

# Chinese Investment in Taiwan

## Client Alert

Taipei

BAKER & MCKENZIE

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### CHINESE INVESTMENT IN TAIWAN INDUSTRIES

#### 陸資對台灣產業之投資

#### Overview

#### 概論

On 25 May 2009 Taiwan's Ministry of Economic Affairs released draft guidelines concerning the regulation of investment in Taiwan by individuals and entities from the People's Republic of China (the "PRC") ("PRC Investors"). These guidelines are referred to as the Guidelines Governing the Investment in Taiwan by PRC Nationals (the "Investment Guidelines") and the Guidelines Governing the Establishment of Branches and Representative Offices in Taiwan by PRC Profit-Seeking Enterprises (the "Branch Guidelines"). On 30 June 2009 the Ministry of Economic Affairs announced that the Guidelines had been approved and would enter into effect. The published final version of the Guidelines also included a list of permitted Investment Items (the "Permitted Investment List").

台灣經濟部於2009年5月25日發佈了關於中國大陸地區個人及法人（下稱「大陸地區投資人」）對台灣投資之相關許可辦法。該等許可辦法包含「大陸地區人民來臺投資許可辦法」（下稱「投資許可辦法」）、「大陸地區之營利事業在臺設立分公司或辦事處許可辦法」（下稱「分公司許可辦法」）。經濟部於同年6月30日公佈上開許可辦法應自同日起生效施行。最後公布的許可辦法亦包含一開放陸資來臺投資業別項目（下稱「投資業別項目」）。

The two Guidelines and Permitted Investment List will largely overturn the previous prohibition on PRC investment in Taiwan companies and will regulate investment in unlisted companies, investment in listed companies exceeding 10% (and not covered by the separate Guidelines on investment in listed securities), the establishment of subsidiaries and the opening of branches and representative offices of PRC companies in Taiwan. However, all PRC investment into Taiwan which is permitted under the Guidelines and Permitted Investment List will still require prior government approval. The Investment Commission of the Ministry of Economic Affairs will be the responsible governmental agency for granting such approvals.

上述兩項許可辦法暨投資業別項目將大幅地放寬先前對於陸資來台投資之限制，且針對非上市(櫃)公司之投資、對上市(櫃)公司投資達 10 %以上之情形（且非「大陸地區投資人來臺從事證券投資及期貨交易管理辦法」所規範）及在台設立子公司、分公司及辦事處之情形進行規範。然而，所有適用於前述許可辦法及投資業別項目之大陸對台投資仍應取得主管機關之事前許可。經濟部投資審議委員會即為核發此等許可之主管機關。

The Guidelines also form part of various recent measures and proposed measures by the Taiwan Government and PRC Government to relax travel, transportation, trade, investment and financial restrictions between Taiwan and the PRC which have been in place since 1949 when the Kuomintang Nationalist Party retreated from Mainland China to Taiwan. These measures are a reflection of increasing warm cross-strait relations between the respective governments.

上述兩項許可辦法亦屬台灣政府與大陸政府間，就國民黨政府於 1949 年自大陸撤退來台後對觀光旅遊、交通運輸、貿易、投資及金融所加諸之限制之開放，近來所做出之多樣化及草擬措施之一部分；而此些措施也反應海峽兩岸政府間關係之日趨和緩。

Baker & McKenzie Taipei has published a separate Client Alert which summarises the regulations governing portfolio investment (not exceeding 10%) by PRC Investors in Taiwan securities.

國際通商法律事務所就大陸地區投資人對台之證券投資（不超過 10%）相關規範之簡介，已於另行發佈之客戶通知中介紹。

We summarise the Guidelines as follows.

茲簡介前述許可辦法如下：

## **PRC Direct and Indirect Investment** **大陸地區投資人之直接和間接投資**

All investment in Taiwan by

以下大陸地區投資人對台之投資活動應受投資許可辦法之規範：

- (a) PRC nationals, corporate entities, groups or other institutions of the PRC (“**Direct Investment**”); or
- (a) 大陸地區人民、依大陸地區法令成立之法人、團體、其他機構之投資（下稱「直接投資」）；或
- (b) any companies in third countries (ie. by companies located in jurisdictions other than the PRC such as the Cayman Islands, “**Investment Vehicle**”) which are invested by PRC nationals, corporate entities, groups or other institutions (“**Indirect Investment**”),
- (b) 在大陸及台灣以外之第三地區投資之公司（即位於大陸地區管轄權以外之公司，如開曼群島等，下稱「投資工具」），該等公司乃由大陸地區人民、法人、團體，或其他機構投資之公司（下稱「間接投資」）。

shall be subject to the Investment Guidelines.

However, Indirect Investment shall only be subject to the Investment Guidelines where either: 然而，間接投資僅於有下列情形之一者，方受投資許可辦法之規範：

- (c) PRC nationals, corporate entities, groups and other institutions directly or indirectly hold more than 30% of the total shares or capital of the Investment Vehicle, or

- (c) 大陸地區人民、依大陸地區法令成立之法人、團體、其他機構直接或間接持有投資工具股份或出資總額逾百分之三十；或
- (d) PRC nationals, corporate entities, groups and other institutions have control over the Investment Vehicle.
- (d) 大陸地區人民、依大陸地區法令成立之法人、團體、其他機構對投資工具具有控制能力。

According to the Investment Commission's current explanation, each of the following circumstances constitutes "having control over the Investment Vehicle":

依據投資審議委員會之現階段解釋，有下列情形之一即會認定為「具有控制能力」：

- (i) Holding majority voting rights by agreement with other investors;
- (i) 與其他投資人約定下，具超過半數之有表決權股份之能力；
- (ii) Dominating the direction of the company's decision-making on finances, business operations and personnel pursuant to applicable laws and contractual arrangements;
- (ii) 依法令或契約約定，可操控公司之財務、營運及人事方針；
- (iii) The right to appoint and dismiss a majority of the directors; or
- (iii) 有權任免董事會超過半數之主要成員；
- (iv) Having control over a majority of the board of directors.
- (iv) 有權主導董事會超過半數之投票權。

## **Types of Investment Permitted Subject to Guidelines**

### **投資許可辦法所規範之開放投資內容**

The Investment Guidelines permit and regulate the following categories of investment:  
投資許可辦法許可並規範下列投資類型：

- (i) shares of or capital in Taiwanese companies or enterprises;
- (i) 持有臺灣地區公司或事業之股份或出資額；
- (ii) establishment of branches of PRC companies in Taiwan
- (ii) 在臺灣地區設立大陸公司之分公司；
- (iii) establishment of partnerships and joint ventures in Taiwan; and
- (iii) 在臺灣地區設立獨資或合夥事業；
- (iv) granting loans with a term of one year or more to any entities as described in items (i), (ii) or (iii) above.
- (iv) 對前三款所投資事業提供一年期以上貸款。

In each case, the investment requires the prior approval of the Investment Commission of the Ministry of Economic Affairs.

依上述類型所為之任何投資內容皆應經過經濟部投資審議委員會之事前許可。

Note that investment in shares of Taiwan companies listed on the Taiwan Stock Exchange or Gre-Tai Securities Exchange, below 10% of the total issued share capital of the company, is permitted and is separately regulated under the Guidelines Governing Securities Investment and Futures Trading in Taiwan by PRC Investors promulgated on 30 April 2009.

請注意，大陸地區投資人於取得不超過上市或上櫃公司 10% 以上之股份或出資額之限度內，得投資於臺灣證券交易所股份有限公司上市公司及財團法人中華民國證券櫃檯買賣中心上櫃公司之有價證券，該投資應另適用 2009 年 4 月 30 日發布之「大陸地區投資人來臺從事證券投資及期貨交易管理辦法」。

## Permitted Investment List

### 投資業別項目

The Permitted Investment List details a number of sectors which are available for PRC investment. In summary, permitted sectors include:

投資業別項目詳列多項允許的大陸投資項目。簡言之，投資業別項目包括：

1. Manufacturing: automobile, rubber, plastics, textiles, computer peripherals, electronic components and home appliances. But not LCD panels, wafer foundries, construction or herbal products  
1. 製造業：汽車，橡膠，塑膠，紡織，電腦周邊設備、電子零組件及家電用品等等。但並不包含液晶顯示面板、晶圓廠、營造或中藥製品
2. Services: retailers and wholesalers of daily necessities, aviation, shipping, accomodation and Type II telecommunications enterprises (subject to a 50% ownership cap).  
2. 服務業：日常所需用品之零售業及批發業、航空運輸業、陸上運輸業、住宿服務業及第二類電信事業（總持股比率以不超過 50% 為限）。
3. Infrastructure: approved infrastructure projects, public areas of civil aviation terminals, aviation terminals and ports (both subject to a 50% ownership cap, and shareholdings of the PRC Investors in aggregate cannot exceed the shareholdings of the Taiwanese shareholders in aggregate). PRC Investors will not, however, be permitted to bid for construction contracts and so may have to partner with a Taiwanese company to invest in some projects. The Government has also indicated that PRC Investors will be allowed to participate in the Taiwan Government's NT\$3 trillion i-Taiwan Infrastructure Development Expenditure Programme and which includes the planned Taoyuan AeroCity Project.  
3. 公共工程建設：經許可之公共建設計畫，民用航空站之公共區域、機場航空站(持股比率須低於 50%，且不得超過台灣地區最大股東之持股比例)。又就此等公共建設合約，大陸地區投資人可能無法投標，因此可能必需透過與一台灣公司合夥之方式以投資此等公共建設計畫。政府機關亦指出將會允許大陸地區投資人參與台灣政府之投資金額達新台幣 3 兆元之愛台灣 12 項建設，包括研擬中之桃園航空城計畫。

Investment in monopolies and in businesses which could affect national security remains prohibited.

對於獨佔事業或影響國家安全之投資項目仍在禁止投資項目之列。

PRC military-related enterprises remain prohibited from investing in Taiwan.

與大陸軍方或軍事相關之事業仍禁止來台投資。

## Investments by Taiwanese Company Having PRC Investment

## 陸資投資事業之轉投資

If PRC Investors (in aggregate) hold 1/3 or more of the total issued shares or capital of a Taiwanese company, then investments made by such Taiwanese company will also be subject to the Investment Guidelines and prior approval of the investments will be required.

倘大陸地區投資人持有所投資之台灣事業之股份或出資額，合計超過該台灣事業之股份總數或資本總額三分之一以上者，該陸資投資事業之轉投資，仍應適用投資許可辦法之規定，且其投資亦應取得事前許可。

## Directors and Supervisors of Taiwan Company

### 台灣公司之董事及監察人

If a PRC Investor is a natural person and acquires shares in a Taiwanese company, he or she may act as a director or supervisor of the invested company.

若大陸地區投資人為自然人且取得台灣公司之股份，該大陸地區投資人得擔任被投資公司之董事或監察人。

If a PRC Investor is a corporate entity and acquires shares in a Taiwanese company, it may appoint a PRC natural person to act as a director or supervisor of the invested company.

若大陸地區投資人為一法人且取得台灣公司之股份，該大陸地區投資人得任命大陸地區自然人擔任被投資公司之董事或監察人。

The supervisor of a company is responsible to ensure that the company complies with applicable laws and its constitutional documents. The supervisor is entitled to attend board of director meetings and has the powers and responsibilities specified in the Taiwan Company Law.

公司監察人乃負責確保該公司遵循相關法律及其章程文件之規定。公司監察人並有權出席董事會，且台灣公司法並賦予公司監察人相當的權力及責任。

Note that in accordance with Taiwan Company Law, a shareholder may be entitled to appoint or vote for the appointment of directors or supervisors.

而根據台灣公司法，公司之股東有權指派或參與表決選任董事及監察人。

## Financing

### 融資

Separately from the Guidelines summarised above, Taiwan's Financial Supervisory Commission has also promulgated two regulations entitled "Amendment to Taiwan and Mainland Area Guidelines for Mutual Financial Business" and "Guidelines for Taiwan Banks and Credit Cooperatives Providing Mortgage Financing to PRC Individuals Non-Resident in Taiwan". In accordance with the first of these regulations, PRC Investors who have obtained approval from the Ministry of Economic Affairs to invest in Taiwan will be able to obtain financing on the same basis as Taiwanese individual and entities.

除前開許可辦法之簡介外，台灣金融監督管理委員會亦分別修訂及訂定「台灣地區與大陸地區金融業務往來許可辦法」及「台灣地區銀行及信用合作社辦理在臺無住所大陸地區人民不動產擔保放款業務應注意事項」。依據前述第一項許可辦法，針對已取得經濟部來台投資許可的大陸地區投資人將比照台灣地區個人及法人方式辦理。

PRC Investors will normally need to have established a presence in Taiwan by way of a subsidiary or a branch or representative office or, in the case of an individual, be granted the right to reside in

Taiwan in order to qualify for financing but, for real estate investment, PRC Investors may be able to obtain mortgage financing whether or not they are resident (if an individual) or have an established presence (if a company) in Taiwan.

原則上，大陸地區投資人透過成立子公司、分公司或辦事處之方式在台灣有營業場所者，及個人投資人需在台灣有居留資格者，方能在台灣獲得銀行融資，但就不動產投資部分，大陸地區投資人，不論其是否屬台灣居民（於個人之情形）或是否於台灣有營業場所（於法人之情形），皆得取得不動產擔保放款。

Under the second of these regulations, PRC Individuals who have not been granted residency in Taiwan, but who have obtained approval from the Minister of Internal Affairs to acquire real estate in Taiwan, may obtain New Taiwan Dollar financing to fund the purchase of the property. The loan to value ratio of this financing cannot exceed 50% and generally may not exceed the ratio applicable to Taiwanese borrowers.

而依據前述第二項應注意事項，大陸地區個人投資人儘管尚未取得台灣地區居留資格，但經內政部許可在台灣地區取得不動產者，仍可取得新台幣授信，以作為投資台灣不動產之用。核貸成數以鑑估價值 50% 為上限，且不得優於對於台灣地區客戶之核貸成數。

It is expected that in the near future the Bankers Association of the Republic of China will publish measures and requirements for its members to adopt in lending to PRC Investors and that initially these measures and requirements will be more restrictive in order to allow banks a period within which to accumulate experience in lending to PRC Investors and to develop their systems for management and control of risks.

中華民國銀行商業同業公會即將公告貸款予大陸地區投資人的相關配套措施及條件，以供其會員銀行遵循，並預計在實行初期時，此等配套措施及條件將會較為嚴格以使銀行有相當時間累積對大陸地區投資人貸款之經驗，並發展其經營及風險控管之系統。

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