

April 23, 2024

# SEHK Rule Amendments Relating to Treasury Shares and Some Practical Considerations

---

## 1. INTRODUCTION

On April 12, 2024, The Stock Exchange of Hong Kong Limited (“**SEHK**”) published its consultation conclusions on proposed amendments to the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the “**Listing Rules**”) relating to treasury shares. Issuers will be given the flexibility to purchase their own shares and hold them as treasury shares, and subsequently re-sell such shares (whether on-market or off-market). As the amendments will take effect very soon on June 11, 2024, we highlight below some key aspects on the amendments, with a particular focus on practical implications for issuers.

## 2. WHAT ARE TREASURY SHARES?

Treasury shares are shares repurchased and held as such by an issuer.

Under the existing Listing Rules, if an issuer purchases its own shares, the listing status of such shares are automatically cancelled, and the issuer *must* proceed to cancel the share certificates as soon as reasonably practicable. This mandatory requirement will be removed, which will give an issuer the option to either (i) cancel the shares it repurchased or (ii) hold them as treasury shares where permitted under the laws of its place of incorporation and its constitutional documents.

Treasury shares are issued shares and retain their listing status. However, their right to voting and dividend or other distribution are normally suspended by laws. Issuers must also abstain from voting with treasury shares on matters that require shareholders’ approval under the Listing Rules.

## 3. WHAT CAN TREASURY SHARES BE USED FOR?

Subject to the laws of the place of incorporation and the constitutional documents of an issuer, treasury shares may be:

- resold for cash (on-market or off-market);
- transferred as consideration;
- used to satisfy employees' share schemes; and/or
- used upon conversion of convertible securities.

## 4. CALCULATIONS INVOLVING TREASURY SHARES

### 4.1 Listing Rules

Treasury shares are generally *excluded* in calculations relating to the Listing Rules, e.g.:

- public float;
- market capitalization;
- equity capital ratio;
- limits for general mandate; or
- a shareholder's % voting right or % interest (e.g. definitions of controlling/substantial shareholders, INED or sponsor independence).

### 4.2 Takeovers Code

Treasury shares are generally *excluded* in calculations relating to the Code on Takeovers and Mergers (the **Takeovers Code**), e.g. for 30% trigger and 2% creeper rule for mandatory general offers. Accordingly, for Takeovers Code purposes, if an issuer repurchases shares and keeps them as treasury shares, its remaining shareholders' voting rights will increase in the same way as if the repurchased shares are cancelled.

### 4.3 Disclosure of Interests (DI)

Treasury shares are *included* in calculating % interest for DI purposes. A repurchase of shares which are then held as treasury shares and/or a resale of treasury shares does not affect the % interest of any shareholder not involved in the repurchase/resale.

## **5. RESALE OF TREASURY SHARES IS REGULATED AS ISSUE OF NEW SHARES**

Issuers holding treasury shares can sell such shares to raise funds. As such, SEHK extends a number of existing requirements applicable to the issue of new shares to the resale of treasury shares. In particular:

- an issue of new shares or a resale of treasury shares must be approved by shareholders by general/specific mandate, except (i) to existing shareholders on a pro rata basis or (ii) under a share scheme under Chapter 17 of the Listing Rules;  
Share schemes funded by treasury shares (treasury H shares for PRC issuers) are treated as funded by new shares. The number of treasury shares used is counted towards the scheme mandate limit.
- in terms of volume, a general mandate to issue new shares and/or re-sell treasury shares is limited to 20% of issued shares *plus* the number of shares repurchased during the year. In terms of discount, an issue or resale for cash consideration using a general mandate cannot be made at a discount of 20% or more to the benchmarked price;
- an issue of new shares or a resale of treasury shares to connected person(s) is a connected transaction and subject to independent shareholders' approval, unless an exemption under Rule 14A.92 or 14A.92B of the Listing Rules applies (e.g. pro rata issue, share scheme or on-market resale of treasury shares);
- an issuer cannot issue new shares or re-sell treasury shares (on-market or off-market) within 30 days after any share repurchase; and
- a newly listed issuer cannot issue new shares or re-sell treasury shares within six months of its listing.

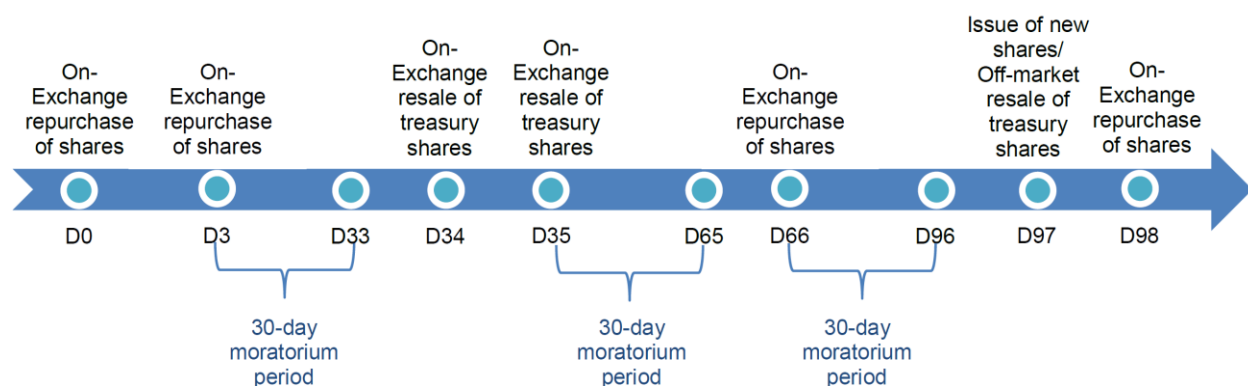
A key practical difference is that **a transfer of treasury shares is subject to stamp duty in Hong Kong** – which may create additional cost for using treasury shares as compared to issuing new shares.

## **6. RESALE OF TREASURY SHARES IS SUBJECT TO SIMILAR DEALING RESTRICTIONS AS SHARE REPURCHASE (ON-MARKET)**

To avoid insider trading and market manipulation, no *on-market* share repurchase or *on-market* resale of treasury shares can be made (i) when the Company has undisclosed inside information or (ii) during the 30 days before and including the date of a results announcement. To prevent quick trading, SEHK also introduced a 30-day moratorium for an *on-market* share repurchase after an *on-market* resale of treasury shares. The following chart from SEHK's consultation paper provides a helpful summary of the 30-day

# SULLIVAN & CROMWELL LLP

moratorium periods required between repurchase of shares and resale of treasury shares under Section 5 above and this section:



## 7. PRC OR A+H, DUAL PRIMARY, WVR AND SECONDARY ISSUERS

### 7.1 PRC or A+H Issuers

For a PRC issuer whose H shares are listed on SEHK, repurchase of H shares and resale of treasury H shares are subject to the Listing Rules.

On the other hand, a PRC issuer's A shares (or domestic shares) are not listed on SEHK. Consequently, repurchase of A shares and resale of treasury A shares are not subject to the Listing Rules except for certain disclosure requirements.

### 7.2 Dual Primary Issuers

For an issuer with a dual primary listing, as the same class of shares are listed on SEHK and the overseas stock exchange, any repurchase of shares or resale of treasury shares on the overseas stock exchange is subject to shareholders' approval and other requirements under the Listing Rules.

### 7.3 Weighted Voting Rights (WVR) Issuers

As mentioned before, treasury shares are excluded in calculating voting rights under the Listing Rules. So WVR issuers must reduce the voting rights of WVR beneficiaries proportionately in accordance with Rule 8A.15, whether the repurchased shares are to be cancelled or held as treasury shares.

### 7.4 Secondary Issuers

Secondary issuers have been allowed to have treasury shares before the present amendments. The newly introduced shareholders' approval requirement, dealing restrictions and disclosure requirements for resale of treasury shares have no material implications for secondary issuers.

**8. DISCLOSURE REQUIREMENTS**

<b>When?</b>	<b>What?</b>
Seeking general mandate from shareholders to repurchase shares at annual general meetings	Disclose intention as to whether the repurchased shares will be cancelled or held as treasury shares (or state that the issuer may do either)
After each share repurchase	File next-day disclosure return, setting out whether repurchased shares are to be cancelled or held as treasury shares, reasons for any deviation from previous intention statement, etc.
After each resale of treasury shares	File next-day disclosure return, setting out number of treasury shares sold, max/min selling price, amount of funds raised, etc.
After each month during which any resale of treasury shares is conducted	Set out details of resale of treasury shares in monthly return
If on-market resale of treasury shares amounts to 5% or more of issued shares within 12 months	Make an announcement on such resales, including number of treasury shares sold, max/min selling price, amount of funds raised, use of proceeds, reasons of such resales, etc.
Dividend/distribution announcement (include a results announcement where a dividend/distribution is declared)	Disclose number of treasury shares and confirm that treasury shares will not receive dividend/distribution
Annual/interim report	Disclose monthly break-down of treasury shares sold, number of treasury shares at year/period-end and their intended use, use of proceeds (current year or brought-forward from previous years), reasons of the resales, etc.
Poll results announcement	Disclose number of treasury shares and confirm that (i) treasury shares are excluded from the total number of issued shares entitled to attend/vote and (ii) the issuer did not vote with the treasury shares

**9. NEXT STEPS**

Issuers interested in taking the benefit of the new treasury share flexibility may consider taking the following steps:

**(a) Discuss with local counsel to confirm whether the laws of its place of incorporation and its constitutional documents allow the holding and resale of treasury shares.**

According to SEHK, most issuers (including those incorporated in the PRC, the Cayman Islands, the BVI and Bermuda) are not restricted by local laws to hold and re-sell treasury shares. However, Hong Kong-incorporated issuers cannot hold treasury shares, and SEHK is exploring necessary changes to the Companies Ordinance with relevant parties.

**(b) Seek shareholders' approval at the next annual general meeting on:**

- general mandate to repurchase shares;
- general mandate to issue new shares and/or re-sell treasury shares; and

## SULLIVAN & CROMWELL LLP

- amendments to constitutional documents (if necessary).
- (c) **Touch base with brokers and share registrar on relevant arrangements for e.g.:**
- identifying and segregating treasury shares; and
  - holding/withdrawing treasury shares through/from CCASS.
- (d) **Amend share scheme rules to allow the use of treasury shares to satisfy share grants (if necessary) – no shareholders' approval is required.**

**Steps can be taken any time now.** Issuers may wish to take appropriate actions now (for e.g. passing any necessary shareholders resolutions at their coming annual general meeting) to be in the position to fully utilize the new treasury share regime once it becomes effective on June 11, 2024.

\* \* \*

# **SULLIVAN & CROMWELL LLP**

## **ABOUT SULLIVAN & CROMWELL LLP**

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 900 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

## **CONTACTING SULLIVAN & CROMWELL LLP**

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers or to any Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to [SCPublications@sullcrom.com](mailto:SCPublications@sullcrom.com).