



CONSULTATION

Companies Acts 1931 to 2004
(Treasury Share) Regulations
2013

Companies Act 2006
(Treasury Share) Regulations
2013

26 August 2013 to 20 September 2013

Issued by:
The Treasury
Isle of Man Government
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When a company buys its own shares back and holds them "in treasury" without cancelling them, these are called treasury shares.

Shares held in treasury are officially classed as issued share capital, with the holder being the company itself. However, the rights of shares held in treasury are suspended. The company cannot vote in respect of those shares, nor can it receive distributions in respect of them. This includes distributions made in the course of a winding up of a company.

A company that holds its shares in treasury has the option to sell those shares back into the market or to cancel them.

The importance of treasury shares to companies is that the costs of capital maintenance can be reduced.

The Treasury, consulting on behalf of the Department of Economic Development ("DED"), is inviting comments on the draft Regulations which can be found on the Treasury and DED consultation pages, using the links below:

<http://www.gov.im/treasury/consultations.gov>

<http://www.gov.im/ded/consultations.gov?menuid=21605>

Please note that submission of a response will not be a guarantee that a change will be made to the draft Regulations.

A summary of the responses received will be posted on the Treasury and DED websites.

Respondents must please provide contact details with their submissions.

While the summary document will not contain sufficient information to permit identification of respondents, anonymous submissions will nevertheless be disregarded.

Responses should be sent in writing or by email (preferably as Word documents) to:

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Please ensure that comments are received by no later than Friday 20 September 2013.

A. INTRODUCTION

- 1.1 The Companies Act 1931 to 2004 (Treasury Share) Regulations 2010 ("the 2010 Regulations") came into operation on 1 May 2010.
- 1.2 The Regulations permit only companies that are incorporated under the Companies Acts 1931-2004 ("1931 Act Companies") to hold a maximum of 10% of all issued shares, of any class of shares, as treasury shares at any time. Any shares in excess of this 10% limit must be cancelled by the company within 12 months of the infringement of the 10% rule.
- 1.3 The 2010 Regulations further only permit the shares of "market traded companies"¹ to be held as treasury shares.
- 1.4 At the time that the 2010 Regulations were consulted on, it was suggested that for companies under the Companies Act 2006 ("2006 Act companies") there were sufficiently flexible capital maintenance provisions as to obviate the need for equivalent Regulations to be made under this Act. At the time of consultation there were no objections to this assertion.
- 1.5 Section 52 of the 2006 Act does permit companies to buy shares back to reduce their capital. This simply requires the directors of a company to make a declaration that a company will continue to meet the "solvency test" set out under section 49 of the Act. However, section 52 continues to say that any shares bought back by a company are "deemed to be cancelled immediately on acquisition".
- 1.6 The current position sees a 2006 Act Company that buys back some of its shares having to cancel these shares as soon as they have been repurchased. If, in future, the same company found that it needed to raise more capital from the markets, the costs associated with a "fresh issue" of shares would be incurred.
- 1.7 Section 58A of the 2006 Act contains the power to make regulations to permit the holding of treasury shares.

¹ The Regulations define a market traded company as the shares of "a company incorporated in the Island whose shares are admitted to trading on an established market".

B. TREASURY SHARES UNDER THE COMPANIES ACTS 1931 TO 2004

Section 25A of the Companies Act 1992 gives DED the power to make regulations to permit companies to hold and deal with treasury shares. The 2010 Regulations were duly made and allow market traded companies to hold 10% of their issued share capital as treasury shares.

2. Removal of maximum holdings restriction

- 2.1 At the time at which the 2010 Regulations were drafted, treasury shares were a new concept in the Isle of Man. A cautious approach was taken at this time in order to allow for evaluation of any risks associated with treasury shares and the possible identification of any problems that might arise with treasury shares. It was for this reason that a limit was imposed on the maximum amount of shares that a company could buy back and hold in treasury. This limit was set at 10% of any class of shares.
- 2.2 It is now clear that no problems have been identified in relation to treasury shares in respect of 1931 Act companies.
- 2.3 At the time that the 2010 Regulations were made, the UK had already removed the 10% limit from its legislation. While the upper limit on the number of shares that can be held in treasury has been removed, a lower limit on the number of shares issued continues to exist. A company must have a minimum of one ordinary share in issue at all times.
- 2.4 The reason for this requirement is that shares held in treasury are officially classed as issued share capital, with the holder being the company itself. However, the rights of shares held in treasury are suspended because a company cannot have rights against itself. The company cannot vote in respect of those shares, nor can it receive distributions in respect of them. This includes distributions made in the course of a winding up of a company. In order for the company to be able to function, there must be at least one ordinary share in issue.
- 2.5 There does not seem to be any reason not to follow the lead of the UK in removing the upper limit of 10% of shares that can be held as treasury shares.
- 2.6 The draft Companies Acts 1931 to 2004 (Treasury Share) Regulations 2013 ("the 2013 1931 Act Regulations") propose to permit companies to hold an unlimited number of shares in treasury, subject always to the proviso that at least one ordinary share must be in issue at all times.

Questions

- (i) Do you agree that the restriction on the maximum holding of treasury shares of 10% of the nominal value of each share class should be removed entirely?***
- (ii) If you disagree, is that because:***

- (a) you believe the maximum limit of 10% should remain; or**
- (b) because you believe a different limit should be imposed?**

Please give reasons for your answer.

3. Widening of the classes of companies that can hold their shares in treasury

- 3.1 The 2010 Regulations only apply to companies whose shares are admitted to trading on an established market.
- 3.2 The 2013 1931 Act Regulations propose to widen the classes of companies eligible to purchase and hold shares as treasury shares to include the following:
 - (a) a company incorporated in the Island, whose shares are admitted to trading on an established market;
 - (b) a public company within the meaning given by section 341 of the Companies Act 1931; or
 - (c) a company which is a collective investment scheme within the meaning given in Part 1 of the Collective Investment Schemes Act 2008.
- 3.3 The 2013 1931 Act Regulations replace the definition of "market traded companies" with the wider concept of "qualifying companies".

Questions

- (iii) Do you agree that the classes of companies eligible to purchase and hold treasury shares should be widened to include:**
 - (a) all market traded companies;**
 - (b) all public companies; and**
 - (c) collective investment schemes?**
- (iv) If you disagree is that because:**
 - (a) you believe that the proposed widening of application is now too permissive; or**
 - (b) you believe that the proposed widening of application falls short of what is required?**
- (v) If you consider that additional classes of companies should be included within the scope of qualifying companies included in the 2013 1931 Act Regulations, please clearly identify what other classes should be included.**

4. Additional disclosure under the 2013 1931 Act Regulations

- 4.1 The International Organisation of Securities Commissions Objectives and Principles of Securities Regulation (“the IOSCO Core Principles”) are the international benchmark against which a jurisdiction’s securities regulation is judged by independent assessors such as the IMF. The IOSCO Core Principles apply to any issue of securities to the public, including shares in companies.
- 4.2 The companies included in the definition of qualifying companies under the proposed widened scope of the 2013 1931 Act Regulations all meet the definition of “issuers”. They therefore need to make full and accurate disclosures of information that is material to risk. In addition to this, holders of securities should be treated in a fair and reasonable manner. There must be a proper basis for asset valuation, pricing and redemption.
- 4.3 The Isle of Man is a member, and a full signatory to the memorandum of understanding, of IOSCO. It is therefore critical that the Island is, and is seen to be, fully supportive of the IOSCO Core Principles.
- 4.4 For this reason, the draft 2013 1931 Act Regulations consider the inclusion of two additional pieces of information that must be notified to the Companies Registry in respect of treasury shares.
- 4.5 The current requirement is that the company must, within one month of purchasing or otherwise dealing with treasury shares, provide information on:
- the class of shares;
 - number and nominal value of the shares; and
 - the date on which the event took place
- 4.6 The 2013 1931 Act Regulations consider requiring the company to disclose the following additional information:
- the total number of shares held as treasury shares; and
 - the total number of shares in issue.

Questions

- (vi) Do you agree that it would be prudent to add two new fields of information to the return filed at the Companies Registry?***
- (vii) If you disagree, please give reasons for your answer.***
- (viii) Do you consider that any additional information should be collected in respect of the returns made by companies that hold shares in treasury?***

C. TREASURY SHARES UNDER THE COMPANIES ACT 2006

Section 58A of the 2006 Act gives DED the power to make regulations to permit companies to hold and deal with treasury shares. To date this power has not been exercised.

Questions

- (ix) Do you agree that treasury share regulations should be made in respect of 2006 Act companies?***
- (x) If you do not agree with the proposal to make treasury share regulations under the 2006 Act, please substantiate your position.***

5. Treasury shares under the Companies Act 2006

5.1 The draft Companies Act 2006 (Treasury Share) Regulations 2013 ("the 2013 2006 Act Regulations") will enable companies incorporated under the Companies Act 2006 to hold and deal with treasury shares. It is proposed that there will be no restriction on the maximum number of shares that can be held in treasury, subject always to the proviso that at least one ordinary share must be in issue at all times.

Questions

- (xi) Do you agree that there should be no restriction on the maximum holding of treasury shares?***
- (xii) If you disagree, is that because:***
 - (a) you believe that 2006 Act companies should not be able to hold treasury shares; or***
 - (b) because you believe a limit should be imposed?***

Please give reasons for your answer.

6. Classes of companies that can hold their shares in treasury

6.1 The 2013 2006 Act Regulations propose to enable the following classes of companies to purchase and hold shares as treasury shares:

- (a)** a company incorporated in the Island, whose shares are admitted to trading on an established market; and
- (b)** a company which is a collective investment scheme within the meaning given in Part 1 of the Collective Investment Schemes Act 2008.

6.2 Companies that fall within these classes will be known as "qualifying companies".

Questions

(xiii) Do you agree that the classes of companies eligible to purchase and hold treasury shares should include:

(a) all market traded companies; and

(b) collective investment schemes?

(xiv) If you disagree is that because:

(a) you believe that the proposed scope of application is too wide; or

(b) you believe that the proposed scope of application falls short of what is required?

(xv) If you consider that additional classes of companies should be included within the scope of the 2013 2006 Act Regulations, please clearly identify what other classes should be included.

7. Disclosure under the 2013 2006 Act Regulations

- 7.1 As is the position in respect of 1931 Act companies, "the IOSCO Core Principles" are the international benchmark against which a jurisdiction's securities regulation is judged by independent assessors such as the IMF. The IOSCO Core Principles apply to any issue of securities to the public, including shares of 2006 Act companies.
- 7.2 The qualifying companies under the proposed scope of the 2013 2006 Act Regulations meet the definition of "issuers". As is the case with 1931 Act companies, these companies need to make full and accurate disclosures of information that is material to risk. The IOSCO Core Principles apply not only to collective investment schemes but also in relation to any issue of securities to the public, including shares in companies.
- 7.3 The Isle of Man's position in respect of IOSCO is considered above at paragraph 4.3.
- 7.4 All 2006 Act companies have the option to disclose their registers of members on the public record at the Companies Registry. Most companies elect not to disclose their register of members. This position is justified, and justifiable, because every 2006 Act company must have a registered agent that is licensed by the Financial Supervision Commission.
- 7.5 There are two options available to ensure that the introduction of treasury shares in respect of 2006 Act companies does not mean that the IOM could be seen to be failing to meet its obligations under the IOSCO principles.
- 7.6 The first option is to require all qualifying 2006 Act companies to make the election to disclose their share registers on the public record.

7.7 The second option is to require all qualifying 2006 Act companies that either hold or deal with treasury shares to file a return at the Companies Registry that includes the following information:

- the class of shares;
- number and nominal value of the shares;
- the date on which the event took place;
- the total number of shares held as treasury; and
- the total number of shares in issue.

7.8 The draft 2013 2006 Act Regulations do not consider that companies should make the election to disclose their share registers on the public record. They currently include the proposal that certain limited information in respect of share classes should be reported to the Registrar.

Questions

(xvi) Do you think that all qualifying 2006 Act companies should be required to make the election to disclose their registers of members?

(xvii) If you answered yes to question (xvi), please substantiate your answer.

(xviii) Do you agree with the proposed amount and type of information that a qualifying company should be required to disclose?

(xix) If you do not support the amount and type of information that is currently proposed, please give reasons.

(xx) Do you think that it would be appropriate for no information to be disclosed in respect of treasury shares in qualifying companies?

(xxi) If you think that no information should be disclosed, please justify this position.

(xxii) Are there any other more general points that you would like to raise about treasury share regulations?