

# *PwC Indonesia Legal Alert*

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OJK New Regulation on Takeover of Public Companies



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On 27 July 2018, the Indonesian Financial Services Authority (“**OJK**”) issued OJK Regulation No. 9/POJK.04/2018 on Takeover of Public Companies (“**OJK Regulation 9/2018**”) to repeal and replace Regulation No. IX.H.1 attached to Decree of Bapepam-LK No. Kep-264/BL/2011 on Takeover of Public Companies (“**Old Regulation**”).

OJK Regulation 9/2018 addresses practical issues encountered in acquisition of public companies and regulates these matters more clearly, increasing protection for investors and upholding the fairness, transparency and accountability principles of the Indonesian capital markets in general.

### 1) *Definition of Controlling Shareholder*

OJK Regulation 9/2018 added the words “directly and indirectly” to the definition of “Controlling Shareholder” which now reads as a Party, that directly or indirectly: (i) holds more than 50% of the total issued shares with voting rights; or (ii) has the ability to determine, directly or indirectly, in any way the management and/or policy of the public company.

This new phrasing eliminates any doubt that a Party indirectly holding more than the shareholding threshold is considered as Controlling Shareholder of a listed company. This ultimately clarifies the indirect control concept which was not clearly formulated in the Old Regulation.

OJK Regulation 9/2018 also clarifies that the ability to determine, directly or indirectly, in any way the management and/or policy of the public company could be evidenced by, among others, any of the following documents and/or information. This clarifies the gap for an evidence of control by minorities.

- a. any agreements with other shareholders that allow it to have more than 50% voting rights
- b. any authority to determine financial and operational policy based on the listed company’s articles of association or agreements
- c. any authority to appoint or dismiss a majority member of the board of directors and the board of commissioners who control the listed company through the board of directors and the board of commissioners
- d. any powers to dominate majority votes in the board of directors’ and the board of commissioners’ meeting allowing them to control the listed company;
- e. any other powers indicating control over the listed company

### 2) *Control Threshold*

Whilst not introducing new requirements on change of control situation, OJK Regulation 9/2018 clarifies that the control threshold for implementing requirements in acquisition of public companies now refers only to that defined under OJK Regulation 9/2018.

This means, for most financial institutions (which applies a 25% control threshold), a new 25% controlling shareholder of a listed Indonesian financial institution does not need to carry out a mandatory tender offer after acquiring the initial 25% shares, but only after the more than 50% threshold is reached, subject to single shareholder limit which may apply.

This benefits those parties looking to acquire or structuring a takeover of a listed company engaging in those specific industries with control thresholds lower than 50%.

### **3) Mandatory Tender Offer (MTO) & Sell-Down Requirements**

OJK Regulation 9/2018 now allows a new Controlling Shareholder to appoint another Party to carry out the MTO requirement provided that it is an effectively more than 50% subsidiary of the Controlling Shareholder. Where another Party is appointed for such purpose, it will have to comply with the MTO procedures and requirements under OJK Regulation 9/2018, including independent financial capability.

This new provision would benefit a party looking to acquire a listed company in particular where such party does not plan to fund the MTO itself, and would offer more flexible structuring schemes of takeovers of listed companies.

Similar to the Old Regulation, OJK Regulation 9/2018 also requires a new Controlling Shareholder to sell-down shares in excess of 80% of a listed company where those shares were acquired through an MTO, to sell-down to 80% within two years of the MTO, and retain a minimum public float. The key difference introduced is that OJK now strictly requires new Controlling Shareholders to complete the sell-down requirement within two years of the MTO and no extension allowed. Failure to comply with the sell-down requirement will be subject to the sanctions provided under OJK Regulation 9/2018.

It remains to be seen how the OJK will strictly implement this looking at the sell-down challenges commonly found in practice. The aim of this requirement is enhanced minority protection and liquidity of the shares in the market, and ultimately, parties looking to acquire a listed company should anticipate and plan the sell-down requirement well in advance.

OJK Regulation 9/2018 does not require for there to be at least 300 shareholders upon the sell-down completion. However, given the rules of the IDX, if the company is listed on the IDX, the listed company must still comply with the IDX free float requirement. It should also be noted that the IDX rules do not provide a period for listed companies to comply with the IDX free float requirement, and so implementation by IDX remains to be seen.

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### **4) Changes in Exemptions**

Under the Old Regulation, a takeover announcement and MTO requirements are clearly exempt in a situation where a change of control has resulted from a rights issue or an increase of capital without pre-emptive rights.

OJK Regulation 9/2018 now introduces certain changes on the exemptions available particularly on rights issues or an increase of capital without pre-emptive rights situations. It now provides that the exemption only applies if the control is acquired as a result of an existing shareholder obtaining shares by exercising its rights in proportion to its shareholding. This would mean, if the control is acquired via a rights issue rather than a shareholder exercising its rights in proportion to its shareholding, it would be subject to the MTO requirements.

It also now provides that a change of control resulting from an increase of capital without pre-emptive rights in the context of a debt restructuring where the public company is in financial distress will be exempt from the takeover announcement and MTO requirements.

Given these changes, parties looking to acquire a listed company should anticipate these in structuring their takeover structure. It should also be anticipated that in a rights issue situation, the new exemption may discourage parties to carry out backdoor listings as it would trigger the MTO.

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