

## Client Alert

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### For More Information:

Iqbal Darmawan  
Partner  
+62 21 2960 8567  
iqbal.darmawan@bakermckenzie.com

Indah N Respati  
Partner  
+62 21 2960 8512  
indah.respati@bakermckenzie.com

Ken Prasadtyo  
Associate Partner  
+62 21 2960 8543  
ken.prasadtyo@bakermckenzie.com

Elvino Martinus  
Senior Associate  
+62 21 2960 8522  
elvino.martinus@bakermckenzie.com

## OJK's New Rule on Takeover of Public Companies

On 25 July 2018, the Indonesian Financial Services Authority (**OJK**) issued OJK Rule No. 9/POJK.04/2018 on Takeover of Public Companies (**New Rule**). The New Rule revokes Baepam-LK Rule No. IX.H.1 on Takeover of Public Companies, as attached to Decision of the Chairman of Baepam-LK No. Kep-264/BL/2011, dated 31 May 2011 (**Rule IX.H.1**). While the New Rule was issued on 25 July, it was only uploaded into the OJK's website early this week.

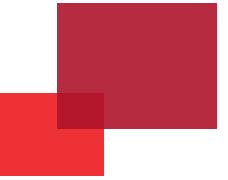
### What's New?

There are several changes introduced by the New Rule:

- Unlike Rule IX.H.1, the New Rule introduces a limitation on the mandatory tender offer (**MTO**) exemption with regard to a rights issue. Under the New Rule, the exemption only applies if the control is acquired as a result of a "shareholder obtaining shares by exercising its rights in proportion to its shareholding". Therefore, if the control is acquired in a rights issue other than through a shareholder exercising its rights in proportion to its shareholding (e.g., buying rights from other shareholders), it would be subject to the MTO requirements. This change may result in backdoor listings no longer be a preferred approach as they could trigger an MTO.
- The New Rule also limits the MTO exemption with regards to an increase of capital without pre-emptive rights. Under the New Rule, only control acquired as a result of an increase of capital without pre-emptive rights in the context of a debt restructuring where the public company is in financial distress that is exempted.
- The New Rule exempts a takeover that has been announced in the IPO prospectus of a public company from the takeover and MTO requirements set out under this rule.
- The New Rule maintains a mandatory sell-down requirement, but unlike Rule IX.H.1, the New Rule no longer regulates the extension of the mandatory sell-down period.

### Key Provisions

The key provisions of the New Rule are stated below. Similarly with Rule IX.H.1, if there is a change of control the new controller is required to do an MTO on the remaining shares of the public company (unless exempted).



1. **Ability to Control the Management.** The New Rule sets out samples of documents or information evidencing control of the management of public companies. The documents or information include:
  - a. a shareholders agreement that provides that a shareholder has more than 50% of the voting rights in the public company
  - b. a document that provides, or information that shows, the authority of a shareholder to control financial and operation policy of the public company based on the articles of association or an agreement
  - c. a document that provides, or information that shows, that a shareholder has an authority to appoint or dismiss most members of the BOD and BOC
  - d. a document that provides, or information that shows, that a shareholder has the majority voting rights in the BOD and BOC (through the BOD and BOC members that it nominated), and hence controls the public company
2. **Announcement.** Under the New Rule, the announcement of the takeover and the MTO can be done through one newspaper which has nationwide circulation or the IDX website. The announcement through the IDX website can only be done if the new controller of the public company is also a public company.
3. **Indirect Takeover.** If the new controller acquires a public company that controls another public company, the New Rule mentions that the new controller is not required to conduct an MTO for the shareholders of an indirectly owned public company if the income contribution of the indirectly owned public company to the consolidated financial statements of the directly owned public company is less than 50%. If the indirectly owned public company (a) is controlled by the new controller (as a result of a direct takeover of a public company) and (b) contributes more than 50% of income in the consolidated financial statements of the directly owned public company, the new controller is required to conduct an MTO of both the directly owned public company and the indirectly owned public company.
4. **MTO by Appointed Party.** The New Rule clarifies that an MTO can be done by another party appointed by the new controller, as long as the new controller owns, directly or indirectly, more than 50% of the shares of the appointed party.
5. **Changes in Exemptions.** Rule IX.H.1 mentions that takeovers resulting from a rights issue or an increase of capital without pre-emptive rights are exempted from the takeover announcement and the MTO requirements. However, the New Rule provides changes to the exemption of the takeover and MTO requirements, including:
  - a. The takeover results from a rights issue, where the shareholders obtain shares by exercising their rights in proportion to their shareholding.

b. The takeover results from an increase of capital without pre-emptive rights in the context of a debt restructuring where the public company is in financial distress.

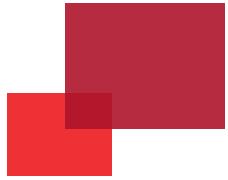
In addition, the New Rule also now exempts the takeover that has been announced in the IPO prospectus of the public company and the takeover occurs at the latest one year after the OJK issues its effective statement for the IPO from the takeover and MTO requirements.

Even though the new controller is exempted from the takeover announcement and the MTO requirement, the new controller is still required to announce the takeover in at least one newspaper or the IDX website (unless the takeover results from marriage, inheritance, a purchase of less than 10% of the public company's shares, a court decision, a merger, a spin off, a consolidation or a liquidation of a shareholder).

6. ***Additional Rule on Takeover Resulting from Rights Issues and Increase of Capital without Pre-emptive Rights.*** The New Rule also sets out additional requirements if the takeover results from a rights issue or an increase of capital without pre-emptive rights. We set out below a brief summary of the additional requirements.

	<b>Rights issue</b>	<b>Increase of capital without pre-emptive rights</b>
<b>Takeover Announcement</b>	The announcement must be made at the latest one working day after the latest share distribution.	The announcement must be made one day after the takeover.
<b>Pricing, if the takeover is conducted directly and the shares are traded on the IDX</b>	The minimum MTO price is the average of the highest daily trading price within the last 90 days prior to the announcement of the rights issue stating the details of the new controller.	The minimum MTO price is the average of the highest daily trading price within the last 90 days prior to the disclosure of information on the increase of capital without pre-emptive rights.

7. ***Minimum Shareholders upon Mandatory Sell-Down.*** Under the New Rule, if the shares owned by the new controller exceed 80% of the issued capital of the public company, the new controller must divest its shares to the public so that at least 20% of the shares of the public company are owned by the public. Unlike Rule IX.H.1, under the New Rule, there is no requirement for the shares to be held by at least 300 shareholders upon the mandatory sell-down. However, if the public company is listed on the IDX, the public company must still need to comply with the IDX free float requirement, including to have at least 300 shareholders.



As the MTO is still required to be done to all shareholders and followed by a mandatory sell-down requirement within two years, it is not clear as how the IDX will implement the free float requirement for public companies who are listed, as the free float requirement has no transition period. We would expect that the IDX will consider to adjusting the free float requirement to conform with the New Rule.

8. **Mandatory Sell-Down Period.** If the mandatory sell-down is required, it must be completed within two years. Under the New Rule, there is no provision on the extension of the mandatory sell-down period. The elucidation of the New Rule states that under the previous rule there was legal uncertainty due to the prolonged extension of the mandatory sell-down period done by the public companies. It seems that OJK, under the New Rule, intends to limit the possibility to extend the mandatory sell-down period.
9. **Sanctions.** The New Rule introduces sanctions similar with the other OJK rules. Unlike Rule IX.H.1, there is no specific amount of fine if there is any delay in submitting information required under the New Rule. Consequently, the Capital Market Law and its implementing regulations should be referred to for provisions on sanctions.

## Implementation

The New Rule became effective on 27 July 2018.

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HHP Law Firm  
Pacific Century Place, Level 35  
Sudirman Central Business District Lot. 10  
Jl. Jenderal Sudirman Kav. 52-53  
Jakarta 12190  
Indonesia

Tel: +62 21 2960 8888  
Fax: +62 21 2960 8999

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