

新公司条例对董事贷款的有关规定

The legal rules on loans to the director under the new Companies Ordinance

问：在新公司条例（622 章）生效之后，董事是否可以向公司借钱（贷款）？在旧条例已经发生的董事借款，在新条例生效之后如何处理？

Question: After the coming into operation of the Companies Ordinance (Cap 622), whether a director can borrow money from the company, and if yes, how these loan transactions should be handled if the transactions continue to exist after the coming into effect of the Companies Ordinance.

答：以上问题可以从两个方面考量：一是贷款的合规性，具体来说就是是否获得股东（成员）通过决议批准，二是透明度要求，具体来说就是该贷款交易是否有在财务报表披露。根据新公司条例第 500 条规定，如果贷款事前获得公司股东批准，并且根据第 383 条规定，在财务报表中有披露该笔董事贷款。该笔贷款是合规的并且符合披露要求的。以上规定同样适用于在新公司条例生效前已经发生的董事贷款。

Answer: the above questions can be considered in two perspectives. The first is about the legitimacy of the loan. In that respect, one can check whether these loans have been approved by the company in the general meeting. The second is transparency of the loan transaction. In that respect, one can check whether the loan has been disclosed in company's financial statements. If the loan has been approved and disclosed, then the loan transaction is legitimate and lawfully reported. These requirements are also applicable to the loans that have not been repaid since the Companies Ordinance came into effect on 3rd March 2014.

违规交易处罚

Provision for contravening transactions

条例第 383 条第 6 款规定，财务报表没有披露有关董事贷款的，董事可被处以第 5 级罚款。根据刑事程序诉讼条例附表 8，第 5 级罚款为港币 5 万元。

Section 383(6) provides that if the loan has not been disclosed in the financial statements, every director commits an offence, and shall be subject to a fine at level 5. As per Schedule 8 of the Criminal Procedures Ordinance, a fine at level 5 amounts to HK\$50,000.

条例第 513 条规定，倘若董事贷款没有获得股东批准，则由公司单方面决定该笔贷款是否有效 (voidable at the company's instance)，除非公司已经获得因贷款导致的损失已经得以补偿，还原该笔交易的标的物已经不再可能，或者第三人不知悉情况下支付了价

值获得的权利因不确认交易或安排受到影响。同时，不论公司是否认为贷款有效，获得借款的董事及批准贷款的董事需要承担偿还贷款的民事责任。

Section 513 provides that where the company has not approved the loan, the loan is voidable at the instance of the company unless restitution of the asset is no longer possible, the company has been indemnified for any loss or damage resulting from the transaction, or the person other than the director, for whom the transaction was entered into in good faith, for value and without notice of the contravention and those rights would be affected by the avoidance. Irrespective of whether the loan is avoided, the director to whom the loan is granted is under a civil obligation to repay the loan to the company. The civil obligation is also extended to any other director who authorized the loan.

第 514 条弥补条款：尽管有 513 条规定，公司可以在事后合理时间内确认贷款有效，以消除效力待定的不确定性。如果没有得到股东批准而又发生时间比较久远的，股东需要通过普通决议确认贷款的合规性。如果没有得到控股公司股东批准的，控股公司股东则需要通过普通决议确认贷款的合规性。

Section 514 provides that in spite of the provisions under section 513, the loan transaction may no longer be avoided if it is affirmed within a reasonable period of time by the company. If the loan was entered into without the approval of the company's members, the affirmation must be obtained by the resolution of the company's members. If the loan was entered into without the approval of the members of the holding company, the affirmation must be obtained by the resolution of the holding company's members.

贷款规定适用范围

Scope of the loan provision

以上第 500 条规定适用于贷款给董事、由董事控制的公司、提供贷款担保、以及提供担保贷款给董事控制的公司。该条也适用于贷款给控股公司的董事、由该董事控制的公司、提供贷款担保与控股公司董事、或由该董事控制的公司。

The provision of section 500 shall apply to the loans to a director, the company under the control of a director, the guarantee given to or security provided in respect of the loan, or the guarantee given to or security provided for the company under the director's control. Section 500 shall also apply to the loan to director of the holding company, the company under the control of the director of the holding company, the guarantee given to or security provided for the director of the holding company, or the guarantee given to or security provided for the company under the control of the holding company's director.

以上规定适用于私人有限公司，但不包括指明公司（Specified Company, Section 491）。指明公司可细分为：公众公司、属于公众公司子公司的私人有限公司、或者是私人担保有限公司。

Sections 500, 513 and 514 shall apply to private companies, excluding specified companies. As per section 491, a specified company includes a public company, a private company, or a company limited by guarantee that is a subsidiary of a public company.

豁免交易

Excluded transaction

不适用范围：第 505 条规定，倘若贷款金额不超过公司净资产，或者催缴资本的百分之五，则该笔交易或安排不受到第 500 条的规限。

Section 505 provides that the restriction under section 500 does not apply where the aggregate of the value of the loan transaction and the value of other relevant transaction does not exceed 5% of the net assets as determined by the company's financial statement, or if no such relevant financial statements have been prepared, the amount of the company's called up capital.

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