

Taiwan

Financial Assistance

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INTRODUCTION

This guide sets out an overview of the regulations dealing with the concept of financial assistance in Taiwan as stipulated by:

- Taiwan's Company Act (Company Act), last amended 29 December 2021;
- Taiwan's Securities and Exchange Act (Exchange Act), last amended 27 January 2021; and
- other securities regulations for public companies.

This guide does not cover rules and regulations that apply to financial institutions, or tax benefits and implications.

GENERAL OVERVIEW

What are the origins of financial assistance in Taiwan law?

'Financial assistance' is not a legal term that is precisely defined by Taiwan law. However, it is generally held that 'financial assistance' includes advancing of funds, making loans and providing security, which are generally prohibited under Articles 15 and 16 of the Company Act.

Articles 15 and 16 of the Company Act apply to both public and non-public companies. In 2002, regulations on financial assistance were added to Article 36-1 of the Exchange Act. The competent authority (the Financial Supervisory Commission or FSC) further promulgated special rules regarding the scope and procedures for public companies; namely, the Regulations Governing the Making of Loans, Endorsements, and Guarantees by Public Companies (the Loan/Guarantee Regulations, last amended on 7 March 2019).

The Loan/Guarantee Regulations govern the scope, working procedures, required public announcements and required filings for financial or operational actions of material significance. This includes the extension of monetary loans to others, and endorsements or guarantees for others.

When providing financial assistance to others, a public company is required to make public announcements, filings and to complete other matters for compliance with

respect to the granting of loans or the provision of security to others.

What should be understood as financial assistance under Taiwan law?

As per Articles 15 and 16 of the Company Act, financial assistance includes giving loans or providing guarantees to shareholders or any other third parties. For public companies, financial assistance also includes the endorsement of a cheque, or the issuance of negotiable instruments to a non-financial enterprise as a security, as per Article 36-1 of the Exchange Act and the Loan/Guarantee Regulations.

Is financial assistance accepted under Taiwan law?

As a general rule, Taiwan law does not allow the granting of loans or the providing of guarantees to shareholders or any to other third parties under Articles 15 and 16 of the Company Act.

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

Articles 15 and 16 of the Company Act provide specific exceptions to the general prohibition against giving loans or providing guarantees, which apply to non-public companies and public companies.

The exceptions set forth in Articles 15 and 16 are as follows:

- loans to another company that is doing business with the loaning company;
- loans to another company in need of short-term financing, provided that the financing amount does not exceed 40 per cent of the net value of the loaning company;
- guarantees permitted by the Articles of Incorporation of the company providing a guarantee; and
- guarantees permitted by other laws (eg, for banks and other financial institutions in the ordinary course of the business).

For public companies, the Loan/Guarantee Regulations provide more exceptions to public companies with respect to giving guarantees on behalf of subsidiaries of the public company as follows:

- loans to another company or enterprise that is doing business with the public company;
- loans to another company or enterprise in need of short-term financing,

provided that the financing amount shall not exceed 40 per cent of the net value of the public company;

- endorsements/guarantees to a company with which the public company does business;
- endorsements/guarantees to/on behalf of a company of which the public company, directly or indirectly, holds more than 50 per cent of the voting shares;
- endorsements/guarantees to/on behalf of a company that directly and indirectly holds more than 50 per cent of the voting shares in the public company;
- endorsements/guarantees between companies that directly or indirectly hold 90 per cent or more of the voting shares with each other, provided that the amount of endorsements/guarantees do not exceed 10 per cent of the net worth of the public company; and
- mutual endorsements/guarantees:
 - to/on behalf of another company in the same industry, or for joint constructors, for purposes of undertaking a construction project;
 - to/on behalf of a jointly invested company in proportion to its shareholding percentages; or
 - to/on behalf of the companies of the same industry for the sale of pre-construction houses pursuant to the Consumer Protection Act.

What are the consequences of providing financial assistance?

Legal effects

Loans made in violation of the Company Act are valid, while guarantees provided in violation of the Company Act would be considered null and void by operation of law.

Civil liabilities for the company's responsible person

The 'responsible person' will be held liable for damages resulting from illegal financial assistance. As a general rule, responsible persons are the following persons, as per Article 8 of the Company Act:

- shareholders conducting the business or representing:
 - an unlimited company; or
 - an unlimited company with limited liability shareholders; or
- directors of a:
 - limited company; or
 - a company limited by shares.

Administrative penalties

For public companies, a responsible person of the company who provides financial assistance in breach of the Loan/Guarantee Regulations is subject to an administrative fine. This may range in amount from NT\$240,000 to NT\$4.8m.

Criminal offences

For public companies, providing financial assistance in breach of the Company Act or Loan/Guarantee Regulations may also constitute a criminal offence, eg conducting irregular transactions.

CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE

Legal effect of illegal financial assistance

Loans

Loans made in breach of Paragraph 1, Article 15 of the Company Act are valid and binding upon the parties to such loans.

Guarantees

Guarantees made in breach of Paragraph 1, Article 16 of the Company Act are null and void. The company's responsible person would be held responsible for such guarantees.

Civil liabilities for the company's responsible person

Loans

As per Paragraph 2, Article 15 of the Company Act, the responsible person of a company shall be liable, jointly and severally with the borrower, for the repayment of the loan at issue. In the event that any damages to the company result therefrom, the responsible person and the borrower shall be held jointly and severally liable.

Guarantees

As per Paragraph 2, Article 16 of the Company Act, the responsible person shall take up the suretyship on their own and shall be liable for the damages, if any, to the company resulted therefrom.

Criminal liabilities and administrative fines

The Company Act has abolished criminal liabilities and fines for providing financial assistance to a third party in violation of Articles 15 and 16 of the Company Act.

Nonetheless, for public companies, in case of any violation of the provisions prescribed in the Loan/Guarantee Regulations as adopted pursuant to Article 36-1, administrative fines ranging from NT\$240,000 to NT\$4.8m may be imposed on the company's responsible person, as per Item 11, Paragraph 1, Article 174 of the Exchange Act.

In certain cases, illegal loans and guarantees would be deemed to be irregular transactions of the company's assets. In such situations, the director, supervisor, managerial officer or employee of a public company is subject to imprisonment for not less than three years and not more than ten years. In addition, a fine between NT\$10m and NT\$200m may be imposed.

OTHER RELATED MATTERS

Compulsory disclosure of sources of funds in tender offer prospectuses

Given the increasing trend of mergers and acquisitions through tender offers, management buyouts (MBO), and leveraged buyouts (LBO), and to address the need to protect investors from thin capitalisation resulting from the advancing of funds, the FSC amended Article 7 of the Regulations Governing Information to be Published in Public Tender Offer Prospectuses, effective 18 November 2016. The Regulations require a mandatory disclosure of the type(s) and source(s) of tender offer considerations.

In the event of a cash consideration by financing means, the prospectus must provide a detailed description of all financing plans, including the source of such financing funds, the parties involved and the collateral. If the collateral encompasses the assets or shares of the target company or the surviving company as part of the repayment plan, the prospectus must disclose the collateralisation terms and provide an impact assessment on the financial and operational soundness of the target or surviving company. In the absence of such collateral, an express declaration must be made to that effect.