

[Latham & Watkins Capital Markets Practice](#)

28 March 2022 | Number 2942

[阅读本客户通讯中文版](#)

Share Buy-Backs in Hong Kong: What to Know

As share buy-backs hit record levels, listed issuers should understand their options when pursuing share buy-backs and the related legal and regulatory implications.

Background

Share buy-backs are a popular way for listed companies and management to provide reassurance and confidence to investors of their long-term vision and commitment in the listed company, particularly when they believe share prices are undervalued. The repurchased shares will be cancelled, which also help improve the listed company's financial ratios.

This Client Alert outlines the different ways in which share buy-backs can be executed under The Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited and The Codes on Takeovers and Mergers and Share Buy-backs, and the implications of these different methods.

Different Methods of Share Buy-Backs

In Hong Kong, a listed company can engage in share buy-backs in four ways:

1. **On-market share buy-back:** Share buy-back through the facilities of The Stock Exchange of Hong Kong Limited (the Stock Exchange)
2. **Exempt share buy-back:** Limited types of share buy-back, including an employee share buy-back
3. **Share buy-back by general offer:** A share buy-back by way of an offer to all shareholders
4. **Off-market share buy-back:** Share buy-back that does not fall into any of the above categories, most typically, buy-backs from specific shareholders without going through the facilities of the Stock Exchange

On-Market Share Buy-Back

On-market share buy-back is essentially buy-back of the shares through open market. Whilst shareholder approval is required, this is most typically pursuant to the repurchase mandate granted by the

shareholders at its annual general meeting to repurchase shares up to a maximum of 10% of shares in issue (the Repurchase Mandate).

Listed companies should note that a number of restrictions apply to on-market share buy-back, including:

- The purchase price cannot be higher by 5% or more than the average closing market price for the five preceding trading days on which its shares were traded on the Stock Exchange.
- On-market purchases of shares must be for cash and settlement otherwise than in accordance with the trading rules of the Stock Exchange.
- The listed company must not knowingly purchase its shares from a core connected person and a core connected person shall not knowingly sell shares to the listed company.
- The listed company must procure that any broker appointed by it to effect the purchase of its shares shall disclose to the Stock Exchange such information about purchases made on its behalf as the Stock Exchange may require.
- The listed company must not make any on-market purchases at any time after inside information has come to its knowledge, until that information is publicly available. In particular, the listed company shall not make any on-market purchases of its shares during the regulatory blackout periods.¹
- The listed company must not make any on-market purchases if that purchase would result in the public float of its shares falling below the relevant prescribed minimum percentage for the listed company as determined by the Stock Exchange at the time of its listing.
- The listed company must not make new issue of shares or announce a proposed new issue of shares for a period of 30 days after it has made any purchase of its shares.

On-market share buy-back is the most commonly used execution mechanism for share buy-backs as the repurchase mandate has already been pre-approved by the shareholders, and therefore execution can be done on a swift basis. However, this is subject to the timing, pricing and other restrictions outlined above. The listed company must also file reports to the Stock Exchange no later than 30 minutes prior to commencement of pre-opening trading session on the next business day. There is also an annual cap of 10% of the then existing issued share capital at the time such repurchase mandate was approved at the general meeting which can be authorized under the repurchase mandate.

Share Buy-Back by General Offer

Share buy-back by general offer is essentially an offer made to all shareholders of the listed company. The process involves a number of formalities and extensive documentation, including, but not limited to:

- The offer requires approval by independent shareholders by ordinary resolution in an extraordinary general meeting convened by a notice accompanied by the offer document.
- The listed company is required to form a committee (Independent Board Committee) comprising all non-executive directors of the listed company who have no direct or indirect interest in the proposed repurchase to advise the independent shareholders in respect of the proposed repurchase.

- The listed company is required to appoint an independent financial adviser to advise the Independent Board Committee in connection with the proposed repurchase, in particular, as to the fairness and reasonableness of the terms of the proposed repurchase and as to voting by the independent shareholders.
- Financial adviser is required to provide a cash confirmation, stating it is satisfied that the financial resources of the listed company are, and will remain, sufficient to satisfy full acceptance of the proposed repurchase.

Timetable for Effecting a Share Buy-Back by General Offer

Date	Event
Day -21	<p>Publish the announcement of intention to repurchase by the listed company (the Rule 3.5 Announcement)</p> <p>The Rule 3.5 Announcement would need to be pre-vetted by the Securities and Futures Commission (SFC). The pre-vetting process would normally take two to three weeks assuming there is no novel issue for the SFC's consideration.</p>
Day 0	<p>Publish the offer document (Offer Document) together with the notice of extraordinary general meeting (EGM) and other ancillary documents within 21 days of the date of Rule 3.5 Announcement.</p> <p>If additional time is required to prepare the Offer Document, an application for extension would need to be submitted to the SFC.</p>
Day +15	<p>EGM for shareholders to consider and approve the proposed repurchase and whitewash waiver (if applicable)</p> <p>The EGM should be held at least 10 clear business days after the date of notice of EGM.</p> <p>The results of the EGM shall be published on the same day.</p>
Day +29	<p>Closing date of the offer acceptance period.</p> <p>Publish the announcement setting out results of the repurchase offer.</p>
Day +39	<p>Completion of the share repurchase.</p>

Off-Market Share Buy-Back

Off-market share buy-backs must be approved by the Executive Director of the Corporate Finance Division of the SFC (Executive) before a repurchasing company acquires any shares from specific shareholders pursuant to such share buy-back. Such approval will normally be conditional upon obtaining an approval of the proposed off-market share buy-back by at least three-fourths of the votes cast on a poll by disinterested shareholders in attendance in person or by proxy at a general meeting of shareholders. In order to conduct an off-market share buy-back:

- A circular containing certain information regarding the off-market share buy-back has to accompany the notice convening such general meeting.
- An independent financial adviser has to be appointed in order to provide recommendation to an independent committee of the listed company's board of directors.

In an off-market share buy-back, the offer to buy back shares is only available to a limited number of shareholders. The fact that the offer is not available to all shareholders and hence shareholders are not treated equally, warrants stringent requirements including approval from the Executive and a high voting threshold (75% of the disinterested shares) for shareholders' approval of off-market share buy-backs. As a result of such stringent requirements, off-market share buy-backs are not commonly seen.

Comparison of the Different Types of Share Buy-Back

The table below sets out the key features of share buy-back by general offer, on-market share buy-back, and off-market share buy-back:

	Share buy-back by general offer	On-market share buy-back	Off-market share buy-back
Size	<ul style="list-style-type: none"> No actual limit 	<ul style="list-style-type: none"> Maximum of 10% of existing issued capital may be repurchased in any one year 	<ul style="list-style-type: none"> No actual limit
Shareholder Approval	<ul style="list-style-type: none"> Approval by independent shareholders by a majority of votes cast 	<ul style="list-style-type: none"> Approved by the shareholders at the AGM as part of the general mandate by way of ordinary resolution 	<ul style="list-style-type: none"> Approval from 75% of disinterested shareholders
Regulatory Approval	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> SFC approval is required
Whitewash Waiver	<ul style="list-style-type: none"> Can apply for a whitewash waiver if share repurchase will trigger mandatory general offer obligation 	<ul style="list-style-type: none"> Not applicable 	<ul style="list-style-type: none"> Can apply for a whitewash waiver if share repurchase will trigger mandatory general offer obligation
Price	<ul style="list-style-type: none"> No price limit Independent financial adviser is required to opine on the "fairness" of the offer price 	<ul style="list-style-type: none"> Purchase price cannot be higher by 5% or more than the average closing market price for the five preceding trading days on which its shares were traded on the Stock Exchange 	<ul style="list-style-type: none"> No price limit Independent financial adviser is required to opine on the "fairness" of the offer price
Disclosure	<ul style="list-style-type: none"> Rule 3.5 announcement Offer document containing information on: <ul style="list-style-type: none"> Terms of the offer Change to the shareholding structure before and after completion of the offer Opinion of independent financial adviser Opinion from Independent Board Committee 	<ul style="list-style-type: none"> File report to the Stock Exchange no later than 30 minutes prior to commencement of pre-opening trading session on the next business day Details of repurchases made during the financial year must be disclosed in annual report 	<ul style="list-style-type: none"> Circular is required including information on: <ul style="list-style-type: none"> Identity of the proposed offeree(s), description of its business and relationship with offeror Description of terms and conditions of the agreement between the listed company and the proposed offeree Reasons for the share repurchase

	Share buy-back by general offer	On-market share buy-back	Off-market share buy-back
	<ul style="list-style-type: none"> During the period from the date of the Rule 3.5 Announcement until the completion of the proposed repurchase, shareholders holding 5% or more of the issued share capital of the listed company and the financial advisor(s) of the listed company for the proposed repurchase would be required to publicly disclose their dealings in the company's securities no later than 12 noon on the business day following the date of transaction 		<ul style="list-style-type: none"> Opinion of independent financial adviser Opinion from Independent Board Committee
Source of Shares	<ul style="list-style-type: none"> All shareholders 	<ul style="list-style-type: none"> Secondary market Cannot knowingly purchase from core connected person 	<ul style="list-style-type: none"> Specific sellers; can be a connected person
Other Considerations	<ul style="list-style-type: none"> No general blackout period Requires appointment of independent financial advisor Cash confirmation is required 	<ul style="list-style-type: none"> Timing constraint: share repurchase cannot be conducted during blackout periods 	<ul style="list-style-type: none"> Requires appointment of independent financial advisor

Identifying whether or not a share buy-back is an off-market share buy-back is important. In a recent example, a listed issuer and a number of its directors and senior management were publicly censured and/or criticised by the SFC in March 2022 for failing to comply with Rules 1 and 2 of the Buy-back Codes in obtaining prior approval from the Executive before conducting and obtaining shareholders' approval for an off-market buy-back.

Whitewash Waiver

If a shareholder's proportionate interest in the voting rights of the repurchasing company increases as a result of a share buy-back, such increase will be treated as an acquisition of voting rights for purposes of the Code on Takeovers and Mergers (the Takeovers Code). As a result, a shareholder or a group of shareholders acting in concert may obtain or consolidate control of a repurchasing company and thereby become obliged to make a mandatory offer in accordance with Rule 26 of the Takeovers Code if:

- Any person (or two or more persons acting in concert), either through a series of transactions over a period of time or not or otherwise, acquires 30% or more of the voting rights of a listed company.
- Any person (or two or more persons acting in concert) holding between 30% and 50% of the voting rights of a listed company, acquires additional voting rights and such acquisition increases their

collective holding of voting rights of the listed company by more than 2% from the lowest collective percentage holding of such persons in the 12 month period.

In such circumstances, the Executive should be consulted at the earliest opportunity. The Executive will normally grant a waiver from the obligation to make a mandatory general offer if:

- The Takeovers Code implications of the share buy-back are disclosed in the offer document.
- The share buy-back is approved in accordance with the applicable shareholder approval requirements of the Share Buy-backs Codes.
- The procedures applicable to a whitewash waiver set out in Note 1 on dispensations from Rule 26 of the Takeovers Code and Schedule VI is followed, including, amongst others:
 - The whitewash waiver and the share repurchase must be separately approved by at least 75% and more than 50% respectively of the independent votes that are cast either in person or by proxy at shareholders' meeting.
 - The person seeking the waiver must not execute any disqualifying transaction during the date six months prior to the announcement of the proposals, and up to and including the date of the shareholders' meeting.

In a decision by the Takeovers and Mergers Panel (Panel) dated 17 December 2003, the Panel considered a ruling in which the Executive found that Rule 32.1 of the Takeovers Code did not enable a whitewash mechanism to be used to waive mandatory general offer obligations triggered by on-market share repurchases. The Panel concluded that Rule 32.1 should not be interpreted so as to permit whitewash applications in respect of mandatory bid obligations triggered by on-market share repurchases. The Panel considered it was deliberate that whitewash waiver is only available to two specific types of share repurchases, namely share repurchases by general offer and off-market share repurchases.

Conclusion

In determining the structure of the share back-buy and the method in which to conduct the share buy-back, companies must consider a number of factors, such as the timing of the share buy-back, the size of the share repurchase, and whether a mandatory general offer obligation will be triggered as a result of the share repurchase.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Cathy Yeung

cathy.yeung@lw.com
+852.2912.2622
Hong Kong

Terris Tang

terris.tang@lw.com
+852.2912.2719
Hong Kong

Mandy Wong

mandy.wong@lw.com
+852.2912.2682
Hong Kong

You Might Also Be Interested In

[Hong Kong Stock Exchange Publishes SPAC Consultation Conclusions](#)

[China Securities Regulatory Commission Proposes Major Expansion of Shanghai London Stock Connect Programme](#)

[Hong Kong Securities and Futures Commission Publishes Consultation Paper on Bookbuilding, Placing Activities and Sponsor Coupling](#)

[Considerations for a Business Combination with a SPAC](#)

[The Stock Exchange of Hong Kong Limited Listed Issuer Regulation Newsletter \(Chinese Version\)](#)

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's Client Alerts can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham, [visit our subscriber page](#).

Endnotes

¹ The period of one month immediately preceding the earlier of (i) the date of the board meeting for the approval of the listed company's results for any year, half-year or quarterly period; and (ii) the deadline for the listed company to publish an announcement of its results for any year, half-year or quarterly period, and ending on the date of the results announcement.