
People's Republic of China

Financial Assistance

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INTRODUCTION

This guide sets out an overview of the regulations dealing with the concept of financial assistance in the People's Republic of China (PRC), as currently regulated by the 2018 revision of the Company Law of the PRC (the Company Law), as well as various guidelines and regulations for listed companies.

GENERAL OVERVIEW

What are the origins of financial assistance in PRC law?

The regulation of financial assistance in PRC law has its origins in Articles 115 of the Company Law, which is the fundamental law applicable to both listed and non-listed companies.

Financial assistance regulations are also included in the guidelines and administrative measures for the standardised operation or takeover of listed companies. In addition, the Shenzhen Stock Exchange (SZSE) and Shanghai Stock Exchange (SSE) prescribe special rules regarding the applicable scope and procedures, required public announcements and filings, and other matters for compliance regarding the giving of loans or the provision of security to others by listed companies.

What should be understood as financial assistance under PRC law?

The concept of financial assistance under PRC law is not limited to activities of advancing funds, making loans or providing security with a view to the acquisition of its shares by a third party. Generally, financial assistance could be covered by the general prohibition on a company providing funds or any other type of asset to third parties with charges lower than the industry average.

Under PRC law, financial assistance includes directly or indirectly providing loans to any of its directors, supervisors or senior management personnel. For listed companies, it also covers:

- the provision of funds to controlling shareholders, actual controllers and other affiliates; and
- the provision of loans or financial assistance in any other form to incentivise recipients, investors subscribing for the shares, acquires and so on.

The Regulatory Guidelines for Listed Companies stipulate that, where over-raised funds are used for permanent supplementation of liquidity and repayment of bank loans, the listed company shall not provide financial assistance to third parties (other than its holding subsidiaries) within 12 months after the supplementation of liquidity.

Is financial assistance accepted under PRC law?

As a general rule, PRC law does not allow companies to provide financial assistance to third parties (including shareholders).

Are there any exceptions under PRC law as regards the general prohibition of providing financial assistance to third parties?

Both SZSE and SSE regulate specific exceptions to the general prohibition, approval and disclosure requirements on providing financial assistance, which are applicable to listed companies. The exceptions are as follows:

1. circumstances where the main business of a listed company with a financial licence is to provide loans and other financing services to external parties;

2. circumstances where the assistance object is the holding subsidiary of a listed company within the scope of the consolidated financial statements, the shareholders of which do not include controlling shareholders, actual controllers and affiliates of the listed company; and
3. other circumstances recognised by China Securities Regulatory Commission, SZSE or SSE.

CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE

Civil penalties

Article 153 of the Civil Code of the PRC may be applied. Any agreement to provide unlawful financial assistance is void and unenforceable by either party to it. Similarly, any security or guarantee that breaches the prohibition is also void and unenforceable.

Liability of responsible person of the company

Articles 147 and 149 of the Company Law provide that directors, supervisors and senior management personnel of a company shall comply with the provisions of laws, administrative regulations and the articles of association of the company, and bear fiduciary duties towards the company. Any violation of the provisions of laws and administrative regulations, or the articles of association of the company, in performance of duties and powers which causes the company to suffer damages shall lead to compensation liability.

Unlawful financial assistance may violate the statutory obligations of the directors, supervisors and senior management personnel to the company. Compensation liability shall be borne by the responsible person of the company.

Serious violation of the prohibition on financial assistance, which causes serious loss to the interests of the listed company, may be deemed a crime. The responsible person or the listed company shall bear criminal liability, including imprisonment or criminal detention or criminal fine.

Fines

For listed companies, an administrative fine could be imposed for providing unlawful financial assistance. There is also a criminal fine for serious violation of the prohibition, which constitutes the crime of causing damage to the interests of a listed company by breach of faith, as prescribed in Article 169 of the Criminal Law of the PRC.

OTHER RELATED MATTERS

Approval and compulsory disclosure of providing financial assistance under exceptional circumstances

Stock exchanges in PRC also regulate approval and disclosure requirements for listed companies regarding providing financial assistance under exceptional circumstances.

A resolution on financial assistance must be approved by more than two-thirds of the directors present at meeting of the board of directors. It also must be approved by the general meeting of shareholders, if it fulfils certain special circumstances as prescribed in the guidelines and regulations of the relevant stock exchange. These special circumstances include:

- the amount of a single financial assistance or the accumulative amount of the financial assistance for the most recent 12 months exceeding 10 per cent of the net assets of the listed company;
- the asset-liability ratio of the entity which accepts the financial assistance exceeding 70 per cent; or
- other circumstances prescribed by the stock exchange or the articles of association.

Listed companies are obliged to disclose the specific circumstances and the planned remedial measures when entities that have accepted the financial assistance fail to make the repayment in a timely manner, or there are circumstances which seriously influence their solvency.