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New OJK Regulation Requires Standby Buyers that Acquire a Public Company through a Rights Issue Subscription to conduct a Mandatory Tender Offer



On the 27th of July of 2018, the Financial Services Authority (Otoritas Jasa Keuangan or “**OJK**”) ratified OJK Regulation No. 9/POJK.04/2018 of 2018 regarding Acquisition of Public Companies (“**OJK Regulation No. 9/2018**”), revoking and replacing the previous regulation which governed the acquisition of public companies (“**Acquisition**”), namely Bapepam LK Regulation No. IX.H.1 (“**Regulation No. IX.H.1**”). The new OJK regulation differs from its predecessor in some important issues, including mandatory tender offer (“**MTO**”) requirements in the case of Acquisition through rights issue, the definition of a controlling party that acquires a public company (“**Controlling Party**”), refloating requirements and other matters which will be discussed further herein.

HIGHLIGHTS OF OJK REGULATION NO. 9/2018

A. Mandatory Tender Offer Requirements in The Case of An Acquisition through a Rights Issue

i. Rights Issue Exception

Under Regulation IX.H.1, an Acquisition that occurs as a result of an increase of capital (“**Rights Issue**”), whether with or without preemptive rights, shall be exempted from obligations of Acquisition announcement and MTO. However, under the new OJK Regulation No. 9/2018, an Acquisition resulting from a Rights Issue with preemptive rights shall only be exempted to the extent that the new Controlling Party received their shares through the exercise of their preemptive rights in accordance with the portion of their ownership of shares. The implications of such provision are that:

a) the subscription of shares by new shareholders, such as the standby buyer, will be subject to Acquisition announcement and MTO requirements (“**Rights Issue-MTO**”), as only existing shareholders may exercise preemptive rights; and

b) as clarified in the elucidation to OJK Regulation No. 9/2018, the exemption does not include the exercise of preemptive rights that are purchased or transferred from another party, even if purchased by or transferred to an existing shareholder.

ii. MTO Price

According to OJK Regulation No. 9/2018, the share purchase price for a Rights Issue-MTO shall be:

- a) the average of the highest trade price within a period of 90 (ninety) days before the disclosure of information regarding a Rights Issue which includes the disclosure of the prospective Controlling Party (“**Average Price**”); or
- b) the price of the Acquisition that has already been conducted (“**Acquisition Price**”), whichever is higher.

The determination of the Average Price is subject to the timing of the public company's disclosure of the prospective Controlling Party in accordance with the relevant OJK regulation governing rights issue with preemptive rights. As for the Acquisition Price, according to confirmation from OJK officials, in the case of a Rights-Issue MTO, the Acquisition Price shall be the price of subscription of the public company's shares by the new Controlling Party, as agreed upon in the standby buyer agreement between the new Controlling Party and the public company.

B. Refloating Requirement

Under Regulation IX.H.1, in the case where an MTO results in the Controlling Party owning more than 80% (eighty percent) of the paid up capital in the public company, then the Controlling Party shall transfer shares back to the public shareholders, such that the shares that are held by the public shareholders shall:

- a) amount to at least 20% (twenty percent) of the paid up capital of the public company; and
- b) be held by at least 300 (three hundred) parties,

at the latest 2 (two) years since the finishing of the MTO implementation.

Although OJK Regulation No. 9/2018 still require the transfer of shares so that at least at least 20% (twenty percent) of the paid up capital of the public company, it no longer requires the shares to be held by at least 300 (three hundred) parties.

Furthermore, while Regulation IX.H.1 provides that, under certain circumstances, OJK shall have the option to extend the time period to fulfill the refloating requirement, OJK Regulation No. 9/2018 does not provide such option to extend.

C. Other Important Matters

i. Indirect Acquisition of Public Companies

Both Regulation IX.H.1 and OJK Regulation No. 9/2018 define Acquisition as a change in the Controlling Party of the public company. However, the new definition of Controlling Party under OJK Regulation No. 9/2018 is clearer in its coverage of indirect controlling shareholders.

Under Regulation IX.H.1, parties who indirectly own 50% (fifty percent) of shares in the public company ("**Indirect Controlling Shareholders**") are not expressly included as a Controlling Party. Although such Indirect Controlling Shareholders may be considered as "*parties who have indirect control over the management and/or policy of the public company*", the previous regulation offers no method of proving or calculating such indirect control.

Under the definition of Controlling Party in OJK Regulation No. 9/2018, Indirect Controlling Shareholders are expressly considered as Controlling Party. Thus, under OJK Regulation No. 9/2018, a change in Indirect Controlling Shareholders will trigger obligations for Acquisition including, among others, obligations for Acquisition announcement and MTO in accordance with the provisions of such regulation.

OJK Regulation No. 9/2018 further clarifies that control over a public company that is based on the "*ability to decide the management and/or policy of the public company*" shall be proven by document(s) and/or information that proves such control, such as:

Agreement(s) with other shareholder(s), to the effect that the party owns more than 50% (fifty percent) of voting rights;

- a. Authority to control financial and operational policies of the public company based on the articles of association/agreement;
- b. Authority to appoint or change the majority of the members of the board of directors and members of the board of commissioners that control the public company through the board of directors and board of commissioners;
- c. Ability to control the majority of the board of directors meeting and board of commissioners meeting and thus control the public company; and/or
- d. Other abilities that may indicate control over the public company.

Aside from the above, it is also important to note that, in the case where a regulation from a different sector (such as banking, insurance or finance) provides criteria for controlling party and/or control that differs from the criteria as provided under OJK Regulation No. 9/2018, the criteria under OJK Regulation No. 9/2018 shall apply in the implementation of OJK Regulation No. 9/2018.

ii. Appointment of third party to conduct MTO

OJK Regulation No. 9/2018 provides the option for the new Controlling Party to appoint a third party to conduct the MTO for and on behalf of the Controlling Party. Such third party must be a subsidiary of the Controlling Party whose fully paid-up voting shares are at least 50% (fifty percent) owned by the Controlling Party, either directly or indirectly.

iii. MTO exception for an Acquisition that is previously disclosed in a prospectus

An Acquisition that has been disclosed in the public company's prospectus for a public offering of equity securities will not be subject to MTO obligation, as long as the public offering is conducted at the latest 1 (one) year after the effective date of the registration statement.

iv. Disclosure of proof of funds and development plan as part of MTO announcement

Under OJK Regulation No. 9/2018, an MTO announcement shall include, among others, (i) a statement that the new Controlling Party has sufficient funds to conduct an MTO and discloses the source of such funds and (ii) the new Controlling Party's development plan for the public company.

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