



## Legislative and Regulatory Amendments to the FMA: Coming into Force

### The Amendments

Amendments to the *First Nations Fiscal Management Act* (FMA) along with corresponding amendments to several FMA regulations came into force on April 1, 2016 after being passed by Parliament and given Royal Assent in June 2015. The Amendments clarify and simplify various processes under the FMA, ultimately making it easier for First Nations to opt-in to the FMA, strengthening the regime and creating a more certain business environment for investors.

The amendments improve the regime's overall performance, but do not affect the objectives of the legislation nor the mandate or function of the institutions. They will have a positive and immediate impact on the administration of the regime, which will facilitate the entry of more First Nations into the FMA and accelerate the issuance of subsequent bonds.

The introduction of these amendments stems from recommendations and consultations with the three First Nations-led institutions that were established under the legislation – the First Nations Tax Commission (FNTC); the First Nations Financial Management Board (FMB); and the First Nations Finance Authority (FNFA) – as well as with First Nations scheduled to the FMA and those First Nations interested in opting-in.

The *First Nations Fiscal Management Act* has been successful in improving economic opportunities and promoting greater self-sufficiency in First Nation communities that have opted-in and these amendments will contribute towards its continued success.

### Background

The FMA is optional, First Nation-led legislation that was enacted in 2005. The FMA provides First Nations with fiscal powers including real property taxation, financial management and debenture financing. Since the FMA's coming into force in 2006, 177 First Nations have chosen to participate, accessing one or more of the FMA's core fiscal tools. These tools include:

- financial administration laws, financial performance certification, and financial management systems certification to strengthen accountability, instill greater investor confidence, and to meet requirements for debenture financing;
- revenue-raising laws like property tax, development cost charges, and taxation of business activities to pay for the cost of local services and capital infrastructure; and,
- debenture financing giving First Nations the ability to finance major capital projects through long-term pooled borrowing. Long-term debt provides advantages including: amortization of costs over the life of the asset, access to capital at low interest rates, lower annual financing payments and lower administration costs. By utilizing the FMA borrowing process First Nations are able to promote economic and social development in their communities.

Under the FMA, First Nations have raised over \$262 million in local revenue and have collectively borrowed over \$250 million from the FNFA under the FMA regime.

***New amendments make it easier and faster for First Nations to participate in the FMA, reduce costs and red tape on participating First Nations and strengthen investor confidence making it easier for First Nations to attract investment and create prosperous, self-sustaining economies.***

## ***Streamlining Access***

### **Access to the FMA**

- The Minister of Indigenous and Northern Affairs, rather than Governor in Council, will amend the FMA Schedule for First Nation participation. This will significantly reduce delays associated with adding new First Nations to the Schedule.

## ***Improving First Nation Property Taxation***

### **Notification of FN Laws**

- Shorter minimum period of notification of First Nation laws or amendments to laws (from 60 to 30 days). Elimination of mail out requirement of notice to all members and taxpayers. First Nations can still choose a mail out or decide to use an alternative form of notification. Newspaper publication requirement eliminated. Replaced with notification in the First Nations Gazette ([www.fng.ca](http://www.fng.ca)). Gives FNTC the ability to develop standards for notification.

### **Property Taxation**

- Local revenue now includes payments in lieu of taxation. Payments in lieu of taxation are typically made by federal and provincial governments or government entities like Crown Corporations. A new fiscal power for collecting fees for water, sewer, waste management, animal control, recreation, and transportation, and other similar services is added. Finally First Nations can now recover costs for enforcement (including costs for seizure and sale of taxable property).

### **Annual Laws (Annual Rates and Expenditure Laws)**

- Clarifies when annual laws are to be made by First Nations, and gives FNTC the ability to develop standards to meet the different timing requirements for First Nation law-making.

### **Amendments to the FMA Regulations**

- Reduces the period for a reconsideration of an assessment notice from 30 days to 21 days. Also, reduces the appeal timeline from 60 days to 45 days, the notice of hearing from 30 days to 10 days, and the commencement of a hearing from 90 days to 45 days.
- Enables First Nations to use assessment inspection processes that are used in the province.
- Clarifies the content of the Tax Arrears Certificate, and when a Tax Arrears Certificate is required.

## ***Improving First Nations Financial Management***

### **Financial Administration Laws**

- All financial administration laws (FALs) made (or amended) under section 9 of the FMA must comply with FMB's standards and will not come into force until they have been issued a compliance approval by FMB. Previously only the FALs of borrowing members of the FNFA were required to comply with FMB's standards.
- A borrowing member of the FNFA must always have an FMB approved FAL in force. It cannot repeal its FMB approved FAL unless it replaces it with another FMB approved FAL. This requirement provides continuing comfort to investors that borrowing members have strong financial management systems.
- If a First Nation is under third party management under the FMA (for failure to meet its obligations to FNFA for example), FMB has authority to act in place of council to amend or enact a FAL under section 9. This authority will permit FMB, in appropriate circumstances, to address any problematic provisions in the First Nation's FAL in order to help it in meet its obligations under the FMA.
- If a First Nation with a financial management bylaw in force under section 83 of the Indian Act is scheduled to the FMA before or on or after April 1, 2016, the bylaw remains in force until it is repealed or replaced by a FAL made under section 9. This allows a First Nation transitioning into the FMA to determine when and if it will make a FAL under section 9. In the meantime its existing bylaw governing financial management issues remains in force.

### **Management of Local Revenues**

- Local revenues must be kept in a separate bank account from all other First Nation moneys. This clarification removes confusion in the meaning of "local revenue account" used in sections 13 and 14 of the FMA.
- Local revenues must be accounted for and reported on separately from all other First Nation moneys. The method of accounting and reporting of local revenues must comply with FMB's financial reporting standards which standardizes the accounting and reporting of local revenues for all taxing First Nations.

## **Management of Local Revenues Continued**

- A separate financial report for local revenues must be prepared and audited annually unless FMB's financial reporting standards permit the First Nation to include this reporting in its audited annual financial statements. This clarification and amendment will give the option to some taxing First Nations to reduce their annual costs for audits.

## **FMB Issued Certificates**

- A First Nation must have a Financial Performance Certificate issued by FMB before the FNFA may admit the First Nation as a borrowing member and also before FNTC may approve the First Nation's law to borrow money from FNFA. Previously the FMA did not stipulate the type of FMB issued certificate required for each of these purposes.
- The circumstances under which FMB may revoke a First Nation's certificate now includes where the First Nation provided incomplete or incorrect information or made misrepresentations when applying for its certificate. This amendment allows FMB to maintain the integrity of its certificates and enhances investor confidence.

## ***Improvements to First Nations Borrowing***

### **Borrowing Authority**

- A First Nation that wishes to cease being a borrowing member must get the consent of all other borrowing members using the same revenue stream.
- Restrictions on subsequent borrowings are clarified. Borrowing members with long-term loans from the FNFA secured by property tax revenues may not obtain subsequent long-term loans, using property tax revenues, from any lender other than the FNFA.

### **Debt Reserve Funds ("DRFs")**

- The separation and distinction of the DRFs for loans secured by property tax revenues and loans secured by other revenues is clarified. The FNFA is given flexibility to withhold between 1-5% of the loan amount, depending on the circumstances and in accordance with regulations.
- Clarification is given that only borrowing members who have received financing can be called on to contribute to or replenish a DRF, and only the DRF established for their borrowing stream.

## ***Enhancing Investor Confidence***

### **Loans Secured by Property Tax Revenues**

- Borrowing members can only repeal laws imposing property taxation or fees if the revenues are not used to secure a loan from the FNFA, or if the law is immediately replaced with a similar law that would not reduce the borrowing capacity of the borrowing member.

### **FNFA Priority**

- The FNFA's priority over other creditors of a First Nation, in the event of the First Nation's insolvency, is strengthened. The timing of the FNFA's priority is clarified - it arises from the date the borrowing member has received financing from the FNFA.

### **Investing in FNFA Securities**

- The FNFA is given the ability to invest sinking fund moneys in its own securities and those of a provincial municipal finance authority. This brings FNFA's practices in line with those of similar organizations such as the Municipal Finance Authority of BC. Repurchasing its debentures will allow the FNFA to retire the same debt issue that raised the financing, thereby improving its balance sheet and accordingly its credit rating.

### **Credit Enhancement Fund ("CEF")**

- A mechanism is established for repayment to the CEF, within 18 months, where the CEF has been used to replenish a DRF.

### **Amendments to FMA Regulations**

- Clarifies that a borrowing member may be called on to replenish the DRF of their borrowing stream regardless of whether the borrowing member has repaid its loan. Clarifies that a defaulting member is required to repay the entirety of their share of a shortfall.
- Certain other revenues streams, such as revenues coming from certain governmental payors, cannot be placed directly into a secured revenues trust account ("SRTA"). The creation of an intermediate account allows a First Nation to have these revenues deposited into an intermediate account before directing them into an SRTA, thereby opening up new revenue streams that can be used as security for loans from the FNFA.

## First Nations Finance Authority (FNFA)

By providing a means to engage in pooled borrowing through the Finance Authority, First Nations have access to significant amounts of private financing in the global capital markets. Currently, 29 First Nations in 7 Provinces have borrowed \$250 million from the FNFA (\$140 million from debenture financing, plus \$110 million in short term loans). First Nations used these FNFA loans to build or improve schools, community housing and other infrastructure in their communities.

With the success of the inaugural bond, interest in the regime from First Nations has grown across the country. As of March 31, 2016, more than 177 First Nations have passed resolutions requesting to be scheduled to the FMA. With more than \$375 million in unused borrowing capacity among current 52 Finance Authority members, and nearly \$6 billion in own source revenues collectively across all First Nations in Canada, the potential of the regime to help First Nations grow their economies is significant.

## First Nations Tax Commission (FNTC)

Property tax is used to pay for the cost of local services and for community infrastructure such as roads, community centers, and administrative buildings. It is also used to build infrastructure to support residential and commercial developments. In doing so, tax revenue has provided a community wide benefit from better services, infrastructure and economic development.

The First Nations Tax Commission provides regulatory support to First Nation property tax jurisdiction. The Commission ensures the integrity of the tax system on reserve nation-wide, reconciles the interests of taxpayers with the interests of First Nations, prevents or resolves disputes and helps build capacity in the tax system. The Commission has now approved over 760 laws under the Act, and FMA First Nations are generating over \$48 million in property tax revenues annually, when leveraged for long-term borrowing, the impact increases exponentially.

## First Nations Financial Management Board (FMB)

First Nations certified by the Financial Management Board (FMB) have demonstrated strong financial management systems (FMS) or financial performance (FP). FP certified First Nations can seek financing from the Finance Authority for longer terms and lower cost and may be better able to take advantage of emerging economic opportunities with the private sector. FMS certified First Nations have fully implemented their FMB approved financial administration law resulting in more process focused decision-making and greater accountability to their membership.

The FMB sets standards for approval of financial administration laws and certification of financial management systems and financial performance. There are now 76 First Nations with FALs that have developed financial administration laws that meet FMB standards. 68 of these First Nations have achieved FP certification and 2 First Nations have its FMS certification.

## By the Numbers

- **52** - Number of First Nations accepted as borrowing members of the FNFA.
- **76** – Number of First Nations with FMB-approved financial administration laws. 68 of these have achieved financial performance certification, and 2 have financial management system certification.
- **86** - Number of First Nations collecting property tax under the FMA.
- **177** – Number of First Nations who have chosen to participate in the FMA.
- **\$45,000,000** - Amount of property tax revenue collected under the FMA in 2015.
- **\$250,000,000** – Amount of money collectively borrowed by First Nations using the FMA borrowing powers.
- **\$262,000,000** – Amount of revenue collected by First Nations using property tax powers under the FMA since 2008.

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