
Singapore

Financial Assistance

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INTRODUCTION

This guide provides an overview of the regulation of financial assistance in Singapore, as currently provided for in Section 76 of the Companies Act 1967 (the Act).

GENERAL OVERVIEW

What are the origins of financial assistance in Singapore law?

Section 76 of the Act governs the provision of financial assistance by a public company incorporated in Singapore. It defines the general prohibition, demarcates its scope of application and sets out the circumstances under which exceptions may be made.

Section 76 was amended in 2015 to remove the prohibition against financial assistance for private companies, pursuant to the Companies (Amendment) Act 2014. However, the financial assistance prohibition is retained for public companies and subsidiaries of public companies, and new exceptions have been introduced.

What is financial assistance under Singapore law? Is financial assistance accepted under Singapore law?

The term 'financial assistance' is not defined under the Act, but the Act specifically provides that the giving of financial assistance would include:

- making a loan;
- providing security or giving a guarantee for a loan made; and
- releasing an obligation or a debt.

Section 76(1) of the Act prohibits a public company or a subsidiary of a public company from giving financial assistance directly or indirectly for the purpose of (or in connection with) the acquisition or proposed acquisition by any person of shares (or units of shares) in the company, its holding company or its ultimate holding company, as the case may be.

Section 76(1A) of the Act further prohibits a company from directly or indirectly:

- acquiring its own shares (or units of shares), or purporting to acquire shares (or units of shares) in its holding company or ultimate holding company (as the case may be); or
- lending money on the security of the shares (or units of shares) in the company, its holding company or ultimate holding company (as the case may be).

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

Section 76(8) of the Act provides for a number of exceptions whereby a company may enter into specified transactions or arrangements free from the prohibition contained in Section 76(1).

For instance, Section 76(8)(a) of the Act provides that distribution of a company's assets by way of lawfully made dividends is permitted. The Act also permits a company to provide financial assistance within the scope of Section 76 of the Act through 'whitewash procedures' set out in that section.

What are the consequences of providing financial assistance?

Generally, contracts or transactions entered into in contravention of Section 76 of the Act will be rendered void or voidable. In certain circumstances, there could also be criminal penalties.

FINANCIAL ASSISTANCE

General rules

As mentioned above, Section 76(1) of the Act prohibits a public company or a subsidiary of a public company from giving financial assistance, whether directly or indirectly, for the purpose of, or in connection with the acquisition or proposed acquisition by any person of shares (or units of shares) in the company, its holding company or its ultimate holding company, as the case may be.

While the term 'financial assistance' is not defined in the Act, Section 76(2) of the Act specifically includes the giving of financial assistance by means of the making of a loan, the giving of a guarantee, the provision of security, the release of an obligation, or the release of a debt or otherwise.

A 'unit' (in relation to a share) means any right or interest, whether legal or equitable, in the share, by whatever name. This includes any option to acquire any such right or interest in the share. Section 76(1A) of the Act further prohibits a company from directly or indirectly:

- acquiring its own shares (or units of shares), or purporting to acquire shares (or units of shares) in its holding company or ultimate holding company (as the case may be); or
- lending money on the security of the shares (or units of shares) in the company, its holding company or ultimate holding company (as the case may be).

Exceptions to the applicability of the general rule as regards Singapore Companies

Section 76(8) of the Act expressly provides that Sections 76(1) and (1A) do not prohibit the following transactions or arrangements:

- distribution of a company's assets by way of lawfully made dividends;
- distributions in the course of a company's winding up;
- a payment made by a company pursuant to a reduction of capital in accordance with Division 3A of Part IV of the Act;
- the discharge by a company of its liability that was incurred in good faith, as a result of a transaction entered into on ordinary commercial terms;
- anything done pursuant to an order of the General Division of the Singapore High Court (the Court) in relation to a scheme of arrangement;
- anything done under an arrangement made pursuant to section 178 of the Insolvency, Restructuring and Dissolution Act 2018 (ie, any transfer, sale or arrangement made by a liquidator of the company in relation to its voluntary winding up);
- anything done under an arrangement made between a company and its creditors in relation to the winding up of the company;
- the giving of a guarantee or security in good faith and in the ordinary course of commercial dealing by a company for the indebtedness of its holding company;
- the giving of any representation, warranty or indemnity in good faith and in the ordinary course of commercial dealing by a company in relation to a public offering of its shares;
- the purchase by a company of its own shares pursuant to an order of the Court;

- the creation or acquisition, in good faith and in the ordinary course of commercial dealing, by a company of a lien on its own shares;
- entering into an agreement, in good faith and in the ordinary course of commercial dealing, by a company with a subscriber of its shares to allow the subscriber to pay for those shares by instalments;
- allotment of bonus shares;
- redemption of redeemable shares of a company in accordance with the company's constitution; and
- the payment of some or all of the costs by a listed company, associated with a scheme, arrangement or plan under which any shareholder of the company may purchase or sell shares for the sole purpose of rounding off any odd-lots which they own.

Section 76(9) of the Act further provides that the prohibitions in Section 76(1) and (1A) will not apply to the following transactions:

- transactions made by financial institutions in the ordinary course of business, on ordinary commercial terms as to the rate of interest, terms of repayment of principal and payment of interest, security to be provided and otherwise;
- financial assistance provided for the purpose of, or in connection with, employee share ownership schemes; or
- the purchase or acquisition (or proposed purchase or acquisition) by a company of its own shares pursuant to a share buy-back in accordance with Sections 76B to 76G of the Act.

Any other transaction to provide financial assistance which does not fall within Sections 76(8) and 76(9) of the Act may be authorised if a company undertakes the appropriate 'whitewash' procedures set out in Section 76(9A), 76(9B), 76(9BA) or 76(10):

- the procedure in Section 76(10) requires, *inter alia*, the passing of a special resolution by the shareholders of the company;
- where the transaction does not involve more than 10 per cent of the paid-up capital and reserves of the company, the procedure in Section 76(9A) requires, *inter alia*, the passing of a board resolution and all directors of the company making a solvency statement in relation to the giving of the financial assistance;
- where the transaction is approved (1) by all the shareholders of the company present and voting at the relevant meeting, or (2) by all the shareholders of the company if the resolution is passed by written means under Section 184A, the procedure in Section 76(9B) requires, *inter alia*, the passing of a board resolution and all directors of the company making a solvency statement in relation to the giving of the financial assistance; or
- where the provision of the financial assistance does not materially prejudice the interests of the company or its shareholders, or the company's ability to pay its creditors, the procedure in Section 76(9BA) requires, *inter alia*, the passing of a board resolution, a copy of which must be lodged with the Registrar of Companies. There is no requirement for a solvency statement.

CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE

Void

A contract or transaction entered into in contravention of Section 76 of the Act shall be void if such a contract or transaction involves a company:

- acquiring or purporting to acquire its own shares (or units of such shares), or the shares (or units of such shares) in its holding company or ultimate holding company, as the case may be; or
- lending money on the security of its own shares (or units of such shares), or the shares (or units of such shares) in its holding company or ultimate holding company, as the case may be.

Voidable

Other contracts or transactions entered into in contravention of Section 76 of the Act, or contracts or transactions related to such contracts or transactions, shall be voidable at the option of the company which gives the financial assistance.

The company may, subject to Section 76 of the Act, avoid such contracts or transactions by giving notice in writing to the other party or parties to such contracts or transactions.

Penalties

While Section 76(5) of the Act provides that the company shall not be guilty of an offence, it does stipulate that each officer of the company who is in default under Section 76 shall be guilty of an offence. Such officer shall be liable on conviction for:

- a fine not exceeding S\$20,000;
- imprisonment for a term not exceeding three years; or
- both.

The Court may also order such convicted officers of the company to pay compensation to the company or to another person who suffered loss or damage as a result of the contravention. The compensation will be any amount that the Court may specify.