

Legal Commentary

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New Amendments to HKEX Listing Rules Allow Treasury Shares

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On April 12, 2024, The Stock Exchange of Hong Kong Limited (“**HKEX**”) published its consultation conclusions (“**Consultation Conclusions**”) regarding the introduction of a new treasury share regime under The Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (“**Listing Rules**”) (“**Amendments**”). The Amendments will be incorporated into the Listing Rules with effect from June 11, 2024¹. After the Amendments become effective, a listed company may repurchase its shares and hold them in treasury for future resale if permitted under the laws of their places of incorporation and their constitutional documents. This article outlines the key Amendments and important explanations covered by HKEX in the Consultation Conclusions.

Key Amendments relating to the regulation of treasury shares

I. Under the current Listing Rules:

The listing of all shares repurchased by listed companies is automatically cancelled and listed companies must cancel and destroy the documents of title of repurchased shares as soon as reasonably practicable after settlement of the purchase².

II. After the Amendments come into effect:

Listed companies may hold repurchased shares in treasury, subject to the laws of their places of incorporation and their constitutional documents. Additionally, treasury shares will retain their listing status³.

¹ A listed company may seek shareholders’ approval for the amendments to its constitutional documents before June 11, 2024 to allow the listed company to hold and use treasury shares to the extent permitted under all applicable laws, rules and regulations. In addition, a listed company may seek a general mandate to issue new shares or resell treasury shares from its shareholders before June 11, 2024 provided that the listed company shall specify that it may use such general mandate for its resale of treasury shares only after the Amendments have come into effect.

² This cancellation requirement does not apply to listed companies with secondary listing on HKEX under Chapter 19C of the Listing Rules.

³ For the avoidance of doubt, listed companies would still need to obtain HKEX’s prior approval for any issue of warrants or convertible securities. This is despite the fact that a listed company might choose to use treasury shares to cover the exercise of subscription or conversion rights under the warrants or convertible securities.

The table below summarizes key Amendments governing the holding and resale of treasury shares:

Key Amendments	Current Listing Rules' requirements	New Listing Rules' requirements
Status of treasury shares	Unless a waiver ⁴ from share cancellation requirement is granted by HKEX, a listed company cannot retain treasury shares.	Listed companies can hold repurchased shares in treasury for future resales if permitted under the laws of their place of incorporation (e.g., Bermuda, the Cayman Islands, the British Virgin Islands, the People's Republic of China and others) ⁵ . Listed companies shall ensure that treasury shares are appropriately identified and segregated. The listing of all shares which are purchased by a listed company (whether on HKEX or otherwise) but not held as treasury shares shall be automatically cancelled upon purchase. There is no limit or restriction on the actual number of treasury shares that may be held by a listed company ⁶ .
Resale of treasury shares	Not applicable as repurchased shares cannot be held as treasury shares.	As a resale of treasury shares impacts existing shareholders in a similar manner as an issuance of new shares, the framework for an issuance of new shares is applied to govern the resale of treasury shares. The new Listing Rules do not require listed companies to resell all of their treasury shares before issuing new shares. Some key features of the resale framework are summarized below (non-exhaustive) ⁷ : <ul style="list-style-type: none"> ■ Pre-emptive basis: A resale of treasury shares is subject to pre-emption right of the shareholders (i.e., must be first offered to all shareholders on a pro-rata basis) or alternatively, approved by shareholders under a specific mandate or a general mandate (see below for details). ■ Shareholders' mandate: A resale of treasury shares can be approved by shareholders under a specific mandate.

⁴ Listed companies with waivers from the share cancellation requirement granted by HKEX will be required to comply with the new Listing Rule requirements. Transitional arrangements will be provided to these listed companies to comply with the new Listing Rule requirements by their second annual general meeting after June 11, 2024.

⁵ The Companies Ordinance (Chapter 622 of Laws of Hong Kong) (the "**Companies Ordinance**") currently requires a Hong Kong incorporated company to cancel repurchased shares, thereby effectively preventing repurchased shares from being held "in treasury" for "resale" at a later date. According to the Consultation Conclusions, the Hong Kong government is proposing amendments to the Companies Ordinance to enable listed companies incorporated in Hong Kong to also benefit from the treasury share regime as other overseas issuers.

⁶ However, the maximum number of shares that a listed company can repurchase on HKEX is still subject to Rule 10.06(1) of the Listing Rules which requires a listed company to obtain shareholders' approval for a specific repurchase or a repurchase mandate to repurchase shares on HKEX. The repurchase mandate is limited to a maximum of 10% of the issued share capital of the listed company on the date of the resolution granting the repurchase mandate. The 10% of the issued share capital excludes any treasury shares held by the listed company at the given time. A listed company may hold shares repurchased in other circumstances (e.g. off-market share buybacks from specific shareholders or employee share buybacks permitted under the Code on Share Buy-backs) in treasury where authorized by the laws of its place of incorporation and its constitutional documents.

⁷ Also applies to a resale of treasury shares by a listed company or its subsidiary through an agent or nominee. HKEX clarifies in the Consultation Conclusions that the requirements would not apply to a sale of shares by the trustee of a listed company's share scheme if those shares are not regarded as treasury shares under the laws of the listed company's place of incorporation and its constitutional documents.

Key Amendments	Current Listing Rules' requirements	New Listing Rules' requirements
		<p>Treasury shares can also be resold under the general mandate, approved in advance by shareholders, that allows listed companies to allot or issue shares (up to 20% of the listed company's issued shares on the date of the approval, "General Mandate Limit"). The general mandate must specifically authorize the resale of treasury shares in order for a listed company to resell its treasury shares under the general mandate. Additionally, the number of shares repurchased during the year under a repurchase mandate approved in advance by shareholders (up to 10% of the listed company's issued shares on the date of the approval, "repurchase mandate limit") can be added to the general mandate limit.</p> <ul style="list-style-type: none"> ■ Calculating mandate limits: Both the general mandate limit and the repurchase mandate limit are calculated based on the number of issued shares of the listed company excluding the treasury shares held by it at that given time. ■ On-market price discount: An on-market resale of treasury shares under the general mandate is subject to a maximum price discount of 20% of the higher of: <ul style="list-style-type: none"> - the closing price on the trading day immediately prior to the resale; and - the average closing price in the 5 trading days immediately prior to the resale. ■ Off-market price discount: An off-market resale of treasury shares under the general mandate is subject to the same price discount limit as the on-market price discount.
<p>Disclosure requirement</p>	<p>The details of share repurchases and the cancellation of repurchased shares must be disclosed in next day disclosure returns, monthly returns and annual reports as and when required under the Listing Rules.</p>	<p>Disclosure of repurchases and resales: A listed company should disclose its repurchase of shares, resale of treasury shares and any movement in the number of treasury shares by announcement, listing document⁸, next day disclosure return, monthly return and annual report as and when required under the new Listing Rules.</p> <p>Disclosure of the intention to hold treasury shares: when seeking shareholders' approval for a repurchase mandate, a listed company is required to disclose in the explanatory statement to shareholders its intention as to whether the repurchased shares will be cancelled or kept as treasury shares. In addition, a listed company is required to disclose in the next day disclosure return after each share repurchase (a) whether repurchased shares are to be cancelled or held in treasury; and (b) where applicable, the reasons for any deviation from the</p>

⁸ For example, when there is a rights issue or open offer.

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		intention statement previously disclosed by the listed company in the explanatory statement. Notwithstanding the above, the disclosure of the intention statement would not preclude a listed company from subsequently cancelling any treasury shares. A listed company is required to report cancellation of treasury shares through next day disclosure returns and when such disclosure obligation arises.
Restrictions on the dealing in treasury shares	Not applicable as repurchased shares cannot be held as treasury shares or be resold.	<p>To mitigate the risks of market manipulation or insider dealing resulting from the repeated repurchases and resales of their own shares, listed companies are subject to the following restrictions:</p> <ul style="list-style-type: none"> ■ Any resale of any treasury shares is not permitted on or off-market within 30 days after any share repurchase. The 30-day moratorium period will not apply to (i) a new issue of shares, or a sale or transfer of treasury shares under a capitalization issue; (ii) a grant of share awards or options under a share scheme that complies with Chapter 17 of the Listing Rules or a new issue of shares or a transfer of treasury shares upon vesting or exercise of share awards or options under the share scheme that complies with Chapter 17 of the Listing Rules; and (iii) a new issue of shares or a transfer of treasury shares pursuant to the exercise of warrants, share options or similar instruments requiring the listed company to issue shares or transfer treasury shares, which were outstanding prior to the share repurchase⁹. ■ Any resale of any treasury shares is not permitted on-market: <ul style="list-style-type: none"> - when there is undisclosed inside information; and - during the period of 30 days preceding any results announcement. ■ Any on-market share repurchase is not permitted within 30 days after any on-market resale of treasury shares.
Voting rights attached to treasury shares	Not applicable as repurchased shares cannot be held as treasury shares.	Listed companies holding treasury shares must abstain from voting on matters that require shareholders' approval under the Listing Rules, which prevents controlling/substantial shareholders from using treasury shares to consolidate their control of the listed company.
Use of treasury shares for share	Shares repurchased by a listed company itself cannot be	A share scheme using treasury shares to satisfy share grants would be treated as a share scheme funded by new shares under Chapter 17 of the Listing Rules, in which case such share grants would be subject to the scheme mandate limit approved by

⁹ HKEX clarifies in the Consultation Conclusions that the carve-out applies to issuance of new shares and transfer of treasury shares by a listed company upon conversion of convertible securities, which were issued with subscription monies fully settled prior to the share repurchase.

Key Amendments	Current Listing Rules' requirements	New Listing Rules' requirements
schemes	used to satisfy share grants in a share scheme as the repurchased shares must be cancelled.	<p>shareholders under Chapter 17 of the Listing Rules.</p> <p>The rules of a listed company's share scheme should specifically allow the use of treasury shares to satisfy share grants. The rules of any existing share scheme should be amended to allow the use of treasury shares to satisfy share grants. However, HKEX would normally not regard the amendments simply to allow the use of treasury shares to fund the share scheme as a material alteration to the scheme rules which would require shareholders' approval under Chapter 17 of the Listing Rules.</p> <p>For the avoidance of doubt, if a listed company establishes a share scheme funded by existing shares (for example, by appointing a trustee to administer the scheme and purchase shares on-market to satisfy share grants), such share scheme would only be subject to annual reporting requirements under Rule 17.12 of the Listing Rules. This is because the scheme is satisfied by issued shares of the listed company rather than shares held in treasury (the rights of which are suspended by laws)¹⁰.</p>
Resale of treasury shares to connected persons of the listed company	Not applicable as repurchased shares cannot be held as treasury shares or be resold.	<p>Any resale of treasury shares to a connected person would be subject to the same connected transaction requirements as an issue of new shares under Chapter 14A of the Listing Rules.</p> <p>For example, a resale of treasury shares to a connected person would be subject to independent shareholders' approval and relevant disclosure requirements, unless fully exempted under the new Listing Rules (e.g., a pro rata issue to existing shareholders or a share scheme that complies with Chapter 17 of the Listing Rules).</p> <p>Listed companies are prohibited from knowingly reselling treasury shares to a core connected person (i.e., a director, supervisor (if applicable), chief executive or substantial shareholder of the listed company or any of its subsidiaries or a close associate of any of them) on the market.</p>
Excluding treasury shares in the calculation of issued shares	Repurchased shares must be cancelled as soon as reasonably practicable.	<p>Treasury shares are disregarded when calculating a listed company's issued shares or voting shares for the purpose of determining the following under the Listing Rules:</p> <ul style="list-style-type: none"> ■ public float; ■ market capitalization; ■ equity capital ratio for size test calculation; ■ size limit for issuing or purchasing securities as a percentage of the issued shares;

¹⁰ For a listed company incorporated in the People's Republic of China, a share scheme funded by its treasury H shares is subject to the same requirements as a share scheme funded by new shares under Chapter 17 of the Listing Rules, and a share scheme funded by its treasury shares not listed on HKEX is subject to Rule 17.12 of the Listing Rules.

Key Amendments	Current Listing Rules' requirements	New Listing Rules' requirements
		<ul style="list-style-type: none"> ■ a shareholder's percentage of rights to vote at a general meeting of the listed company; and ■ a shareholder's percentage interest in the listed company*. <p><i>*Please see "Implications under the Codes and the SFO" for further explanation on how treasury shares are counted towards calculating a shareholder's interest in a listed company under the Codes (defined below) and the SFO (defined below).</i></p>
Implications for new listing applicants	New listing applicants must cancel all their treasury shares prior to their listing on HKEX.	New listing applicants are permitted to retain their treasury shares upon listing, but they must disclose details of their treasury shares in their prospectus. A newly listed company cannot resell any treasury shares or enter into any agreement for such resale within six months after listing.

Implications under the Codes and the SFO

I. Under the Codes on Takeovers and Mergers and Share Buy-backs (the "Codes")

Treasury shares are **excluded from** the calculation of voting rights percentages under the Codes. If a listed company has treasury shares, such shares will not be treated as disinterested shares or counted towards the various thresholds under the Codes. This will apply when determining whether a shareholder's voting right percentages crosses the 30% mandatory offer threshold, the 2% creper threshold or an acceptance threshold. In addition, an offer is not required to be made for treasury shares during a general offer or partial offer.

Accordingly, a listed company repurchasing and holding its shares in treasury will trigger an increase in the voting rights percentage of its shareholders under the Code on Takeovers and Mergers. Listed companies should therefore exercise caution to avoid inadvertently triggering a mandatory general offer obligation of its shareholders under the Code on Takeovers and Mergers due to the Listed Companies' dealings in treasury shares.

According to the Consultation Conclusions, the Takeovers Executive of the Securities and Futures Commission of Hong Kong ("SFC") will issue a practice note clarifying the treatment and implications of treasury shares in the context of a Codes-related transaction.

II. Under the Securities and Futures Ordinance (chapter 571 of Laws of Hong Kong) ("SFO")

In the context of the disclosure of interest requirements under Part XV of the SFO, treasury shares are considered as **included in** a listed company's issued shares, and the calculation of shareholding interest percentages must take the presence of treasury shares into account. Any repurchase of shares and the holding or reselling of treasury shares by a listed company will not affect the total number of issued voting shares for the calculation of percentage figures of interests of shareholders. Notably, if a listed company holds 5% or more of its own shares as treasury shares, it is also obligated

to disclose such information under this regime. Further, any shareholder that controls one-third or more of the voting power at general meetings of the listed company concerned would also be taken to have an interest in those treasury shares which must be added to his other interests in shares of the listed company to determine his reporting obligations under Part XV of the SFO.

According to the Consultation Conclusions, the SFC will update the Outline of

Part XV of the SFO – Disclosure of Interests to provide further guidance on the treatment of treasury shares, including the calculation of percentage interests if treasury shares are involved.

Conclusion

The Amendments permitting the holding and resale of treasury shares offer greater flexibility to listed companies towards managing their capital structure and fund raising strategies. For example, listed companies can now react promptly to market conditions and resell treasury shares in small lots on the market at market prices, which offers an alternative means to raise funds compared to a placing of new shares which typically involves a discount to market prices. Alternatively, treasury shares can also be transferred as consideration for an acquisition, for satisfying employees' share incentive schemes or upon conversion of convertible securities, subject to the company laws of the places of incorporation of the listed companies. As over 90% of the companies listed on HKEX are incorporated in jurisdictions that allow companies to hold treasury shares, the Amendments will further enhance the competitiveness and appeal of the Hong Kong market for these companies and their investors. We look forward to navigating our clients through these new developments to maximize the benefits they may bring.

Important Announcement

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