

New Regulation on Acquisition of Publicly Listed Company

On July 27, 2018, the Financial Services Authority (*Otoritas Jasa Keuangan* – “**OJK**”) of the Republic of Indonesia issued a new OJK Regulation No. 9/POJK.04/2018 on Acquisition of Publicly Listed Companies (“**POJK 9/2018**”). POJK 9/2018 replaces BAPEPAM-LK Reg. No. IX.H.1 on Acquisition of Publicly Listed Companies (“**Reg. IX.H.1**”).

Acquisition, as defined by both Reg. IX.H.1 and POJK 9/2018, means an action, either directly or indirectly, that causes a change of controller (“**Acquisition**”).

As has been the policies in relation to the Acquisition of a publicly listed company, an Acquisition would trigger the obligation of a new controller to conduct what is called a Mandatory Tender Offer (“**MTO**”). MTO itself is defined under both Reg. IX.H.1 and POJK 9/2018 as offer for the purchase of remaining shares in a publicly listed company that must be conducted by a new controller.

Based on the above definition and policies on MTO, POJK 9/2018 introduces new definition and interpretation on the term “controller”, as well as several new policies in relation to the implementation of the MTO obligation.

❖ DEFINITION AND ASSESSMENT OF “CONTROLLER” IN A PUBLICLY LISTED COMPANY

POJK 9/2018 introduces examples of documents or information that may be used as evidence of control over a publicly listed company. Under Reg. IX.H.1, a controller means a party that directly or indirectly: (a) owns more than 50% of fully paid shares in a publicly listed company; or (b) having the ability to determine, either directly or indirectly, through any means, the management and/or the policy of a publicly listed company (point (a) and (b) herein shall be referred to as “**Control**”, and the party having Control as “**Controller**”).

Previously, OJK as the supervising authority for publicly listed company, heavily relies on self-assessment of a prospective Controller, to conduct the proper assessment and disclosure in a proposed Acquisition transaction. This is especially the case if a shares purchase transaction does not reach 50% of fully paid up shares in a publicly listed company. POJK 9/2018 now introduces some assistance for these prospective Controller in determining the “ability to determine, either directly or indirectly, through any means, the management and/or the policy of a publicly listed company”.

Article 2 of POJK 9/2018 provides that Control based on the “ability to determine, either directly or indirectly, through any means, the management and/or the policy of a publicly listed company” may be proven by documentation and/or information that shows a party’s Control over a publicly listed company. In its elucidation of Article 2, POJK 9/2018 stipulates what kind of documents or information that determine a party’s Control over a publicly listed company, as follows:

- a. An agreement with other shareholder that shows a possession of more than 50% of the voting rights in the publicly listed company;
- b. A document/information that provides the authority of a shareholder to control financial and operation policy of the publicly listed company based on the articles of association or an agreement;
- c. A document/information that provides that a shareholder has an authority to appoint or dismiss most members of the BOD and BOC;
- d. A document/information that provides that a shareholder has the majority voting rights in the BOD and BOC meetings; and/or

- e. A document/information indicating a control over a publicly listed company.

In addition to the above, POJK 9/2018 also provides that if there is a different provision on the criteria of a Controller in other regulations, the criteria of the Controller under POJK 9/2018 would be applicable. This provision relates to other specific regulations governing definition of controlling shareholders in, among others, banking, insurance, and multi-finance industries. This provision, as it appears, seems to address the conflicting definition of “Controller” in financial institutions, which determines that a party is deemed as controlling a financial institution if it holds more than 25% paid-up shares in such institution.

For example, for insurance company, a new shareholder will be deemed as new controller if it owns shares exceeding 25% of fully paid up shares. Consequently, this will require such party to undertake and pass the fit and proper test as the new controller. However, such new controller will only be bound by MTO requirement if it owns more than 50% shares in such insurance company or fulfill the criteria of “Controller” having the ability to determine, either directly or indirectly, through any means, the management and/or the policy of a publicly listed company under POJK 9/2018.

❖ **MANDATORY TENDER OFFER BY AFFILIATE OF THE NEW CONTROLLER**

Article 8 of POJK 9/2018 provides new provision that MTO may be carried out by another party appointed by the new Controller (must be a subsidiary of the Controller, at least 50% owned by the Controller, whether directly or indirectly). Further, POJK 9/2018 requires such appointed party to conduct all procedures for the implementation of MTO.

This possibility of appointing subsidiary to carry out MTO is newly introduced in POJK 9/2018 as it was not accommodated in Reg. IX.H.1. This possible appointment-arrangement might ease the new Controller in having to bear the additional costs required to purchase additional shares for all shareholders exercising the option under MTO implementation – which might be difficult to estimate. With this arrangement, the new Controller may allocate such additional costs to be borne by its appointed subsidiary, if it chooses to. In addition, this also accommodate a possibility for a third party (aside from the new Controller and its appointed subsidiary undergoing the MTO) to indirectly participate in acquiring additional shares obtained during MTO process from its shareholding in such subsidiary (e.g. the party which own the remaining 49% of such appointed subsidiary) by providing financing as well as holding certain control over the target company, although indirectly.

❖ **QUALIFIED EXEMPTION FOR ACQUISITION OCCURRING BASED ON RIGHTS ISSUE**

Under the Reg. IX.H.1, MTO is exempted if an Acquisition occurs due to shares obtained as part of actions performed based on Regulation No. IX.D.1 (or the regulation governing Pre-Emptive Rights as now regulated under OJK Regulation No. 32/POJK.04/2015 dated December 22, 2015 on the Capital Increase in Publicly Listed Companies with Pre-Emptive Rights and Regulation No. IX.D.4 (or the regulation governing Issuance of Capital without Pre-Emptive Rights as now regulated under OJK Regulation No. 38/POJK.04/2014 dated December 30, 2014 on Capital Increase in Publicly Listed Companies without Pre-Emptive Rights).

Under POJK 9/2018, an Acquisition resulting from Rights Issue may only be exempted from MTO obligation if:

- The change of control results from the exercise of the pre-emptive rights in accordance with the new Controller’s proportion under such rights issue;
- The change of control results from a capital increase with rights issue in the context of debt restructuring where the company is in financial distress.

Previously under Reg. IX.H.1, any Acquisition resulting from Right Issue is exempted from MTO without any qualification of exemption. With this new qualification under POJK 9/2018, it seems that OJK would like to apply MTO obligation for certain Acquisition resulting from Right Issue – whereas under such corporate action, the new Controller subscribes newly issued shares in addition to its default proportion that results in a change of control.

❖ NO POSSIBLE EXTENSION FOR REFLOAT OBLIGATION

Previously under Reg. IX.H.1, the 2 years re-floating obligation may be extended under several conditions namely:

- *Indeks Harga Saham Gabungan* (IHSG) falls below 10% for 3 consecutive days;
- The Stock Exchange is closed;
- The trading of shares of the publicly listed company in the Stock Exchange is stopped;
- Natural disasters, wars, fires, which significantly affect the business of the publicly listed company;
- The price of the shares during the sell-down period has never been equals to or more than the price of MTO; and/or
- The new controller has taken an effort to conduct the refloat obligation, but the requirements have not been met.

POJK 9/2018 no longer regulates the possibilities of extending the 2-year period of refloat obligation.

❖ NEW PROVISIONS ON SANCTIONS

Previously, Reg. IX.H.1 provide specific type of sanctions for violations on certain obligations provided therein, including annulment of transaction for failure to conduct MTO.

Under this POJK 9/2018, sanctions are given administratively and given general treatment for any violations of obligation under POJK 9/2018, leaving OJK to determine based on its discretion of which sanctions should be applicable to which violations, namely:

- Written warning;
- Fines;
- Limitation of business activity;
- Suspension of business activity;
- Revocation of business license;
- Cancellation of approval; and/or
- Cancellation of registration.

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