



Responses to the Consultation on the
**Companies Acts 1931 to 2004
(Treasury Share) Regulations 2013 &
Companies Act 2006 (Treasury
Share) Regulations 2013** (26 August
to 20 September 2013)

&

Further Consultation on the
**Companies Acts 1931 to 2004
(Treasury Share) Regulations 2014 &
Companies Act 2006 (Treasury
Share) Regulations 2014**
(1 April 2014 to 28 April 2014)

Issued by the Treasury, on behalf of
The Department of Economic Development
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Introduction

The Treasury consulted on behalf of the Department of Economic Development ("DED"), for the period 26 August 2013 to 20 September 2013 ("the 2013 Consultation") on the topic of treasury share regulations under both the Companies Acts 1931 to 2004 ("the 1931 Act") and the Companies Act 2006 ("the 2006 Act").

The consultation proposed that the existing Companies Act 1931 to 2004 (Treasury Share) Regulations 2010 ("the 2010 Regulations") be amended to consider a more permissive regime. In addition to this, it was noted that at the time that the 2010 Regulations were made under the 1931 Act, no provision was made in respect of a comparable regime under the 2006 Act. The reason for this omission in 2010 was that the capital maintenance regime under the 2006 Act appeared to be sufficiently flexible as to obviate the need for treasury shares under this legislation.

The driver for making regulations to permit treasury shares in the Isle of Man in 2010 was industry led. The FSC, who were at that time responsible for making the Island's company law, responded and duly set out the scope of the regime that it proposed to introduce. No responses were received in respect of the original consultation which was undertaken in February 2010. On this basis, it was assumed that the scope was sufficiently wide and FSC proceeded to make the 2010 Regulations. These regulations consider only certain specified types of companies incorporated under the 1931 Act.

Six responses were received to the consultation on the Companies Acts 1931 to 2004 (Treasury Share) Regulations 2013 ("the draft 1931 Act 2013 Regulations") and the Companies Act 2006 (Treasury Share) Regulations 2013 ("the draft 2006 Act 2013 Regulations"). It should be noted that one of these respondents submitted a consolidated response on behalf of much of the regulated financial services sector in the Island. The Treasury and the DED wish to thank those who participated and responded.

The 2013 Consultation, taking account of submissions and requests from industry, made the assumption that treasury shares were desirable and/or required in respect of the 2006 Act. On this basis, the consultation applied to regulations that were to be made under the 2006 Act and the 1931 Act.

Within this widening of scope of application, three fundamental parameters were tested. These were whether:

1. it was desirable to remove the restriction of the 10% upper limit of qualifying shares that market traded companies could hold in treasury;
2. it was desirable to widen the scope of application of the treasury share regulations to include a wider definition of qualifying company than currently permitted; and
3. increased levels of transparency and disclosure would be appropriate under a more permissive regime.

This document provides a summary of the comments received and the Treasury and DED response. The draft Companies Acts 1931 to 2004 (Treasury Share) Regulations 2014 and the draft Companies Act 2006 (Treasury Share) Regulations 2014 (“the draft 2014 Regulations”) reflect the post consultation position in respect of treasury shares under both regimes.

Since the draft 2014 Regulations represent substantially revised versions of the original proposals, it has been considered to be appropriate to allow further comments to be submitted for a limited period of a further four weeks from 1 April 2014 to 28 April 2014.

Please ensure that all comments on the draft 2014 Regulations are received by no later than 17:30 on Monday 28 April 2014. No late submissions will be accepted.

Further comments and responses should be sent in writing or by email (preferably as Word documents) to:

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A Removal of maximum holdings restriction

The 2010 Regulations were introduced with a limit on the maximum allowable holding of treasury shares. This mimicked the original UK limit and was set at 10% of the total of the issued share capital of a company. Any shares held in excess of 10% were required to be cancelled.

At the time that the 2010 Regulations were made, the UK had already removed the 10% upper limit from its legislation.

Treasury shares remain a relatively new concept, having been introduced into the UK legislation in 2003. In the intervening decade no obvious problems have become apparent in respect of treasury shares. In recognition of this, it is proposed that the upper limit on the number of shares that a company can hold in treasury be removed from the Isle of Man's legislation.

While the 2010 Regulations applied only to companies incorporated under the 1931 Act, a decision has been taken to facilitate the holding of treasury shares in companies incorporated under the 2006 Act as well.

The draft 2014 Regulations confirm that unless a 1931 Act company is a private limited company, the company must have a minimum of two shares in issue at all times. A private limited company can have one share in issue. 2006 Act companies can have one share in issue as there is no distinction drawn between private and public companies.

The reason for the requirement that there are a minimum number of shares in issue 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 a minimum number of ordinary shares in issue.

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

The 2010 Regulations restricted the use of treasury shares to those companies that were listed or traded on a market. The draft 2013 Regulations suggested that the regime should be applied to all companies meeting the revised definition of a qualifying company.

The 1931 Act draws a distinction between public companies and private companies. For this reason, the draft 1931 Act 2013 Regulations considered widening the definition of "qualifying company" to include a company:

- (a) whose shares are admitted to trading on an established market;
- (b) which is a public company within the meaning given by section 341 of the Companies Act 1931; or

- (c) which is a collective investment scheme within the meaning given in Part 1 of the Collective Investment Schemes Act 2008.

The 2006 Act draws no distinction between public and private companies. For this reason, the definition of qualifying company in the draft 2006 Act 2013 Regulations considered a qualifying company to be one:

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

While certainly not unanimous, the responses to the consultation were in favour of widening the scope of application to include private companies. The rationale put forward was that there may well be instances where for example, through an employee share option plan, the shares of a private company may be owned by an employee who wishes to leave the employ of that company. There is obviously no market available on which these shares can be sold. In addition to this, the company may view it as undesirable to transfer the shares to a third party. Permitting private companies to hold shares in treasury would enable these companies to pay departing employees out for their shares, but to retain these until such time as it is deemed appropriate to transfer ownership from the company to a third party/another employee or perhaps even cancel the shares in due course. The value is that the company will have time to consider its options.

Those respondents who opposed a wholesale widening of scope were unable to put forward any concrete reasons why this might be undesirable. Careful consideration was given to this and attempts were made to define what the possible risks might be. Despite this, no concrete risks could be identified and the 2014 Regulations have been drafted in the knowledge that there might be some level of risk attached. Since the type and level of risk was unquantifiable this was not deemed to be a sufficiently good reason not to consider widening the scope to include private limited companies.

Unless good reason can be shown why this should not happen, it is proposed that regimes that are put in place for 1931 Act and 2006 Act companies will permit all limited companies to buy their shares back and hold them in treasury. This will be subject always to the statutory minimum number of ordinary shares being in issue.

C Additional disclosure under the Regulations

The 2010 Regulations require a company to make a return to the Companies Registry that discloses the following information in respect of treasury shares:

- (a) the number and nominal value of the shares involved;

- (b) the date on which the transaction took place;
- (c) the number of treasury shares;
- (d) the total number of shares in issue.

It was proposed that additional information should be disclosed in respect of treasury shares. This was strongly supported by two respondents. While some respondents simply indicated general support for the revised regime, none were opposed to a widening of the information that should be disclosed in the return made to the Companies Registry. Reasons for additional information to be disclosed included that shares being held in treasury by a company could alter the percentage holdings which might, in the case of listed companies, trigger the thresholds for notifications to be made on the size of the holdings of individual shareholders. The additional disclosures are intended to make it easier for shareholders to analyse data relating to the size of shareholdings.

The draft regulations now propose that the following information should be disclosed in respect of any transaction (purchase/sale/disposal) of treasury shares:

- (a) the particulars of the class of shares;
- (b) number of the shares;
- (c) the par value of each share;
- (d) the date on which the transaction took place;
- (e) the total number of shares held in treasury following the transaction; and
- (f) the total number of shares in issue following the transaction.

It is proposed that the same level of disclosure will be required under the new 1931 Act and 2006 Act Regulations. It is noted that the obligation to make a return in respect of a 2006 Act company is unlikely to be universally welcomed. It should however also be noted that the Island has made a commitment to transparency. The limited disclosures proposed here will still fall short of expectations under the IOSCO Principles. They will however provide shareholders of 2006 Act companies with sufficient information to be able to assess the percentage of their shareholdings in order to determine whether or not the threshold for notification to the listing authority has been reached.

While the Isle of Man's commitment to transparency inclines the Treasury towards a greater amount of information being included in any return made to the Companies Registry, a sufficiently persuasive argument to the contrary would be considered.

It should however be noted that, as always, there is no guarantee that a response on a particular matter will result in a change being made to the current proposals.