



## TAX CONDITIONS

Last updated: 18 December 2020.

This guidance document incorporates content from the pre-1 January 2021 FIRB website and Guidance Note 47, as well as new content indicated by a side bar. Please note, this is a temporary provision to assist reader's transition to these new guidance documents and may be removed in due course.

- If a foreign investment application is approved, it may be approved subject to certain conditions, including tax conditions.
  - A set of guiding principles have been established to aid in the development of any condition(s). See the *Principles for Developing Conditions* Guidance Note.
- Successive governments have considered that the effects of foreign investment on the tax system should form part of the consideration of whether proposals are contrary to the national interest. This includes the potential impact of an action on Australian tax revenues and the integrity of the tax system in determining whether the action is contrary to the national interest.
- If the Treasurer considers that tax conditions need to be applied to an investment to protect the national interest, 'standard' tax conditions may be imposed.
- If a proposed investment is considered to have a significant or particular tax risk, then 'additional' tax conditions may also be imposed.
- Foreign investors may agree in advance to accept the 'standard' tax conditions. This however does not mean that these conditions will necessarily be applied. It also does not prejudice the investor's right to comment on any other condition(s) that may be imposed, including the 'additional' tax conditions.

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## A: ROLE OF THE ATO IN APPLICATION SCREENING

The Australian Taxation Office (the **ATO**) has a dedicated Tax Consult area that is consulted on foreign investment proposals to assist the Treasurer in making a decision as to whether an action is contrary to the national interest.

Separately, the ATO also has a dedicated foreign investment screening team that administers the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**) with respect to screening of residential land and non-sensitive internal reorganisations and commercial land applications. The ATO's foreign investment screening team consults with the ATO Tax Consult area on these applications. The ATO's foreign investment screening team is separate from the ATO's Tax Consult area with whom it consults.

The scope of the ATO's Tax Consult advice about an action is the potential impact on the Australian Government's tax revenues and the integrity of the federal tax system. The ATO Tax Consult advice provides a risk rating of 'low', 'medium' or 'high' for each action along with qualitative advice on the risks to tax revenues and the integrity of the tax system as a result of the action. The following risk rating definitions are adopted:

- Low: the ATO has not identified significant tax issues.
- Medium: there may be a risk to tax revenue or to the integrity of the tax system.
- High: there is a clear risk to tax revenue or to the integrity of the tax system.

One distinguishing factor between risk ratings of 'medium' or 'high' is the likelihood of the outcome occurring. High risk ratings indicate that the estimated tax consequence of the action is 'likely' to occur rather than it being just 'possible'.

The ATO may assess an action that involves complex structuring (such as layered trusts or the use of holding entities in tax havens) as low risk if that structuring does not create Australian tax issues of concern.

## B: SUMMARY OF TAX ISSUES

The ATO's advice to the Treasurer and risk rating may reflect a broad range of matters including:

- Compliance with the substantive tax law;
- The tax compliance history of the investor and its related parties;
- The transparency of the investor's engagement with the ATO;
- The choices and behaviours that the investor evidences in their tax affairs;
- Potential application of the general anti-avoidance rule and the Diverted Profits Tax;
- Tax outcomes that are inconsistent with the policy intent of tax laws;
- Maintaining the integrity of the tax regime;

- Related or earlier actions undertaken that are relevant to the consideration of the proposal; and
- Whether the arrangement has features of concern, or is within high risk parameters identified by the ATO in guidance material including, but not limited to:
  - Taxpayer Alerts;
  - Practical Compliance Guides;
  - Framework documents for particular industries;
  - ATO Interpretative Decisions; and
  - Tax Rulings.

The ATO's [legal database](#) sets out a complete list of public guidance.

#### **Related or earlier actions undertaken**

The ATO undertakes a broad and holistic examination of the circumstances surrounding each action and each investor. In formulating its advice about the impact of an action on the Australian Government's tax revenues the ATO considers:

- The tax impact of earlier transactions undertaken by the investor and its related parties;
- Any patterns of behaviour by the investor and its related parties;
- Any pre-existing arrangements that may affect the tax revenue from the proposed action; and
- Known future actions that are related to the action and that may affect the tax revenues from the action, including elements that may occur entirely offshore.

For example, if asked to consider the tax risk associated with the acquisition of a new asset by an investor, the ATO may have regard to any related party financing arrangements already in place that may have the effect of reducing the tax payable in respect of income to be derived from the new asset. This may be especially relevant when the ATO is asked to advise on the tax impact of an application for an exemption certificate, which allows an investor to take certain actions (for example, acquisition of multiple unspecified land titles) over a period of time.

#### **If the applicant is unable to provide sufficient information**

The ATO generally requires that all relevant information specified in the FIRB Application Checklist be provided with the application. Where information is not provided as part of the initial application, it will routinely be subsequently requested through a request for information which will contribute to an extended review time for the application.

If the investor is unable to provide the required information, there may still be a possibility of the tax risk being assessed by the ATO as either 'low' or 'medium' – depending on the nature of the potential risks present, and provided that additional tax conditions are imposed.

## **C: WHEN MAY A TAX CONDITION BE IMPOSED?**

See also the *Principles for Developing Conditions* Guidance Note.

### 'Standard' tax conditions

If, following consultation, the Treasurer considers that tax conditions need to be applied to protect the national interest (including to address a risk to the integrity of the tax system and/or tax revenue), the 'standard' conditions may be imposed as part of a no objection notification for significant actions, to ensure that the action will not be, or is not, contrary to the national interest.

The imposition of the 'standard' tax conditions will be done on a case-by-case basis.

Situations where the 'standard' tax conditions may be imposed to ensure an action is not contrary to the national interest would be to address risks associated with, but not limited to, the following:

- Capital gains tax;
- Transfer pricing;
- Low tax jurisdictions;
- Consolidations;
- Withholding taxes;
- Debt and equity risks;
- Thin capitalisation;
- Tax avoidance;
- Tax liabilities on future disposals;
- The provision of relevant information; or
- Particular use of structures.

Matters that will be taken into consideration include:

- The complexity of the action;
- The size of the action;
- Previous interactions with Australia's tax system; and
- Level of certainty the investor can provide in relation to the details of the action.

Investors will be given an opportunity to review and respond to these and any other proposed conditions as part of the application review process.

Investors may agree in advance to the 'standard' tax conditions. This does not mean that the conditions will necessarily be applied, but in the event that some or all of the 'standard' tax conditions are applied, no further discussion on those conditions will be initiated by the Treasurer with the investor.

### 'Additional' tax conditions

If an action is considered to have a significant or particular tax risk then 'additional' tax conditions may also be imposed. The imposition of such conditions would be considered on a case-by-case basis, and any conditions would be tailored to the particular circumstances of the action under consideration.

Should the Treasurer wish to impose any 'additional' tax conditions, the investor will be given the opportunity to ask questions about the operation and effect of the condition(s) and to provide comments to the Treasurer as part of the application review process.

Note that advance agreement to the 'standard' tax conditions does not prejudice an investor's right to comment on any other condition(s) that may be imposed, including the 'additional' tax conditions.

In cases where particularly complex or novel conditions are proposed, or the investor considers that there is an error or other technical issue with the proposed conditions, the investor may ask to discuss this further with the Treasury, or jointly with the Treasury and the ATO. Both Treasury and the ATO are willing to engage in such discussions with investors, where appropriate. Should an investor wish to request such a discussion with either the Treasury, or jointly with the Treasury and the ATO, they can ask for this when responding to the application review process. All requests for further discussions will be considered on a case-by-case basis, and where there is considered to be a reasonable need for such a discussion, Treasury will contact the investor to arrange this. Please note, however, that personalised discussions impose a significant time and resource cost on both investors and government agencies, and are unlikely to be considered necessary for the imposition of 'standard', simple or routine tax conditions.

If a discussion involving the ATO is required, it is important that all representatives for the investor are appropriately authorised to talk to the ATO. If an adviser is not the registered tax agent of the investor it is recommended that a 'nomination of a representative' form (NAT75152-02.2019) is completed for anyone involved in the discussion.

## D: EXAMPLES OF TAX CONDITIONS<sup>1</sup>

### 'Standard' tax conditions

1. The Applicant must comply with the taxation laws of the Commonwealth of Australia in relation to the action, and any transactions, operations or assets in connection with the assets or operations acquired as a result of the action. The Applicant does not breach this condition if it has taken reasonable care to comply with the relevant taxation laws and has a reasonably arguable position.
2. The Applicant must use its best endeavours to ensure, and within its powers must ensure, that entities in its control group<sup>2</sup> comply with the taxation laws of the Commonwealth of

1 The Treasurer has the ability to impose any condition(s) that the Treasurer considers necessary to protect the national interest. While this section outlines some of the more common tax conditions applied, all investments are considered on a case-by-case basis, and thus the actual conditions imposed may vary from these.

2 For the purposes of these conditions, an Applicant's control group consists of entities: (a) that control the Applicant (a controller); (b) that a controller controls; (c) that the Applicant controls, which includes for the purposes of these conditions an entity that is the subject of the application. For the purposes of determining a control group, control has the meaning in section 50AA of the *Corporations Act 2001*.

Australia in relation to the action and any transactions, operations or assets in connection with the assets or operations acquired as a result of the action. The Applicant does not breach this condition if entities in its control group have taken reasonable care to comply with the relevant taxation laws and have a reasonably arguable position.

3. The Applicant must provide any documents or information<sup>3</sup> that is required to be provided to the Australian Taxation Office (ATO) in accordance with the taxation laws of the Commonwealth of Australia in relation to the action and any transactions, operations or assets in connection with assets or operations acquired as a result of the action. These documents or information must be provided within the timeframe specified by the ATO.
4. The Applicant must use its best endeavours to ensure, and within its powers must ensure, that entities in its control group provide any documents or information that is required to be provided to the ATO in accordance with the taxation laws of the Commonwealth of Australia in relation to the action and any transactions, operations or assets in connection with assets or operations acquired as a result of the action. These documents or information must be provided within the timeframe specified by the ATO.
5. The Applicant must pay its outstanding taxation debt under the taxation laws of the Commonwealth of Australia, and must use its best endeavours to ensure, and within its powers must ensure, that entities in its control group pay any outstanding taxation debt under the taxation laws of the Commonwealth of Australia, which is due and payable at the time of the proposed action. This condition does not apply to payment arrangements agreed with the ATO or where the ATO has exercised its discretion to defer part or all of the payment of a disputed amount, to the extent that those arrangements are complied with.
6. The Applicant must provide an annual report to the Government on compliance with conditions 1-5. The first report must cover the period from the date the action takes place to the end of the Applicant's income year for tax purposes. All subsequent reports must cover the Applicant's income year for tax purposes. If the action takes place less than 90 days before the end of the first income year, then that period can be incorporated in the next report. Each report must be provided by the due date for lodgement of the Applicant's tax return for that year.

#### Possible 'additional' tax conditions

The Applicant must provide the following information to the Government within 90 days of the transaction completing<sup>4</sup>:

1. Where a new Australian entity associated with the transaction has been incorporated, provide the Tax File Number (TFN) or Australian Business Number (ABN).
2. Provide the details (name, position and firm) of any tax adviser/s who advised on Australian tax matters in relation to this transaction, FIRB application and/or request for information/condition response.

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<sup>3</sup> This includes documents or information held, possessed or stored outside Australia.

<sup>4</sup> In the notification, please reference the FIRB ID and provide a copy of the no objections letter.

3. Provide a copy of the most recent audited financial statements for the Target Entity, or, if audited financial statements are not available, the latest financial records or unaudited financial statements.
4. Provide an overview of the acquisition/restructure (the Transaction) step plan including a diagram of the pre- and post-Transaction organisational structures of the Target Entity that includes the flow of funds used to finance the Transaction, as well as the legal form and tax residency of the ultimate investor(s) or shareholder(s) ('the Investors') and all of the entities interposed between them and the Target Entity.
5. State if the ultimate unitholders or shareholders (either directly or indirectly via a wholly owned subsidiary or associate) propose to borrow from a third party for the purpose of financing part or all of the proposed acquisition. If yes, provide the following information for each third party loan: the lender's name, the amount, the currency used, and the rate of interest (including AUD equivalent interest rate).
6. Using the below table, provide details of the existing and/or proposed debt and equity arrangements of Australian entities, including Australian Bid/Hold Co(s) used for the purpose of acquiring Target Entity/Group. Provide details of existing and/or proposed debt and equity arrangements of any non-resident direct beneficiaries/unitholders of Division 6 trusts, to the extent that they are expected to give rise to deductible amounts against the distributions from Division 6 trusts.

Key terms	
Legal characterisation (for example, loan, note, ordinary shares, preference shares etc)	
Tax Treatment (per Division 974 ITAA 1997)	
Tax Treatment for counterparty in foreign jurisdiction	
Confirm whether treatment is different for income tax purposes and accounting purposes	
Borrower	
Tax residency of Borrower	
Lender (Clearly state if the Lender/s are a related party or not)	
Tax residency of Lender	
Amount	
Tenor	
Ranking (i.e. senior, subordinate, mezzanine)	
Currency	
Interest rate ( <i>if currency is not AUD, also equivalent AUD rate</i> )	

Key terms	
Credit rating of the Borrower	
Other features (security, restrictive covenants, guarantees, guarantee fee, contingencies, payment in kind, convertibility, options, etc.)	

7. For any related party debt disclosed at question 6, whether or not cross-border, having regard to Schedule 1 of the Practical Compliance Guideline 2017/4 (PCG 2017/4), advise for each:
  - 7.1. The risk rating;
  - 7.2. How each price and behavioural indicator was scored; and
  - 7.3. Which of the comparison options at paragraph 61 of Schedule 1 of PCG 2017/4 was used and the key terms of the debt (as set out in the table at question 6).
8. Where international transfer pricing documentation has been prepared and/or provides further details on demonstrating the arm's length principles for any of the above dealings, provide a copy of the documentation, and detail if this information has been previously provided to the ATO.
9. Advise if any part of the Transaction has features or an arrangement covered by one or more of the following Taxpayer Alerts:
  - 9.1. TA 2020/4 – Multiple entry consolidated groups avoiding capital gains tax through the transfer of assets to an eligible tier-1 company prior to divestment
  - 9.2. TA 2020/3 – Arrangements involving interposed offshore entities to avoid interest withholding tax
  - 9.3. TA 2020/2 – Mischaracterised arrangements and schemes connected with foreign investment into Australian entities
  - 9.4. TA 2020/1 – Non-arm's length arrangements and schemes connected with development, enhancement, maintenance, protection and exploitation of intangible assets
  - 9.5. TA 2019/2 – Trusts avoiding CGT by exploiting restructure rollover
  - 9.6. TA 2019/1 – Multiple entry consolidated (MEC) groups avoiding CGT through intra-group debt
  - 9.7. TA 2018/4 – Accrual deductions and deferral or avoidance of withholding tax
  - 9.8. TA 2018/2 – Mischaracterisation of activities or payments in connection with intangible assets
  - 9.9. TA 2017/1 – Re-characterisation of income from trading businesses

- 9.10. TA 2016/10 – Cross - Border Round Robin Financing Arrangements
- 9.11. TA 2016/7 – Arrangements involving offshore permanent establishments
- 9.12. TA 2016/3 – Arrangements involving related party foreign currency denominated finance with related party cross currency interest rate swaps
10. Provide for each distribution expected to be made by an Australian entity to an offshore recipient after the Transaction's completion:
  - 10.1. The tax treatment of the payment for the Australian entity making the distribution;
  - 10.2. The tax treatment of the receipt for the non-resident entity receiving the distribution;
  - 10.3. The proportion of the payment subject to withholding tax; and
  - 10.4. If the withholding tax rate is less than 10 per cent or the payment is not subject to withholding tax, the reason(s) why.
11. Provide for each arrangement where an interest payment is expected to be made to the Investors or a non-resident associate of the Investors after the Transaction's completion:
  - 11.1. The name and residency of the recipient;
  - 11.2. A description of the payment's characterisation for tax purposes in the hands of the recipient;
  - 11.3. The proportion of the payment subject to withholding tax;
  - 11.4. If the withholding tax rate is less than 10 per cent or the payment is not subject to withholding tax, the reason(s) why;
  - 11.5. The tax treatment of the receipt of interest for the non-resident entity receiving the distribution, including the effective tax rate it will be subject to;
  - 11.6. If the interest payment is subject to a foreign tax rate of 10 per cent or less, confirm if the hybrid integrity rule in Subdivision 832-J of the ITAA 1997 applies; and
  - 11.7. If deductions were not denied under Subdivision 832-J of the ITAA 1997, advise the reason for this. Reasons may include:
    - 11.7.1. Principal purpose test is not satisfied
    - 11.7.2. Same or lower rate of tax would have been paid by ultimate parent
    - 11.7.3. It is reasonable to conclude that the amount of the payment has been taken into account under the CFC provisions (Part X of the ITAA 1936) and the sum of the attribution percentages of each attributable taxpayer in relation to the interposed foreign entity is at least 100 per cent, or the payment has been taken into account under the law of a foreign country with substantially the same effect as the CFC provisions in Part X.

- 11.7.4. The payment has given rise to a mismatch in an earlier Subdivision of Division 832
12. Confirm which (if any) entities in the post-acquisition structure will be members of a 'Tax Consolidated Group' in accordance with the consolidation rules contained in the Income Tax Assessment Act 1997 (**ITAA 1997**) and provide the name of the head entity for each tax consolidated group.
13. For each entity that will be required to lodge an Australian income tax return:
  - 13.1. Will it be subject to the Thin Capitalisation rules in Division 820 of the ITAA 1997?
  - 13.2. The method it will apply to determine their respective maximum allowable debt amount post the completion of the Transaction.
  - 13.3. If it will rely on any exemption from the Thin Capitalisation rules, which exemption(s) are to be relied on the reasons why they apply.

## **E: WHAT IS THE EFFECT OF THE CONDITIONS?**

The effect of the 'standard' tax conditions, generally speaking, is to require compliance with the Australian Government's tax laws, co-operation with the ATO by producing information in a timely and complete manner, payment of outstanding tax debt, and reporting on compliance with the conditions and the holding of the asset.

In cases with a particular tax risk some 'additional' conditions may impose other obligations. These may include requiring the investor (and/or its associates) to supply certain information, to enter into good faith negotiations with the ATO for an advance pricing arrangement, to request a private binding ruling, or to take other action to resolve tax issues. These may not necessarily be required to be completed in order for a no objection notification to be given, but may be required within a certain timeframe afterwards.

Regardless of whether any conditions are imposed, all obligations under Australian tax law must be met.

Foreign investors will be expected to work with the ATO in complying with any conditions.

## **F: FURTHER INFORMATION ON THE 'STANDARD' TAX CONDITIONS**

Tax conditions will apply until a termination event occurs. A termination event will be defined in the conditions. The current definition is:

For the purposes of these conditions a termination event occurs:

- a) when the Applicant ceases to hold all of the interests the acquisition of which was the subject of the no objection notification;
- b) when the Applicant ceases to control, as defined in the Act, the entity or business the control of which was the subject of the no objection notification;
- c) when the Applicant ceases to carry on an Australian business the starting of which was the subject of the no objection notification; or

- d) when the investor ceases to be a foreign person, as defined in the Act.

The termination event that is applicable depends on the action that is the subject of the no objection decision.

If the action was the acquisition of an interest (which did not require a change in control for it to be a significant action), then paragraph (a) of the definition of termination event is applicable. For example, acquiring an interest in Australian land. While the investor has any interest in the land, the conditions apply. If an investor acquired a direct interest in an agribusiness, while the investor owns a direct interest in the agribusiness, then the conditions apply.

If the action required a change in control, then paragraph (b) of the definition of termination event is applicable. For example, acquiring interests in assets of an Australian business per paragraph 41(2)(b) of the Act. In that case, while the investor has control, the conditions apply.

If the action was starting an Australian business then paragraph (c) of the definition of termination event is applicable.

#### **Conditions one and two – comply with Australian tax laws.**

These conditions make explicit that it is considered contrary to the national interest if foreign investors operating in Australia do not meet their obligations imposed under the tax laws, in relation to an action.

Compliance with Australia's tax laws would be determined by applying the usual legal principles and processes, including reliance on objection or appeal rights by affected entities.

If an investor has taken reasonable care to comply with the relevant tax law and has a reasonably arguable position then it does not breach these conditions.

See below for the meaning of 'best endeavours' and 'control group' in condition two.

#### **Conditions three and four – provide documents or information requested by the ATO**

To ensure that an action does not give rise to or have ongoing tax issues that would make it contrary to the national interest, these conditions require that information that is requested by the ATO, and which must be provided under tax law, must be provided to the ATO within the timeframe specified by the ATO.

Compliance with these conditions does not require the investor to waive any common law or statutory rights or privileges, or the accountant's concession as provided in the ATO's access guidelines.

#### **Condition five – payment of outstanding tax debt**

It is contrary to the national interest to allow foreign investment by investors who may not engage with the Australian tax system with the highest standards and best practices. The existence of and preparedness to address outstanding debts, that is, debts that are past due and payable, is one indicator of these matters. Outstanding tax debts are a pecuniary liability due and payable to the Commonwealth arising directly under a tax law.

The ATO may, at its discretion, permit an entity to pay outstanding tax debts by instalments or in another manner as permitted by the ATO. Those arrangements are not impacted by this condition.

For example, where an entity has exercised its right to dispute its liability for an outstanding tax debt by lodging an objection or filing an appeal, and the ATO has exercised its discretion to agree, subject to conditions such as payment of a portion of the outstanding amount or provision of relevant security, not to take recovery action while the objection or appeal is pending.

Payment of an outstanding tax debt that is not subject to an ATO payment arrangement may be required prior to the action being taken.

#### **Condition six – annual report**

Further information on reporting to the Government on compliance with conditions can be found in the *Conditions Reporting* Guidance Note.

#### **Meaning of control group and best endeavours**

Conditions 2, 4 and 5 require that the investor must use its best endeavours to ensure, and within its powers must ensure, that entities in its control group do certain things.

#### **Control group**

A control group consists of entities that: control the Applicant (a controller); any entities that a controller controls; and that the Applicant controls, which includes for the purposes of these conditions an entity that is the subject of the application.

Control for this purpose is defined in section 50AA of the *Corporations Act 2001*. Section 50AA refers to the capacity to determine the outcome of decisions about another entity's financial and operating policies. It considers practical influence (rather than the rights that can be enforced) and practices or patterns of behaviour. It excludes circumstances where an entity has the capacity to influence decisions about another entity's financial and operating policies but is under a legal obligation to exercise that capacity for the benefit of someone other than its own members.

Furthermore, conditions two and four only apply to entities in an entity's control group in relation to the action and any transactions, operations or assets in connection with the assets or operations acquired as a result of the action.

#### **Best endeavours and within its powers**

If an investor controls another entity as per the definition of section 50AA of the *Corporations Act 2001*, then it would generally be expected that it is within the investor's powers to ensure that the other entity acts in accordance with whichever of conditions 2, 4 and 5 have been applied.

For an entity in the investor's control group that the investor does not control, the investor is expected to use its best endeavours to ensure that the other entity acts in accordance with the relevant condition.

Depending on the circumstances this might involve making representations to that entity and the controlling entity in relation to the relevant conditions in person and/or in writing. Best endeavours means to do all one reasonably can and this will depend on the relationships between the entities, the conditions that have been applied and the particular circumstances.

## G: TAX RISK NOTIFICATION PARAGRAPHS

Tax risk notification paragraphs (**TRNPs**) serve to alert investors to particular tax risks that the ATO has identified that may warrant their consideration. TRNPs often request that the investor engage with the ATO to discuss the identified issues further.

TRNPs are not conditions imposed upon investors and are therefore not legally binding. Where the ATO has reason to suspect that an investor may not be willing to engage voluntarily with the ATO, and the ATO believes such engagement is necessary to mitigate tax risks, the ATO may recommend that this requirement be imposed via a legally binding tax condition.

If an investor is uncertain as to whether commentary in their no objection notification constitutes a legally binding condition or a TRNP, they should contact the officer named on the no objection notification for clarification.

## FURTHER INFORMATION

Further information is available on the [FIRB website](#) or by contacting 1800 050 377 from Australia or +61 2 6216 1111 from overseas.

**Important notice:** This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.