit.

**Subsection (1):** prohibits an officer or employee or a member of their family from accepting a gift or benefit that might be seen to be intended to influence the officer or employee in the performance of their functions. Again it is not the opinion of the officer or employee as to whether the gift or benefit was given to influence the officer or employee but rather whether it would be reasonable to assume that it was given for that purpose. Whether it is reasonable or not to make this assumption will depend almost entirely on the facts and circumstances. For example, if a

financial institution offered to provide a personal loan to the chief administrative officer at a very low rate at the same time as the manager was deciding what financial institution to use for First Nations accounts, it would be reasonable to assume that this benefit was given to influence the chief administrative officer's recommendations or decision.

**Subsection (2):** describes the kinds of gifts and benefits that it *may* be acceptable to accept. The list includes the following:

- a gift or benefit that would be considered a normal exchange common to business relationships (for example, being a guest at a concert or sporting event or paying greens fees for golfing or being a guest for dinner. However, if the value is significant it may not be considered a normal exchange – for example if a developer flew the councillor to Phoenix for the weekend to play golf.).
- a gift or benefit that is a normal exchange common at public cultural events of the First Nation. This exception takes into consideration any unique cultural context in which the First Nation functions. Note reference to the exchange being made in a public context however. This element contributes to transparency.
- a gift or benefit that is of nominal value (for example, a book, pen, cap, etc.).
- a gift or benefit that is given by a close friend or relative “as an element of that relationship”. The language of this exception recognizes that even a gift or benefit from a close friend or relative can be problematic if it is given to attempt to influence a decision of the officer or employee or to obtain some preferential treatment – rather than given as a token of friendship or kinship.
- a gift or benefit that is of a type that the policies or directions of the council have determined would be acceptable if offered by the First Nation to another person. In order for this exception to have any practical meaning it would be necessary for the council to establish a policy or give a direction that set out the types of gifts that the First Nation is permitted to give to others.

**Section 15 (Outside Employment and Business Interests):** addresses the possibilities of potential conflict between the responsibilities an officer or employee has to the First Nation and to any outside employment or business the officer or employee has. The First Nation can, in its employment or contracting policies, determine whether it is permissible for officers or employees to have outside employment. It is not unusual for public sector employees to prohibit outright such outside employment or business activity. This section is considered necessary if such outside activity is permitted in some or all instances. Note that there is no similar provision for councillors – elected officials. Councillors are required to disclose in a public register any employment or business interests and to not participate in any decisions where those interests result in a conflict of interest.



**Subsection (1):** states that where an officer or employee is permitted to have outside employment or business interests, they must disclose them in writing to the chief administrative officer (or for the chief administrative officer, to the chair of the finance and audit committee). This disclosure will assist senior management to anticipate any potential problems associated with this outside employment or business.

**Subsection (2):** is designed to help to ensure that any permitted outside business or employment does not interfere with the officer or employee's primary obligations to the First Nation. It requires the officer or employee to ensure that these interests do not unduly interfere with their work functions and that they are conducted on their own time and with their own resources. For example, if an employee had a night job and came into work every day too tired to do their work, the outside employment would be interfering with their work functions. An employee should not use First Nation communications equipment (computer, telephone, internet etc.) to conduct their outside employment or activities.

**Section 16 (Confidential Information):** Law Standard 24.3 requires a FAL to have provisions respecting the confidentiality of First Nation information and records. This section must be consistent with those provisions however they are developed but the intention of this section is to help make officers and employees aware of how the inappropriate use of this information would also be considered a conflict of interest between their private interests and those of the First Nation. The language of this section is the same as for councillors in Part II of the Schedule.

**Subsection (1):** treats all information that the officer or employee receives while performing his or her functions as confidential unless the information is already out in the public domain or the information is generally available to First Nation members.

**Subsection (2):** imposes an obligation on the officer or employee to use any information that was provided to him or her as officer/employee for the specific purposes for which it was given. See additional discussion under subsection 7(2) of Part II of the Schedule.

**Subsection (3):** makes it clear that an officer/employee must not use any information received during the performance of his or duties to benefit the officer's/employee's private interests or the interests of his or her friends, relatives or associates. See additional discussion under subsection 7(3) of Part II of the Schedule.

**Section 17 (First Nation Property and Services):** addresses use by officers or employees of any property or services of the First Nation. Part II of the Schedule does not include this section for councillors. Whether councillors should also be under the same obligations will depend upon the circumstances of each First Nation and whether this issue is anticipated to be a problem in that community.

**Subsection (1):** prohibits officers and employees from using First Nation property or services for any purposes other than those related to the performance of their work unless the council has

permitted some other use in its policies or directions. Services would include such things as telephones or internet. It is not uncommon for organizations to permit some limited use of telephones, computer and the internet for personal use. This is the kind of use that a council may wish to consider in a policy or direction for use of First Nation property or services. If the council does not establish a policy or give a direction no outside work use is permitted.

**Subsection (2):** is designed to help ensure that officers and employees do not acquire ownership of First Nation property unless done in accordance with council policy. Council policy could address such issues as valuation, open access etc. In this case if the council does not make any policies or give directions respecting this subsection, there are no council expressed limitations on how these officers or employees can gain ownership of First Nation property.

## PART IV – CONTRACTORS

This Part sets out the specific rules that apply to the contractors of the First Nation. The differences in the policy reflected in the principles incorporated into this Part reflect the differences in the relationships of employees and contractors to the First Nation. It sets out the general obligations of integrity and honesty in dealings with the First Nation, rules respecting access to business opportunities that the contractor becomes aware of while performing services, for a contractor who is acting as an officer of the First Nation, for use of confidential information and for use of First Nation property and services. Note Law Standard 12.6 and subsection 23(4) of the Sample Law which provides the legal means to enforce these requirements against contractors.

**Section 18 (Application):** clarifies that Part IV applies to contractors of the First Nation.

**Subsection (1):** clarifies that Part IV applies to contractors of the First Nation except for a person who has an employment contract with the First Nation. This Part is intended for contractors who supply work or services to the First Nation as independent contractors.

**Subsection (2):** clarifies that every obligation imposed on a contractor under this Part is also imposed on every employee or agent of the contractor who is performing functions under the contractor's contract with the First Nation. This clarification is intended to ensure that a contractor informs his employees or agents of the obligations under this Part and makes sure that each of them also comply with the provisions of this Part. A breach of an obligation by an employee or agent of the contractor can then be considered a breach of the obligation by the contractor. The obligations of the contractor to comply with this Part and the potential consequences of the contractor (his employees or agents) failing to comply are addressed in subsection 23(4) of the Sample Law.

**Section 19 (Contractor Acting as Officer or Employee):** requires a contractor to comply with the obligations of an officer of the First Nation if the contractor has been employed to fulfill the duties of an officer. An officer is defined in section 2 of the Sample Law as the chief administrative officer, director of finance, tax administrator and any other person designated an officer by the council. For example, if a

person is engaged to be the chief administrative officer under a contract as an independent contractor rather than as an employee under an employment contract, the person would be considered a contractor for purposes of the Schedule but would however be required to comply with Part III and Part IV of the Schedule.

**Section 20 (General Obligations):** sets out the general duties owed by contractors to the First Nation.

**Subsection (1):** requires the contractor to act at all times with integrity and honesty in its dealings with the First Nation and in its dealings with any third party where the contracting is acting on behalf of the First Nation. This last obligation helps to protect the First Nation's relationships with others by trying to ensure that anyone speaking on its behalf does so with integrity and honesty.

**Subsection (2):** prohibits a contractor from attempting to obtain preferential treatment from the First Nation by offering gifts or benefits that a councillor, committee member, officer or employee is prohibited from accepting under the Schedule (see section 6 in Part II and section 14 in Part III of the Schedule).

**Subsection (3):** requires the contractor to make sure all his employees or agents that are working on the contract with the First Nation understand their obligations under this Part and requires the contractor to take steps (like actively monitoring or developing procedures) to ensure that these employees or agents comply with this Part.

**Section 21 (Confidential Information):** Law Standard 24.3 requires a FAL to have provisions respecting the confidentiality of First Nation information and records. This section must be consistent with those provisions however they are developed but the intention of this section is to help make contractors aware of how the inappropriate use of this information would also be considered a conflict of interests between their interests and those of the First Nation.

**Subsection (1):** treats all information that the contractor receives while performing his or her functions as confidential unless the information is already out in the public domain. The contractor can only consider the information not to be confidential if it is generally available to the public – the contractor's obligation to treat information as confidential does not change if the information is only available to First Nation members.

**Subsection (2):** imposes an obligation on the contractor to use any information that was provided to him or her as contractor for the specific purposes for which it was given. For example, if the contractor is a project manager for the First Nation and is given information respecting the calculation of the First Nation's costs for a project the contractor could not use that information for purposes of bidding on another project in future.

**Subsection (3):** makes it clear that a contractor must not use any information received during the performance of his or duties to benefit the contractor's interests or the interests of his or her

friends, relatives or associates. Note that the phrase “private interests” is not used in this provision. Again by way of example, the contractor who is a project manager must not give any friends, relative or associates any information that he has obtained about the project budget to help them to win a contract in that project.

**Section 22 (Business Opportunities):** imposes a form of good faith on a contractor by prohibiting a contractor from stealing an idea that the contractor is aware that First Nation is considering. For example, if the First Nation is considering purchasing some land adjacent to the First Nation for purposes of economic development and the contractor while providing services to the First Nation finds out about the possible purchase, it would not be acceptable for the contractor to take advantage of this knowledge by purchasing the land and developing the proposed project for his own profit – unless and until the First Nation has decided not to pursue the project.

**Section 23 (First Nation Property and Services):** is intended to ensure that a contractor does not, while providing services to a First Nation, use any equipment or services of the First Nation for the contractor’s own interests. For example, assume a consultant is engaged to provide human resources advice and the consultant is provided an office, computer and telephone and internet services in First Nation’s offices. It would be unacceptable for the contractor to use that equipment or services to manage any of its other business.



First Nations Financial Management Board  
Suite 300 – 100 Park Royal  
West Vancouver, BC V7T 1A2

Tel: 604-925-6665 | Toll Free 1-877-925-6665 | Fax 604-925-6662  
Website: [www.fnfmb.com](http://www.fnfmb.com)