FIRST NATIONS FINANCIAL MANAGEMENT BOARD
LE CONSEIL DE GESTION FINANCIÈRE DES PREMIÈRES NATIONS

A4

SAMPLE

FINANCIAL ADMINISTRATION LAW

EXPLANATORY NOTES

(Prepared to Accompany A3- Sample Financial Administration Law and A2- Financial Administration Law Standards dated November 1, 2010)

FIRST NATIONS FINANCIAL MANAGEMENT BOARD
www.fnfmb.com
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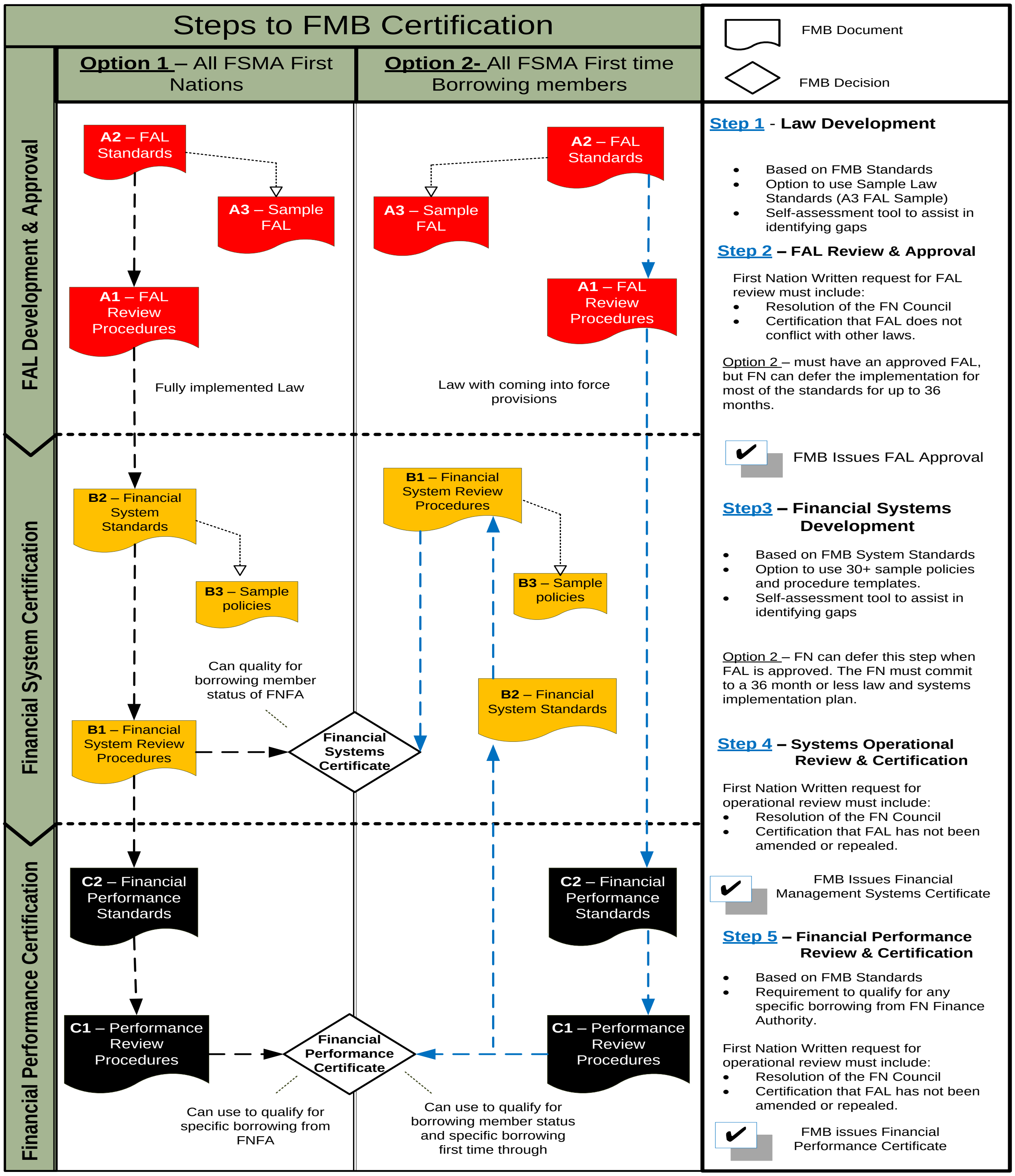
Table 1 - LIST OF CORE DOCUMENTS

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

		FINANCIAL ADMINISTRATION LAW	DESCRIPTION
	A1	FINANCIAL ADMINISTRATION LAW – **REVIEW PROCEDURES**	Procedures to apply when requesting approval of the First Nation's financial administration law.
	A2	FINANCIAL ADMINISTRATION LAW – **STANDARDS**	Standards that would support sound financial administration practices for a First Nation government in Canada.
	A3	**SAMPLE** FINANCIAL ADMINISTRATION LAW	Example of a Law which meets the requirements of the A2 Law Standards.
☑	**A4**	FINANCIAL ADMINISTRATION LAW - **EXPLANATORY NOTES**	Provides assistance on the development of the law by discussing the structure and substantive content of the A3 Sample Law.
	A5	FINANCIAL ADMINISTRATION LAW - **IMPLEMENTATION GUIDE**	Provides assistance on the development the law by identifying actions required and sample policies and procedures that would meet the requirements of the standard.
	A6	FINANCIAL ADMINISTRATION LAW – **SELF-ASSESSMENT**	Tool that can be utilized to compares existing or proposed financial administration law(s) of the First Nation to Law Standards established by FMB.
		FINANCIAL MANAGEMENT SYSTEM	
	B1	FINANCIAL MANAGEMENT SYSTEM - **CERTIFICATION PROCEDURES**	Procedures to apply when requesting a review of the First Nation's financial management system.
	B2	FINANCIAL MANAGEMENT SYSTEM – **STANDARDS**	Standards that would support sound financial practices for the operation, management, reporting and control of the financial management system of a First Nation.
	B3	FINANCIAL MANAGEMENT SYSTEM – **SAMPLE POLICIES & PROCEDURES**	Collection of sample policies and procedures that can be used or adapted to meet the System Standards.
	B4	FINANCIAL MANAGEMENT SYSTEM – **SELF-ASSESSMENT**	Tool that can be utilized to compares the existing financial management system of the First Nation to system Standards established by FMB.
		FINANCIAL PERFORMANCE	
	C1	FINANCIAL PERFORMANCE – **CERTIFICATION PROCEDURES**	Procedures to apply when requesting a review of the First Nation's financial performance.
	C2	FINANCIAL PERFORMANCE – **STANDARDS**	Standards that assess the overall financial health of a First Nation at a point in time.
		LOCAL REVENUE ACCOUNT	
	D1	LOCAL REVENUE ACCOUNT - **REPORTING STANDARDS**	Standards that establish requirements for the financial reporting of a First Nation's local revenue account

Table 2 - LIST OF CORE DOCUMENTS

The following diagram depicts key steps in the process of obtaining approval of a Financial Administration Law and receiving FMB certification in the areas of Financial Management Systems and Financial Performance



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EXPLANATORY NOTES TO SAMPLE FINANCIAL ADMINISTRATION LAW

PURPOSE OF SAMPLE FINANCIAL ADMINISTRATION LAW

The Sample Financial Administration Law (“Sample Law”) is an example of a law that satisfies the requirements of the *Financial Administration Law Standards* (“Law Standards”) of the Financial Management Board (“FMB”) – a precondition for approval of a first nation’s financial administration law under section 9 of the *First Nations Fiscal and Statistical Management Act*.

The Sample Law has 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 Sample Law is appropriate primarily for a first nation that intends to become a “borrowing member” of the First Nations Finance Authority under the *First Nations Fiscal and Statistical Management Act* (“the FSMA”); however, the Sample Law does, with a few modifications, also provide a good model for adoption by a first nation that wishes to carry out its financial administration in a manner that substantially accords with sound financial administration practices of governments in Canada and with the evolving requirements for financial reporting by first nations.

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 Law is only an example 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 (a precondition to being certified by the FMB as eligible to become a “borrowing member” of the First Nations Finance Authority), the FMB has also developed administrative check lists, draft council policies, procedures and directions, organization charts, committee terms of reference, job descriptions etc 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 website.

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 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 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, 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 approved by the FMB under section 9 of the FSMA must be published in the *First Nations Gazette* (section 55(4) of the *First Nations Fiscal and Statistical Management Act* requires this publication). The *First Nations Gazette* has a Style Guide that sets out the requirements for style and formatting of any law it publishes in the Gazette. The style and formatting of the Sample Law is presented in a manner consistent with the requirements of the *First Nations Gazette Style Guide* as at September 15, 2010. Incorporating the same style and formatting as the Sample Law will avoid delay in gazetting a FAL. A first nation may obtain a copy of this Style Guide from the Native Law Centre of Canada at the University of Saskatchewan.

The italicized references at the end of provisions in the Sample Law are to the related provisions in the Law Standards. Readers of these Explanatory Notes will find it helpful to have a copy of the Law Standards, the System Standards and the Sample Law readily available when reviewing these Notes.

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

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 one to read and comprehend all the provisions of the Sample Law. In this case the Part 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" mean 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, procedures and directions, organizational charts and job descriptions, manuals respecting systems, operations, financial administration and personnel management and agreements to which the first nation is a party.

If a first nation does not have or intend to have local revenue laws as defined in the FSMA, the definitions of "local revenue account", "local revenue law" and "local revenues" are not required.

If a first nation wishes to use titles other than "senior manager" or "senior financial officer" for people performing the functions described, those alternate titles should be defined and used instead.

Subsection (2): imports terms defined in the FSMA. For example, when the phrase "borrowing member" is used in the Sample Law, it has the meaning defined in the FSMA. Some of the terms or phrases which are defined in the FSMA have been repeated in subsection (1) of the Sample Law as they are used so often e.g. First Nations Financial Management Board and First Nations Tax Commission.

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. A link to the federal *Interpretation Act* is available at the Board's internet website (FNFMB.com).

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 federal *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.

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 sections 21(2), 30(2) and 103(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 4 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 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 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 FMSA*,* the provision in the FSMA 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 section 13 of the FSMA which requires budgets respecting local revenues to be balanced. In that case section 13 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 section 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 ONE – 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 (c) 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 section 5(1)(f) of the FSMA 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, procedures and directions): recognizes that council may need to make policies, procedures or to give directions 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 or procedures or give directions.

> **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 or to give directions respecting the financial administration of the first nation.
>
> **Subsection (2):** This subsection is an example of the FAL requiring Council to establish specific policies, procedures or directions and is required by Law Standard 8.3.2.
>
> **Subsection (3):** limits the authority of the council to make policies or procedures or directions by requiring them not to be inconsistent with the FAL or generally accepted accounting principles ("GAAP") of the Canadian Institute of Chartered Accountants applicable to first nations. 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, procedures or directions.

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): requires the council to document all its policies, procedures and directions 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, expenses and contracts): requires the reporting of financial benefits received from the first nation by councillors, the senior manager and their families.

Subsection (1): requires the senior financial officer of the first nation to prepare the annual report required in Law Standard 9.2. The paragraphs of the subsection define with more clarity the types of remuneration, expenses and benefits and the contracts with the first nation which must be reported. This reporting requirement makes the financial administration system of the first nation more transparent and allows it to operate with more integrity.

Law Standard 9.0 states that the report must include remuneration, expenses, benefits and contracts received by individuals who are close relatives to councillors and senior managers - that is, their spouse (both married and common law) and the dependent children of them or their spouse.

However, this subsection in the Sample Law – through the definitions of "spouse" and "dependent" in section 2 of the Sample Law - extends this reporting requirement to include benefits received by a person for whom the councillor, the senior manager or their spouse is guardian and to a person who is financially dependent upon the councillor, the senior manager or their spouse. This Sample Law supports the extended policy approach that individuals with significant authority in the financial administration of the first nation should be reporting not only benefits etc given directly to themselves and their family members but also to persons who may be financially reliant upon them.

Other approaches may be taken to define who is included in this reporting obligation so long as all the individuals described as "members of a family" in Law Standard 9.1 are included. The types of remuneration, benefits and expenses to be reported may also be spelled out differently so long as the basic reporting intention addressed in Law Standard 9.0 is met.

Subsection (2): contains exemptions from the reporting requirement that are permitted in Law Standard 9.3. These are permitted but not required exemptions in a FAL.

The reporting requirement does not extend to any benefits, expenses or remuneration received by all members of the first nation or that is received under a program or service that has published terms and conditions and that is available to all members of the first nation or that comes from a trust arrangement under the terms of the trust. For example, the following would be exempted from the reporting requirement:

- equal distributions paid to first nation members out of settlement amounts received by the first nation
- equal distributions paid to first nation members from rents, required by the terms of a designation of first nation lands made to allow a lease to be granted
- social assistance, education funding or similar amounts payable under a universal program.

These have been excluded from the reporting requirement on the basis that the payments or benefits received are already known to members of the first nation or that the councillors or senior manager do not have the opportunity to give themselves any advantage in the administration of these benefits, etc.

DIVISION TWO – 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 and functions of that committee.

Section 11 (Interpretation): is an example of a definition that applies only to Division Two. It has been included as 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.)

Subsection (2): makes the council responsible for appointing members of the finance and audit committee. Law Standard 10.1.5 requires a minimum of three members to be appointed to the committee.

The council must ensure that a majority of the committee members must have financial competency. Law Standard 10.1.4 while requiring a majority 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.

Subsection (3): follows the minimum requirements of Law Standard 10.1.3 which requires at least 25% of the members of the finance and audit committee to be councillors. 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.

A FAL could also require more than 25% - even 100% - of the committee members to be councillors – keeping in mind however that there will still be a requirement that a majority of the committee members have "financial competency".

Subsection (4): 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 (4) of the FAL 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 requirement that the terms be for periods of not less than three complete fiscal years. A fiscal year is required in Law Standard 13.1 to run from April 1 to March 31 of the following year.).

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 (5). 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 (5): 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, who must be a member of the council, 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.

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

Subsection (1): Law Standard 10.3.1 requires this subsection. Requiring a councillor to be the chair of the committee provides better access to council discussions and direction and improves accountability of the committee to council.

Subsection (2): Law Standard 10.3.2 permits a provision allowing the committee to appoint one of its members as vice-chair. This subsection grants that permission with the condition (which is not required by the Standards) that the member appointed must also be a councillor. Unless the council specifies the functions of the vice-chair, the committee may adopt rules for that purpose (see section 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 10.4.1. 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 10.4.2 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 10.4.3 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 10.4.4 requires the senior manager and the senior financial manager 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 section 14(5) of the Sample Law for another exception to Law Standard 10.4.4.

Subsection (5): provides further exceptions to the requirement for the senior manager and the senior financial officer 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 10.4.5 for meetings of the committee. A first nation may wish to specify that the committee meet more often – particularly if a FAL requires the committee to review monthly financial information of the first nation.

Subsection (7): meets the requirements of Law Standards 10.1.2 and 10.4.6. 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. 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): This subsection is not required in a FAL but may be useful. It 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 otherwise already specified by the council (see Law Standard 10.4.7).

Subsection (9): This subject is not addressed in the Law Standards but based upon practical experience may be quite useful. This subsection will allow 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 senior manager. 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 being provided to the first nation.

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 10.5.1. Note that the committee may have additional planning duties to perform in other places in the Sample Law.

Subsection (2): satisfies Law Standard 10.5.4 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 responsibilities): sets out the general audit responsibilities of the finance and audit committee and is almost identical to the responsibilities listed in Law Standard 10.5.2. 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 10.5.3 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.

A first nation may wish to expand the language used in paragraph (g) to explain the purpose of this review as "to obtain reasonable assurances that they are reliable and operate effectively to produce accurate, appropriate and timely financial and other management information".

DIVISION THREE – OFFICERS AND EMPLOYEES

Section 18 (Senior manager): requires the appointment of a senior manager 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 senior manager – 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 senior manager under another first nation law or by council resolution where that senior manager is required to lead the day to day management or administration of the first nation. If a person performing the functions of a senior manager has been appointed under another first nation law or a council resolution, the *Financial Management Systems Standards* of the FMB ("System Standards") require the FMB to review this law or resolution before a FAL may be given final approval.

The first nation may use a different title for senior manager 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 senior manager.

The first nation may also prefer to have more than one individual performing the duties of the senior manager. 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 senior manager 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 senior manager and to establish the terms and conditions of that appointment. This language permits the council to appoint the senior manager as an employee or as an independent contractor. A first nation may prefer to require the senior manager to be an employee and if so, may specify that requirement in its FAL.

Subsection (2): satisfies Law Standards 11.1.1 by making the senior manager responsible for all aspects necessary to lead the overall management of the day to day operations of the first nation. Note in this case that the senior manager'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 senior manager 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 senior manager is responsible for carrying out council's instructions.

This subsection also provides a specific list of duties the senior manager must carry out. This is just an example of the kinds of activities that would be appropriate for the senior manager to carry out. Note that the general description of the responsibilities of the senior manager 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 section 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 senior manager's responsibilities.

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 senior manager 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 senior manager to perform additional activities, the council must not require the senior manager to carry out any activities that are contrary to the requirements of the FSMA or the FAL.

Subsection (3): From a practical point of view, it is expected that the senior manager may require the assistance of other personnel to perform the senior manager's duties. Law Standard 11.1.6 allows a FAL to permit the senior manager to assign the performance of the senior manager'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 senior manager remains responsible for ensuring that these duties or functions are carried out properly.

This subsection gives the senior manager 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 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 senior manager remains responsible for ensuring that any duties or functions assigned to others are carried out properly.

Section 19 (Senior financial officer): requires the appointment of a senior financial officer 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 senior financial officer – 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 senior financial officer if it wishes to do so as long as the person holding this other title has all of the duties and functions of the senior financial officer and reports directly to the council or the senior manager.

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

Subsection (2): Law Standard 11.2.2 requires the senior financial officer to report to the council or to the senior manager. This subsection has the senior financial officer reporting to the senior manager – 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 senior financial officer. This subsection includes these mandatory duties and functions. Note that the general description of the responsibilities of the senior financial officer 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 section 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 senior financial officer's responsibilities.

Paragraph (o) allows the senior manager to require the senior financial officer to carry out additional activities the senior manager may specify. Law Standard 11.2.4 does not require a FAL to give the senior manager this authority but if the FAL does so the senior manager must not require the senior financial officer to act contrary to the FSMA or the officer's duties set out in the FAL.

Subsection (3): From a practical point of view, it is expected that the senior financial officer may require the assistance of other personnel to perform the senior financial officer's duties. Law Standard 11.2.5 allows a FAL to permit the senior financial officer to assign the performance of the senior financial 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 senior financial officer remains responsible for ensuring that these assigned duties or functions are carried out properly.

This subsection gives the senior financial officer 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 senior manager. 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 senior financial officer remains responsible for ensuring that any assigned duties or functions are carried out properly.

Section 20 (Tax administrator): allows the council to give additional duties to the tax administrator appointed under the first nation's local revenue laws.

Subsection (1): The tax administrator is appointed under the first nation's local revenue laws and has defined functions and duties under those laws and under regulations made under the FSMA. Law Standard 11.3.1 permits a FAL to include additional powers, duties or functions for the tax administrator under the FAL. These additional authorities are set out in different locations in the Sample Law (see sections 40, 42, 58 and 81 of the Sample Law). The first nation may wish to include other duties for the tax administrator under its FAL.

This subsection clarifies however that the tax administrator reports to the senior manager *in respect of any duties or functions set out in the FAL*. Again this reporting relationship reflects an FMB recommendation, but not a requirement, for a particular governance structure. Note however that it only applies in respect of any of the tax administrator's duties or functions that are set out in the FAL.

Subsection (2): As is the case with the senior manager and the senior financial officer, Law Standard 11.3.2 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 senior manager. 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 11.3.2 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 the comprehensive requirements for the organization chart and includes information that satisfies Law Standard 11.4.1. This Standard requires the council or senior manager to approve the written descriptions of the principal powers, duties and functions of all employees (other than the senior manager, senior financial officer and tax administrator which are in the FAL already). A first nation could add other information to be included in this chart. Note again that this chart is not limited to financial administration but includes 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 senior manager 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 senior manager 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. Note that the System Standards require a first nation to identify any deficiencies in the skills and competencies of its personnel and to show its plans for training required to remove those deficiencies. These Standards must be complied with before the first nation will be issued a Financial Management System Certificate.

Some first nations may already have qualified personnel available in which case it would be preferable to revise this subsection to state that "the council must ensure that the first nation hires or retains qualified and competent personnel…".

DIVISION FOUR – 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 A – Procedures for Avoiding and Mitigating Conflicts of Interest. The Law Standards do not require these rules to be included in a FAL but the System Standards will require that these rules be established and reviewed before a Financial Management System Certificate will be issued by FMB.

Including the rules of avoiding and mitigating conflicts of interest in a FAL has an obvious advantage and obvious disadvantage. If included in the FAL, no changes may be made to the rules without the approval of the FMB as no amendments may be made to a FAL without FMB approval. On the plus side,

- a requirement for FMB approval before any changes may be made may help to avoid manipulation of the rules for inappropriate purposes
- first nation members will also have the opportunity to see any changes proposed to the rules (See Law Standard 26.2)
- any third parties who are keenly interested in the financial stability of the first nation may appreciate seeing these rules set out in a FAL.

On the negative side, if any changes are considered or desirable in these rules, FMB approval is required before any changes may be made.

Law Standard 12.5 also requires councilllors 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 Schedule A. 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 12.4 requires a FAL to enforce these conduct and behavior expectations. It may not legally be possible for a FAL to revoke a councillor's election if he or she fails to comply. There are limited options available.

As one suggestion this subsection requires a public notice to be posted to first nation members of a determination that a councillor has failed to comply with subsection (1). This public notice may be effective as a form of public shaming but the information provided will also be part of a councillor's public record if he or she seeks re-election. (The requirements for posting a public notice are set out in section 4 of the Sample Law.)

Note that in this subsection the council does not have the discretion to post or not – it is required but also note that a formal determination of non-compliance is required before a public posting is made. This requirement may help to avoid mischief among competing candidates for office. This formal determination may come from a court or from a formal process for making such determinations that are set up under a FAL or in procedures adopted by the council to address such issues.

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 Schedule A – Procedures for Avoiding and Mitigating Conflicts of Interest. The Law Standards permit these issues to be addressed in policies and procedures of the council rather than included in a FAL but the System Standards will require that these policies and procedures be established and reviewed before a Financial Management System Certificate will be issued by FMB. 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 12.6.

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

Law Standard 12.5 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 Schedule A. 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 12.3 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 12.4 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 III – 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 ONE– FINANCIAL PLANS AND BUDGET

This Division sets out the requirements for 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: 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: satisfies Law Standard 14.0 which requires the first nation to have a multi-year financial plan.

The purpose of this plan is to provide information required for informed financial decision-making. Aside from requirements for the plan to be for a five year period and to include information respecting local revenues, 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). Based upon professional advice, 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, section165 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 Nation.

Section 26 (Content of annual budget):

Subsection (1): sets out the contents for the first nation's annual budget as required in Law Standard 15.3.1.

Subsection (2): is only required if the first nation has adopted a land code under the *First Nations Land Management Act* (see section 6(1)(c) and (d) of that Act.)

Subsection (3): defines a term used in subsection (2) and can be omitted if subsection (2) is not included in a FAL.

Section 27 (Budget and planning process): sets out the process and schedule for the preparation and approval of the multi-year financial plan and annual budget. In order to meet the Law Standard requirements to approve an annual budget and the multi-year plan 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 rehabilitation of first nation's tangible capital assets and replacement of assets

January 15 – review by finance and audit committee of proposed budget for rehabilitation and replacement of capital assets and budget for new construction

January 30 – senior financial officer prepares draft annual budget 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 annual budget

June 15 – senior financial officer prepares draft amendment of annual budget for local revenue account for finance and audit committee

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

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

Depending upon individual circumstances a first nation may wish to vary these dates. The Law Standards do not require these various scheduled dates (other than the council budget approvals on March 31 and July 15) 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 senior financial officer to prepare and submit a draft annual budget, budget amendments and multi-year financial plan.

Subsection (2): satisfies Law Standard 10.5.1 - the responsibility of the finance and audit committee to review and recommend for approval to council the plan and budget.

Subsection (3): satisfies Law Standard 15.4.1 - the responsibility of the council to approve the budget by March 31.

Subsection (4): provides process to satisfy Law Standard 15.4.2 - the responsibility of the council to approve the amendment of the budget respecting local revenues by July 15.

Subsection (5): provides process to satisfy Law Standard 15.4.2 - the responsibility of the council to approve the amendment of the budget respecting local revenues by July 15.

Subsection (6): provides process to satisfy Law Standard 15.4.2 - the responsibility of the council to approve the amendment of the budget respecting local revenues by July 15.

Note that subsections (4) - (6) are not required if the first nation is not raising local revenue by taxing property.

Section 28 (Additional requirements for budget deficits): Law Standard 16.3.3 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 takes a two step approach:

first, 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);

second, the council must ensure that deficits "do not have a negative impact on the credit worthiness of the first nation".

Section 29 (Amendments to annual budgets): satisfies Law Standard 15.4.4 which requires the council to approve any change in the annual budget.

Subsection (1): states that an annual budget must not be changed without the approval of the council.

Subsection (2): prohibits a council from changing the annual budget unless there is a substantial 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 section 27(6) of the Sample Law that requires an amendment of the annual budget to address expected local revenues that cannot be calculated until long after the March 31 deadline for annual budget approval and is subject to section 37 of the Sample Law that requires the council to amend the annual budget to address any emergency expenditures authorized under that section.

Section 30 (Local revenue account budget requirements): is not required unless the first nation is included in the Schedule to the FSMA. The council of a scheduled first nation must authorize the expenditure of local revenues in an expenditure law made under section 5(1)(b) of the FSMA. A first nation that has a law made under section 5(1)(a) of the FSMA in effect (a "property taxation law") must make an expenditure law at least once a year that establishes a budget for the expenditure of revenues raised under their property taxation law (see section 10 of the FSMA).

This section is an example of a possible conflict between the FAL and the FSMA and how that conflict is to be resolved (see also section 6 of the Sample Law). For example, assume a FAL permits a budget deficit; however, section 13(3) of the FMSA prohibits a deficit in the local revenue account. Any permission given in the FAL for a deficit would not apply to the local revenue account.

Subsection (1): defines a phrase used in subsection (2).

Subsection (2): confirms that the local revenue part of the annual budget must meet the requirements set out in the FSMA or in the standards of the First Nation Tax Commission - even if these requirements are different from those set out in a FAL.

Section 31 (Policy for first nation information or involvement): satisfies Law Standard 15.4.3 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 or procedures or give directions for how first nation members will be involved in or informed about the annual budget, the multi-year financial plan and the any budget deficits or extraordinary expenditures (see also section 25 of the Sample Law which requires information respecting any expected budget deficits to be set out in a multi-year financial plan).

Any policies, procedures or directions prepared 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, procedures and directions 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).

The policies, procedures or directions required in a FAL must be established and reviewed under the System Standards before the FAL will receive final approval.

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 multi-year financial plan, the annual budget and an amendment to the annual budget is on the agenda of a council meeting for approval.

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 TWO – 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 Standards 16.1.1, 16.1.2 and 16.1.3. Note that Law Standard 16.1.3 (provisions for effective cash management) may be omitted from a FAL if the FAL requires the council to adopt policies and procedures or give directions for effective cash management.

Section 32 (Financial institution accounts): sets requirements for use of accounts in financial institutions. Note that “financial institution” is defined in section 1 of the Sample Law.

Subsection (1): sets three controls for the receipt and deposit of first nation money in accounts:

- first: the account must be opened in the name of the first nation;
- second, the account must be opened in a financial institution;
- third, the account must not be opened unless it has been authorized by the senior manager or the senior financial officer.

Subsection (2): requires separate accounts to be established in a financial institution for different purposes. Law Standard 16.1.2 only requires the segregation of local revenue funds in a separate account (see also section 13(1) of the FSMA). This subsection is expanded however to require a separate general account, a trust account for trust money, a land and resources account for money from revenues from first nation lands and a tangible capital asset reserve account for money set aside for purposes set out in Part Five of the Sample Law. These additional 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 33 (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 senior financial officer as these responsibilities are consistent with the officer’s responsibility for the day to day management of the financial administration system (see Law Standard 11.2.1).

Subsection (1): places the general responsibility for safekeeping all money received by the first nation in the hands of the senior financial officer.

Subsection (2): provides more detail on the general obligation in subsection (1) and requires the senior financial officer to deposit all money received by the first nation *as soon as practicable* into the appropriate financial institution account. The senior financial officer 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 THREE – EXPENDITURES

This Division sets out the requirements for expenditures of first nation funds. This Division addresses in part the requirements of Law Standard 16.2. 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 16.2.

Section 34 (1) – (3) (Prohibited expenditures): specifies the limitations on the use of money from the trust account, local revenue account and tangible capital asset reserve account (required to be established in section 32 of the Sample Law).

Because the Law Standards only require a separate financial institution account for local revenues, Law Standard 16.2.2 limits the use of funds from that account to uses authorized under a local revenue law made under section 5(1)(b) of the FSMA (see also section 13(2) of the FSMA).

However, the Sample Law has suggested that separate accounts also be established for trust funds, the tangible capital asset reserve fund and for general purposes. Therefore, section 34 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 35 (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. 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 36 (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 16.2.3).

Exceptions to this rule are permitted in Law Standard 16.2.3 - "to address unforeseen events for which the FAL provides". The Sample Law contains an exception for expenditures by the senior manager for an emergency purpose under section 37(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 expenditure 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 37 (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 section 36(1) of the Sample Law – reasonable exceptions to this rule are permitted in Law Standard 16.2.3.

Subsection (1): gives the senior manager 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 senior manager. A council should not use these policies or procedures to attempt to define an "emergency". Council policies and procedures cannot be used to define a term used in a FAL. If the council attempted to do so, it would 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 senior manager, on his or her own initiative, to make an emergency expenditure that is not authorized in the annual budget. The senior manager must never borrow money to make such expenditures.

Section 38 (Appropriations): sets out the rules respecting use of budget appropriations (see definition of "appropriation" in section 2 of the Sample Law).

Subsection (1): While section 36 (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 39 (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 sections 38(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 section 13(3) of the FSMA respecting local revenue account budgets.

Section 40 (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 sections 38(2) and (3) and 39(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 sections 38(2) and (3) and 39(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 is essentially a provision proving some efficiency in first nation operations. This provision would also be appropriate for inclusion in council policies or procedures.

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 section 37(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 42 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 senior manager or the senior financial officer.

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

Subsection (10): gives authority to the senior manager or the senior financial officer 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 41 (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 any two of the senior manager, senior financial officer or tax administrator must sign these payment instruments. Again the first nation may prefer different financial controls but the recommendation in this section is that two signatures be required for payments and that the individuals authorized to sign be first nation officers.

DIVISION FOUR – GENERAL MATTERS

This Division addresses a variety of subjects that merit specific financial controls. Law Standards 16.1 and 16.2 are the basis 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.

Section 42(Advances): sets the rules for prepaying first nation expenses.

> **Subsection (1):** permits the senior manager or the senior financial officer 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 43 (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 44 (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 or directions).
>
> **Subsection (2):** requires the council to adopt policies or directions to deal with the subject referred to in subsection (1). The System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

Section 45(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 46 (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. Again the System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

Section 47 (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 48 (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 49 (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 32 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 asset 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 (Capital Projects).

DIVISION FIVE – BORROWING

This Division addresses the debt and borrowing issues set out in Law Standard 16.3. 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 50 (Limitations on borrowing): sets the default rules respecting the borrowing of money or granting of security by the first nation.

> **Subsection (1):** prohibits the first nation from borrowing money or granting security unless specifically authorized to do so 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.
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> The practical effect of this provision is that if the first nation wishes to borrow money and does not find authority to do so in its FAL or a local revenue law, the first nation has no legal authority to do so. If the first nation adopts this approach to managing these issues (a strong control method), the first nation should ensure that the provisions of its FAL provide sufficient flexibility to address the changing needs and circumstances of the first nation.
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> **Subsection (2):** sets out the general responsibilities and authorities to borrow money under the Sample Law or to grant security:
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> - first, there must be authority to borrow under the Sample Law;
> - second, the council may authorize the senior financial officer to borrow the money or grant security on behalf of the first nation;
> - third, the senior financial officer must borrow the money or grant security in the manner approved by the council or if the council does not set out these requirements, in the manner set out in the policies, procedures or directions given by the council. If the council does not establish any policies or procedures or give any directions for these purposes, the council must give specific directions on each occasion to the senior financial officer on how to borrow money or grant a security.

Section 51 (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.

Section 52 (Financial agreements): sets the rules for the first nation to enter into agreements with financial institutions.

> **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 senior financial officer 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 in some way by giving other directions.

Section 53 (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 32 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 senior financial officer 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 54 (Borrowing member requirements): This section is not necessary if the first nation is not and does not intend to become a borrowing member as defined in the FSMA.

> **Subsection (1):** This subsection is included in the Sample Law only to confirm that section 54 is relevant only if a first nation is a borrowing member. If a first nation that is a borrowing member includes section 54, its FAL need not include subsection (1). If a first nation is not a borrowing member all of section 54 would be omitted from its FAL.

> **Subsection (2):** confirms that if the first nation is a borrowing member, it may only obtain long term financing, secured by property tax revenues, from the First Nations Finance Authority. This restriction is contained in the section 80 of the FSMA.

> **Subsection (3):** notes the restriction on use of money borrowed from the First Nations Finance Authority – section 74 of the FSMA limits the use of these funds for purpose specified in that Act.

Section 55 (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 capital projects. These requirements can be set out in the Sample Law or by council policy.

Subsection (1): requires the council to establish policies or procedures or give directions respecting the means by which members of the first nation must be informed about or involved in consideration of borrowing for new capital projects described in section 89(2) of the Sample Law.

As this subsection requires a council to establish policies or give directions, the System Standards will require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

Subsection (2): requires the council to post a public notice of each Council meeting when borrowing for new capital projects described in section 89(2) 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 56 (Borrowing for repayment of debts): allows a first nation to borrow money for the repayment or financing of its debts – with two exceptions:

- first, it cannot borrow to refinance a debt under section 53(1) of the Sample Law which is only intended to be a short term solution to a temporary cash flow problem;
- second, if the first nation is a borrowing member of the First Nations Finance Authority it cannot borrow money to repay a debt owed to that Authority.

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

Section 57 (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 section 63(1) of the Sample Law – investments considered to be safe and 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 58 (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 senior manager or the senior financial officer.

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.

Section 59 (Operational controls): satisfies the requirements of Law Standard 17.6.1. 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 or procedures or to give directions respecting these controls. This section requires the council to develop these requirements by policies, procedures or directions. Again the System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

DIVISION SIX – 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 and insurance. Law Standard 17.0 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.

Section 60 (Limitations on business activity): sets out the general rules for a first nation to participate in business (for-profit) activities.

Subsection (1): Law Standard 17.1 requires a FAL to include provisions that limit or manage the risks associated with the first nation carrying on for-profit activity. This Standard may also be met by a FAL requiring the council to establish policies or procedures or to give directions respecting this subject. If this latter approach is taken in a FAL, the System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

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, procedure or direction.

This subsection restricts the first nation from operating a business as an owner, from taking on the legal responsibility of a general partner in a partnership conducting a business or from acting 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. The exceptions to these three restrictions are set out in subsections (2) and (3).

Subsection (2): permits a first nation to carry on a business 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 solely for profit so long as 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 and 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 rules for a first nation giving a guarantee or an indemnity.

Subsection (1): satisfies the requirements of Law Standard 17.2 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 senior financial officer about the impact of giving the guarantee.

Subsection (2): sets out the contents of the assessment report required by the senior financial officer before the council may approve the first nation giving a guarantee. The senior financial officer 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 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 a FAL or another first nation law.

Subsection (4): requires the council to make policies and directions 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

- specifying the records that must be kept of guarantees and indemnities.

Again the System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

Section 62 (Authority to invest): sets the default rules for investments by the first nation.

Subsection (1): prohibits the first nation from investing any of its financial assets unless the Sample Law or another first nation law specifically permits it.

Subsection (2): If the Sample Law permits the investment of the first nation's financial assets, this subsection allows the council to authorize the senior financial officer to invest the first nation's financial assets in the manner the council specifically approves or in the manner set out in council policies, procedures or directions. If the council does not establish any policies or procedures or give any directions for these purposes, the council must give specific directions on each occasion to the senior financial officer on how to make a particular investment.

Section 63 (Approved investments): defines and sets the rules for approved first nation investments.

Subsection (1): permits the investment of money held in accounts that the first nation established in section 32 of the Sample Law where the money is not immediately required. The investments listed are considered to be conservative and relatively low risk. Investment of money held in a trust account is addressed in subsection (2). Investment of money held in a local revenue account or money obtained from government transfers (which in the Sample Law is not required to be in a separate account) is addressed in subsection (3).

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 and
- in a program for lending money to first nation members – the program requirements of which are set out in section 64 of the Sample Law.

Subsection (4): restricts the investment of funds transferred from the government to the first nation and local revenue monies to those investments specified in section 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 also to investments in securities issued by the First Nations Finance Authority.

This restriction is intended to ensure very conservative investments for monies required for first nation program funding and that may serve as security for borrowings from the First Nations Finance Authority.

Section 64 (Permitted investments in first nation member activities): 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 17.4.2).

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 senior financial officer 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 71(4) of the Sample Law requires this annual report to be included in the annual financial statements of the first nation as a special purpose report. 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 17.4.2 for this lending program.

Subsection (4): requires the council to establish policies or procedures or to give directions for the operation of the lending program. Again the System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

Section 65 (Administration of investments and loans): sets the general requirements for administering investments and loans.

Subsection (1): gives the senior financial officer the authority for all administrative actions and decisions associated with any investments or loans that the first nation is authorized to make under the Sample Law.

Subsection (2): requires the council to establish policies or procedures or to give directions 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 (see Law Standard 17.4.1). The System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

Section 66 (Risk assessment and management): requires the identification, assessment and management of risks.

Subsection (1): gives the senior manager 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 84 of the Sample Law) and its operations. The senior manager 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 11.1.4).

Subsection (2): requires the senior manager to report to the finance and audit committee on plans the senior manager 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 senior manager must make this report at least once a year and more often if necessary (see Law Standard 10.5.2).

Section 67 (Insurance): requires insurance coverage where appropriate for risks to the first nation.

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 section 66(2) of the Sample Law in which the finance and audit committee considers the senior manager'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 66 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 17.5.1).

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 senior manager, the senior financial officer, 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).

DIVISION SEVEN – FINANCIAL REPORTING

This Division addresses the requirements set out in Law Standard 18.0. 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 and anticipate changes to those practices that have been approved and are expected to be required in 2009.

Section 68 (GAAP): This section is mandatory and requires the accounting of the first nation to comply with the generally accepted accounting principles established by the Canadian Institute of Chartered Accountants.

Section 69 (Monthly financial information): requires financial information to be prepared monthly and distributed.

Subsection (1): satisfies the requirements of Law Standard 18.2. This subsection imposes the responsibility on the senior financial officer 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.

Subsection (2): requires the senior financial officer to provide the monthly financial information no later than 45 days after the month end. This time 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.

Section 70 (Quarterly financial statements): requires quarterly financial statements to be prepared, reviewed and approved.

Subsection (1): satisfies Law Standard 18.3. This subsection imposes the responsibility on the senior financial officer 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 subsection also supports Law

Standard 18.2.3 and section 19(2)(d) of the Sample Law that requires the senior financial officer to prepare the first nation's financial statements.

Subsection (2): requires the senior financial officer to provide the quarterly financial information no later than 45 days after the end of the quarter. Again this 45 day time 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 Law Standard 10.5.1 and section 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 71 (Annual financial statements): requires annual financial statements to be prepared and reviewed.

Subsection (1): requires the senior financial officer to prepare the annual financial statements of the first nation at the end of the fiscal year. They must be prepared in accordance with the generally accepted accounting principles established by the Canadian Institute of Chartered Accountants and to a standard that is at least as good as that generally accepted for governments in Canada. The obligation to meet the standard of a government in Canada will be a change for some first nations but this change is expected to be a requirement by 2009. This subsection also supports Law Standard 18.4.2 and section 19(2)(d) of the Sample Law that requires the senior financial officer to prepare the first nation's financial statements.

Subsection (2): This subsection, while not specifically required in the Law Standards, is consistent with the requirements for the 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 Sample Law and with the requirements of the generally accepted accounting principles established by the Canadian Institute of Chartered Accountants. These requirements cannot be modified by council decision.

Subsection (3): affirms that the annual financial statements must include all the financial information of the first nation and its related bodies. They must also include the financial information for the local revenue account that is required to meet the *Local Revenue Account Financial Reporting Standards.* If the first nation has a land code and will have a provision like section 26(2) of the Sample Law in its FAL, the annual financial statements must also include the same revenue categories that must be included in the first nation's annual budget under section 26(2) of the Sample Law (see Law Standard 18.4.2).

Subsection (4): sets out the special purpose reports that must be included in the annual financial statements.

The reports referred to in paragraphs (a) to (d) are required by Law Standard 18.5.2 to be included; however paragraph (e) is only required if the first nation has a land code.

To provide needed transparency in the first nation member lending program permitted in the Sample Law, paragraph (d) requires the report referred to in section 64(3)(c) of the Sample Law to be included as a special purpose report in the annual financial statements.

Paragraph (f) is a catch all provision designed to ensure that any report required by the FSMA or by an agreement entered into by the first nation is included as a special purpose report.

Subsection (5): requires the senior financial officer to provide draft annual financial statements to the finance and audit committee for review within 45 days followed year end. The time period imposed is one of several included in the Sample Law that provides a schedule for activities that will permit the first nation to have its audited financial statements completed and approved by the council not later than 120 days after fiscal year end (see Law Standard 18.4.1). See the schedule of activities set out in these Explanatory Notes under section 27.

Subsection (6): requires the finance and audit committee to present the draft annual financial statements to the council 15 days after it was given them to review by the senior financial officer under subsection (5). This is a short turnaround time but again the time period imposed is one of several included in the Sample Law that provides a schedule for activities that will permit the first nation to have its audited financial statements completed and approved by the council not later than 120 days after fiscal year end (see Law Standard 18.4.1). See the schedule of activities set out in these Explanatory Notes under section 27.

Section 72 (Audit requirements): sets the general requirements for the audit of the annual financial statements.

Subsection (1): sets out the basic requirements for the conduct of an audit of the first nation's annual financial statements. This subsection requires the annual financial statements of the first nation to be audited by an auditor. The qualifications of an auditor are set out in section 73(3) of the Sample Law.

Subsection (2): requires the audit to be conducted in accordance with the generally accepted auditing standards set by the Canadian Institute of Chartered Accountants.

Subsection (3): The FMB has established the *Local Revenue Account Financial Reporting Standards*. This subsection requires the auditor to conduct his audit in accordance with the requirements of those standards (see also section 14 of the FSMA).

Subsection (4): This subsection meets the requirements of Law Standard 19.2.4 which requires the auditor to provide an audit opinion on the annual financial statements and an audit opinion or review comments on the included special purpose reports.

Section 73 (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 19.2. 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 including a requirement that the auditor confirm that the annual financial statements and the audit of them comply with the Sample Law, the FSMA and FMB standards.

Subsection (3): sets out the qualifications for an auditor that are required in Law Standard 19.2.2.

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 19.2.2 only requires the auditor to be independent of the first nation but the Sample Law suggests that 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 of the operations of the first nation and its integrity.

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 if

- 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 or is a partner, employer, employee or member of the immediate family of a director, officer or employee of a related body,

- 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 under the *Bankruptcy and Insolvency Act* or is a partner, employer, employee or member of the immediate family of that trustee.

Second, the auditor must be a public accounting firm or a public accountant and must be

- in good standing with the Canadian Institute of Chartered Accountants, the Certified General Accountants of Canada or the Society of Management Accountants of Canada and their 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).

Section 74 (Auditor's authority): sets out the authority the auditor has to access all information the auditor requires to conduct the audit of the annual financial statements and ability of the auditor to attend and speak at certain meetings of the finance and audit committee, the council and the first nation membership.

Subsection (1): satisfies Law Standard 19.2.5 which 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): In order to give the auditor the opportunity to hear discussions about matters relating to the financial administration of the first nation, the auditor must be given notice of every meeting of the finance and audit committee, every meeting of the council where matters relating to the annual audit, including the approval of the annual financial statements will be dealt with, and every meeting of the members of the first nation where the financial administration of the first nation will be considered. These notice requirements do not require the auditor to attend these meetings.

Subsection (4): While subsection (3) does not require the auditor to attend the meetings, the auditor is entitled under this subsection to attend a meeting for which the auditor must be notified (whether or not the auditor is actually given the required notice) and the auditor must be given the opportunity to make a presentation or give comments at those meetings on any subject that concerns the auditor.

Subsection (5): gives the auditor the authority to call a meeting of the finance and audit committee at any time to deal with any matters that the auditor is concerned about as auditor.

Subsection (6): While the auditor is given authority to attend all finance and audit committee meetings and certain council meetings, 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 19.2.5 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 75 (Review of audited annual financial statements): requires the review and approval of the audited annual financial statements.

Subsection (1): requires the finance and audit committee to review and consider the audited financial statements not more than 105 days after the year end. Again this time period is imposed to provide a schedule for activities that must be completed before the council reviews and approves these statements no later than 120 days after the year end (see Law Standards 18.4.1 and 19.3).

Subsection (2): requires the council to review and approve the audited annual financial statements not later than 120 days after the year end. This deadline is set out in Law Standard

19.3 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 76 (Access to annual financial statements): requires the audited annual financial statements 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 approved by the council (see Law Standard 19.4),
- they must be signed by the chief or the council chair, the chair of the finance and audit committee and the senior financial officer (see Law Standard 19.5), and
- they must include the auditor’s audit report of the statements and the auditor’s audit opinion or review comments about the special purpose reports which are required to be included in the financial statements. This last requirement provides clarification of what are considered to be the audited financial statements “supporting documents and reports” that Law Standard 19.6 requires to be made available to first nation members.

Subsection (2): requires the audited annual financial statements and special purpose reports to be made available for inspection by first nation members at the main 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”.

Subsection (3): requires the auditor’s report relating to the local revenue account be made available for inspection at the main administrative offices of the first nation during normal office hours by any of the following persons (set out in section 14(2) of the FSMA):

- 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 and the First Nations Finance Authority and the Minister of Indian and Northern Affairs and Northern Development.

The most important distinction between subsections (2) and (3) is that the audit of the local revenue account must be conducted in accordance with the FMB's *Local Revenue Account Financial Reporting Standards* and that people who are required to pay property taxes to the first nation are entitled by having access to this audit report to see whether the property taxes raised have been spent as authorized in the local revenue laws of the first nation. These same people, other than first nation members who are also covered by subsection (2) just discussed, are not entitled however to see the complete audited annual financial statements of the first nation.

Section 77(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 the same as the deadline for approving the audited financial statements of the first nation. This requirement in Law Standard 27.0 supports the need for transparency and accountability in the financial affairs of the first nation.

Subsection (2): mirrors the requirements of Law Standard 27.3 for the contents of the annual report.

Subsection (3): The requirements to make this annual report available to the first nation members at the main administrative offices of the first nation and to provide it to the FMB and to the First Nations Finance Authority are set out in Law Standard 27.4. A first nation may wish to provide this annual report to others. 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.

DIVISION EIGHT – INFORMATION AND INFORMATION TECHNOLOGY

Section 78 (Ownership of records): sets the rules for securing the ownership of first nation records.

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 "records" is broadly defined in section 2 of the Sample Law.

Subsection (2): requires the council to make policies or procedures or to give directions 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 79 (Operations Manual): requires the first nation to have an operations manual for all its administrative systems.

Subsection (1): requires the senior manager to prepare and maintain a current operations manual. The manual must include every element of the first nation's administrative systems including the financial administration system referred to in the FAL.

Subsection (2): requires the operations manual to be made available to councillors, the senior financial officer, tax administrator, members of the finance and audit committee and any other council committees and any other officer of and employees of the first nation. Note that Law Standard 20.2.2 allows the first nation to restrict access to some of or the entire operations manual if limited distribution is more appropriate. For example, a first nation may wish to restrict access to a limited number of employees to those parts of the operations manual that deal with data security. Note that subsection (3) provides more limited access to contractors and agents of the first nation.

Subsection (3): requires those parts of operations manual that a contractor or agent of the first nation needs for providing services to the first nation to be made available to the contractor or agent. Law Standard 20.2.2 only requires that the operations manual be made available to contractor and agents as is considered appropriate.

Section 80 (Record keeping and maintenance): sets the general rules for keeping and maintaining the records of the first nation's operations.

Subsection (1): imposes on the senior manager the responsibility for ensuring that the first nation prepares, maintains, stores and secures all records required under the Sample Law or any other law. Note that this provision is not restricted to records required by the first nation's laws. If the council decides to make policies or procedures or to give directions respecting these issues, the senior manager must carry out this responsibility in accordance with these requirements.

Subsection (2): prohibits the destruction or disposal of any first nation's records unless council policies or directions permit it. Where such destruction or disposal is permitted, it must be carried out in accordance with the 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 kept 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. Note that any council policies made under subsection (2) cannot over ride this requirement (see section 9(3) of the Sample Law).

Subsection (4): requires the council to make policies or procedures or to give directions respecting access of any person's to first nation records. A first nation may wish to put provisions into its FAL that address this subject; however, this may be a subject better suited to a policy document that can be revised easily by the council without having to seek the approval of the FMB for any changes to its FAL.

Note that the Law Standards allow the requirements for first nation's records to be addressed completely by a simple section requiring the council to establish policies or procedures or to give directions respecting the preparation, maintenance, security, storage, access and disposal of first nation's records. If a first nation takes this approach to meeting the Law Standard, the FMB will under the System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

Section 81 (Local revenue account records): 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 *Local Revenue Management Implementation Regulations* made under the FSMA.

Section 82(Confidentiality of information): provides the general rules respecting the confidentiality of information in the first nation's record.

Subsection (1): prohibits any person from access to any first nation's records containing confidential information unless that access is permitted and given in accordance with the policies, procedures and directions of the council. Worded this way - as a default provision - if the council does not make any policies, procedures or directions 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 section 80(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, procedures or directions.

Subsection (2): governs the behavior of those persons who are given access to all first nation's records. They must comply with the policies, procedures or directions of the council respecting s 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, procedures or directions 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, procedures or directions.

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 20.5 respecting the confidentiality, control and release of first nation information by requiring the council to establish policies or procedures or to make directions 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. If a first nation takes this approach to meeting the Law Standard, the FMB will under the System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

Section 83 (Information technology): Law Standard 17.6.2 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, procedures or directions.

This section requires the council to address these subjects in policies, procedures or directions. If a first nation takes the same approach to meeting this Law Standard, the FMB will under the System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

PART IV – CAPITAL PROJECTS

Effective January 1, 2009, the Public Sector Accounting Board will require local governments to present information about the complete stock of their tangible capital assets and amortization in the summary of financial statements. The provisions in this Part, which are based substantially on Law Standard 17.0, are intended to assist first nations in preparing for this change in accounting standards.

It is recommended that first nations consult the “Guide to Accounting for and Reporting Tangible Capital Assets – Guidance for Local Governments and Local Government Entities That Apply the Public Sector Handbook” available at the Public Sector Accounting Board web site.

The new standards established for the accounting for and reporting of tangible capital assets by the Public Sector Accounting Board will require full accrual accounting. Full accrual accounting standards will require local governments to account for the stock of capital assets, such as roads, bridges, sewage treatment facilities and buildings, and their use in financial statements.

The move to full accrual accounting for local governments will provide taxpayers, elected officials and administrators with better information and will be a major improvement in their financial reporting. Most local governments are capital asset intensive and their assets can be long-term in nature - consider a water system, for example. These new accounting standards will provide the foundation of financial information needed to understand the costs of using capital assets in service delivery. They will promote ongoing asset condition assessments and improved financial planning related to maintenance and replacement needs.

Traditionally, local government financial statements have focused on annual surplus or deficit. The new reporting standards provide for key indicators such as net debt, accumulated surplus/deficit, annual surplus/deficit, change in net debt and cash flows, all useful for assessing financial position and results.

The new reporting model eliminates the one-dimensional focus on annual surplus/deficit by requiring a more comprehensive set of indicators that will be much more useful to the public and anyone having a stake in making sense of the numbers. The new model will allow one to look at the extent of capital assets a local government has, its net debt, the cost of operations, and the sources and uses of its cash resources in addition to annual results.

Many local governments do not have a complete inventory of what they own or the cost of those assets when they were acquired. Completing the inventory, determining cost or an estimate of it, and creating capital assets policies all needs to be done before January 1, 2009. Although it is a significant undertaking, in the long-run, local governments and taxpayers will have better information for decision making.

Section 84 (Definitions): defines the terms used in this Part. Note the definition of "first nation's tangible capital assets" which is the same definition used in the Law Standards. (The phrase "tangible capital assets" has been adopted by the Public Sector Accounting Board and is recommended for use.)

Section 85 (Council general duties): sets out the general duties of the council in respect of the first nation's tangible capital assets. First it must take reasonable steps to ensure that the first nation's tangible capital assets are maintained in a good and safe condition. The council will be expected to do what a "prudent owner" would do to meet this requirement.

Second, the council must ensure that the rehabilitation or replacement (both terms are defined in section 84 of the Sample Law) of these assets is carried out in accordance with the life-cycle management program set out in section 88 of the Sample Law. A first nation will be expected to include the critical elements of the program set out in the Sample Law in its own FAL.

Finally the council must ensure that any capital projects undertaken are financed, planned and constructed using the procedures and standards that generally apply to the financing, planning and construction of public buildings and other infrastructure of other communities in the region in which most of the first nation's lands (i.e. reserves) are located. If the majority of the first nation's lands are in a large urban centre it will be expected to comply with the standards generally used in that centre and if the majority of first nation's lands are located in an isolated northern region it will be expected to comply with the standards used in other northern communities.

Section 86 (Tangible capital assets reserve fund): The council must establish a tangible capital asset reserve fund for funding capital projects as defined in section 84 of the Sample Law. Note that section 32 of the Sample Law requires the first nation to establish a separate financial institution account for these funds and section 34 of the Sample Law places restrictions on their use.

Section 87 (Reports on capital projects): While the regular reporting requirements set out in this section are not specifically required in Law Standard 21.0, they are recommended as a prudent practice. The section requires regular reporting of information to the finance and audit committee on the financial aspects of each capital project including

- any risks or problems that might have developed and how they are being addressed, and

- steps that have been taken to ensure that the capital project is meeting the requirements of the council's policies, procedures or direction for the effective planning, conduct and risk management of capital projects.

Section 88 (Life-cycle management program): sets out the critical elements of the life-cycle management program – the primarily responsibilities for which are given to the senior manager and the senior financial officer.

Subsection (1): requires the senior manager to keep a current register of all first nation's tangible capital assets. This register includes – for each capital asset – critical base line information for each capital asset. The register must also include 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 senior manager to arrange for the annual inspection and review of the first nation's tangible capital assets. This annual inspection requires information to be collected that will provide the senior manager with updated information on the state of condition of each 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 senior financial officer prepares under subsection (3). This subsection requires the annual inspection to be completed no later than November 30 so that the senior financial officer 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. 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 27.

Note that Law Standard 21.3 permits a FAL to establish a threshold for tangible capital assets that must be included in the asset register. 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 to include in its FAL a threshold for defining which tangible capital assets it includes.

Subsection (3): requires the senior financial officer 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 rehabilitation and replacement of these assets, to prepare a proposed budget for rehabilitation of these assets for the following year and a proposed budget for replacement of these assets for the following year. 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 senior financial officer for the following fiscal year.

Section 89 (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's tangible capital assets.

Subsection (1): requires the finance and audit committee to review annually the information, schedules and budgets prepared under section 88 of the Sample Law by the senior manager and the senior financial officer. 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.

Subsection (2): requires the finance and audit committee to review proposed plans for new construction of tangible capital assets and the proposed schedule and budget for this project plus its impact of this new on future operating costs and routine maintenance costs.

The reviews required in this section must be completed on or before January 15. This will enable the senior financial officer to prepare a draft annual budget for review by the finance and audit committee by January 31 (see section 27(1) of the Sample Law). Again these reviews are scheduled activities in the process of approving the annual budget by March 31.

Section 90 (Capital projects – contracts and tenders): requires the council to provide policies, procedures or directions to ensure that capital projects are carried out in a manner that minimizes the risks associated with such activities.

Subsection (1): requires the council to establish policies or procedures or give directions respecting the management of capital projects. The matters to be addressed in these policies, procedures or directions are 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 21.5 requires these subjects to be addressed in a FAL or in council policies, procedures or directions. 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 or procedures or directions because they can be revised as necessary from time to time with changes in industry standards or with increased first nation experience or capacity. Under the System Standards the FMB will require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

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 approval if the first nation is a borrowing member.

Subsection (2): requires all first nation capital projects to be carried out in accordance with the policies, procedures or directions made by the council. Note that "capital projects" as defined in section 84 of the Sample Law includes all construction, rehabilitation and replacement of first nation's tangible capital assets.

Section 91 (Capital project consultants): permits the senior manager to retain specialized or professional services to assist the senior manager, 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 92 (Policy for information or involvement of members): Law Standard 21.6 requires a FAL to include provisions for providing information or involving first nation members in capital projects or to require council to address these issues in its policies, procedures or directions.

This section requires the council to establish policies or procedures or give directions for the provision of information to first nation members about capital projects or for the involvement of first nation members in consideration of capital projects. If a first nation decides to take this same approach to meeting the Law Standard, the FMB will under the System Standards review these policies, procedures or directions before a FAL may be given final approval.

PART V – BORROWING MEMBER REQUIREMENTS

This Part is based on Law Standard 22.0. Section 93 has been included in the Sample Law only to confirm that Part V is relevant only to a first nation that is a borrowing member.

If a first nation that is a borrowing member includes section 94, its FAL need not include section 93 of the Sample Law – it is only necessary to include a provision similar to section 94 of the Sample Law in order to meet the requirements of Law Standard 22.0. If a first nation is not a borrowing member all of Part Five would be omitted from its FAL.

Section 93 (Application): indicates that this Part is only intended to apply to a first nation that is a borrowing member of the First Nations Finance Authority. See opening comments under Part V on the need for this section.

Section 94 (Compliance with standards): requires the first nation to comply with FMB standards established under the FSMA*.*

> **Subsection (1):** requires the first nation to comply with all FMB standards – they may be listed and identified but could change from time to time. It is recommended that they not be specifically identified in the FAL.
>
> **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), the council once it is aware of this failure must appoint an auditor as required in the Law Standards and its own FAL as soon as possible.

PART VI – LAND MANAGEMENT

This Part has been set aside in the Sample Law to indicate that its provisions only apply to a first nation that has a land code under the *First Nations Land Management Act.*

If a first nation developing a FAL has a land code, it will not be necessary to prepare or set aside a separate Part VI as in the Sample Law or to include the language of section 95 of the Sample Law – it is only necessary to include a provision similar to section 96 of the Sample Law in order to meet the requirements of Law Standard 23.0.

Section 95 (Application): indicates that this Part is only intended to apply to a first nation that has a land code. See opening comments under this Part VI on the need for this section.

Section 96 (Obligations): requires the first nation to comply with the FSMA and any land code that the first nation made under that Act

> **Subsection (1):** requires the first nation to comply with the FSMA and any land code that the first nation made under that Act.

Subsection (2): requires the council through policy consistent with the first nation's land code to provide a method for the first nation to be held accountable to first nation members for the management of first nation's reserve lands and for any money earned from those lands. This subsection addresses the requirements of section 6(1)(e) of the FSMA. The System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

PART VII – OIL AND GAS AND MONEYS MANAGEMENT

This Part has been set aside in the Sample Law to indicate that its provisions only apply to act first nation which has a financial code under the *First Nations Oil and Gas and Moneys Management Act.*

If a first nation developing a FAL has a financial code made under that Act, it will not be necessary to prepare or set aside a separate Part VII as in the Sample Law or to include the language of section 97 of the Sample Law – it is only necessary to include a provision similar to section 98 of the Sample Law in order to meet the requirements of Law Standard 24.0.

Section 97 (Application): indicates that this Part is only intended to apply to a first nation that has a financial code under the *First Nations Oil and Gas and Moneys Management Act.* See opening comments under this Part Seven on the need for this section.

Section 98 (Obligations): requires the first nation to comply with the *First Nations Land Management Act* and any financial code that it made under that Act.

PART VIII – MISCELLANEOUS

The Sample Law is organized logically into different Parts dealing with large blocks of subject matter. Part VIII 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 part to deal with miscellaneous matters will be largely determined by how the subject matter of the FAL is organized. The main subject in this Part addresses is the reporting and investigation of allegations of misconduct relating to the financial administration of the first nation.

Section 99 (Reports of breaches and financial irregularities, etc): provides for the reporting of misconduct respecting the financial affairs of the first nation, including 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 the reporting of a breach of conflict of interest obligations set out in Schedule A – Procedures for 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 25.2).

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 senior manager 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 25.2). Also note Law Standard 12.3 and section 23(3) of the Sample Law which provides the legal means to enforce these requirements.

Section 100 (Inquiry into report): requires any reporting of misconduct to be inquired into.

Subsection (1): spells out how a report made under section 99 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 section 101 of the Sample Law.

This subsection states that if a report under section 99(1) of the Sample Law is made to the senior manager, the senior manager 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 99 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 senior manager 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 101 (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 whistle blower") 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 25.3 and 25.4).

This subsection is intended to afford anonymity to the whistleblower by requiring the senior manager, the members of the finance and audit committee and the members of the council to not 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 of 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 12.3 and section 23(3) of the Sample Law which provides the legal means to enforce these requirements.

Subsection (3): places a positive obligation on the senior manager 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 or procedures or give directions for the keeping of proper records of reports and inquiries or investigations of reports and for the fair treatment of a person against whom an allegation or report has been made. The Systems Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

Section 102 (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 Sample Law or a local revenue law of the first nation. It 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 25.6).

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 103 (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.

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 17.2).

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.)

Section 104 (Periodic review of law): requires the law to be reviewed periodically to ensure that it facilitates sound financial administration of the first nation.

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

Subsection (2): Law Standard 26.2 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, procedures or directions. This subsection of the Sample Law requires the council to make these policies, procedures or directions.

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. If a first nation takes the same approach as in the Sample Law, the System Standards require these policies or directions to be in place before FMB will issue the first nation a Financial Management System Certificate.

Subsection (3): Regardless of the policy adopted in the council policies, etc respecting the informing or involvement of first nation members in a proposed amendment of the Sample Law, this recommended subsection requires the council to notify first nation members of a meeting when the proposed amendment of the Sample Law 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 Sample Law.

Section 105 (Provision of law to First Nations Finance Authority): requires the council to provide a copy of its FAL to the First Nations Finance Authority once it has been finally approved by the FMB. (This section is not required if the first nation does not intend to become a borrowing member of the First Nations Finance Authority.)

Section 106 (Coming into force): The Sample Law does not provide an example of a provision for the coming into force of the FAL of a first nation. Law Standard 29.1 allows the FAL to set a date when the FAL becomes a law of the first nation; however, Law Standard 29.2 states that if the first nation is a borrowing member of the First Nations Finance Authority the date set for the FAL becoming law cannot be any earlier than the date FMB gives final approval of the FAL under section 9(3) of the FSMA).

If the first nation is not a borrowing member of the First Nations Finance Authority and not required to obtain the approval of its FAL from FMB, this section could be worded as follows:

> *This law comes into force on the day after the date it is approved by the Council. OR*
>
> *This law comes into force on September ___, 20__.*

If the first nation is a borrowing member of the First Nations Finance Authority and is required to obtain the approval of its FAL from FMB, this section could be worded as follows:

> *This law comes into force on the day after the date it is approved by the First Nations Financial Management Board under section 9 of the First Nations Fiscal and Statistical Management Act.*
>
> *OR*
>
> *This law comes into force on the later of*
>
> a. *September __, 20__, and*
>
> *b. the day after the date it is approved by the First Nations Financial Management Board under section 9 of the First Nations Fiscal and Statistical Management Act.*

SCHEDULE A – PROCEDURES FOR 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 Parts – to permit necessary or appropriate variations in the way this subject matter is addressed for councillors, employees, contractors and agents.

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

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 Sample Law. While the Schedule is physically segregated from the other provisions of the Sample Law, the Schedule is stated to be an integral part of the Sample Law.
>
> **Subsection (2):** clarifies that the same definitions used in the Sample Law apply to the Schedule – unless a provision in the Sample Law makes an exception from this rule. Please refer to section 1 of the Sample Law for these definitions.
>
> **Subsection (3): s**ections 2 and 4 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 Sample Law are in conflict, the provision in the Sample Law 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 2 of the Sample Law 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 ONE – 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 section 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 senior manager of the information set out in the subsection. The disclosure of this information has three principal purposes:

- first, to require the councillor to actively consider any private interests he or she has that could lead to a conflict of interest;
- second to provide transparency in the financial administration of the fist nation;
- third 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 12.5).

Subsection (4): requires the senior manager 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 senior manager 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 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 senior manager 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). No minimum value has been listed in the Sample Law. That value has been left for a first nation to determine 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. The Law Standards require 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 section 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 (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, procedures for conflicts, procedures for undisclosed conflicts) 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 with be treated as references to a committee meeting.

PART TWO – 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 Two applies to all officers (see definition in section 2 of the Sample Law - senior manager, senior financial officer, 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 section 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.
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> **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 section 4(1) of Part One 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 section 4(1) of Part One of the Schedule. See additional discussion of this obligation under section 4(2) of Part One of the Schedule.
>
> **Subsection (4):** requires the senior manager to ensure that every officer and employee is informed of their obligations under this Part and also requires the senior manager to take actions to ensure such compliance. Note that employees also have the obligation under section 99(3) of the Sample Law to report any breaches of the Schedule. Protection for whistleblowers is addressed in section 101 of the Sample Law. The potential consequences of an officer or employee failing to comply with these obligations are addressed in section 23 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 senior manager or if the senior manager 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 senior manager, or the chair of the finance and audit committee (if the senior manager), 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 senior manager 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 senior manager'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 exchanges – 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): s**tates that where an officer or employee is permitted to have outside employment or business interests, they must disclose them in writing to the senior manager (or for the senior manager, 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.
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> **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): The Law Standards require 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 One 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 section 7(2) of Part One 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 section 7(3) of Part One 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 One 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 THREE – 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 12.3 and section 23(4) of the Sample Law which provides the legal means to enforce these requirements against contractors.

Section 18 (Application): clarifies that Part Three applies to contractors of the first nation.

> **Subsection (1):** clarifies that Part Three 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.
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> **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 section 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 1 of the Sample Law and the Law Standards as the senior manager, senior financial officer, tax administrator and any other person designated an officer by the council.

For example if a person is engaged to be the senior manager 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 Two and Part Three 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 One and section 14 in Part Two 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): The Law Standards 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 phase "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.

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