

Client Update: Indonesia 26 March 2021

OJK Introduces Rules on Going Private and Obligation to Identify Controlling Shareholders



Indonesia's Financial Services Authority, or OJK, recently enacted Regulation No. 3/POJK.04/2021 on Implementation of Capital Market Activities. In line with its title, this regulation governs various capital market activities and the actors in it. The two main elements of this regulation are introducing the procedures to go private and identifying a public company's controlling shareholders and its obligations.

In the regulation, OJK identifies three situations where a public company can go private: voluntarily, based on an order from OJK, or based on an order from IDX. Meanwhile, on controlling shareholders, the regulation affirms OJK's policy of requiring public companies to disclose their controlling shareholders, whether direct or indirect.

We examine these two elements below in detail.

Going Private and Buyback

Previously, Indonesian law does not explicitly regulate the procedure for a company to go private. Instead, the procedure to go private was merely based on OJK's policy, given on an *ad hoc* basis to companies who intend to go private. In our experience, the procedure usually contained, among others, quorum requirement for the general meeting of shareholders ("**GMS**") approving the going private.

Under the new regulation, a public company can go private:

1. voluntarily;
2. based on OJK's request; or
3. based on IDX's request, if IDX intends to delist the company's shares.

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Going private voluntarily

In the first situation, the public company would need to:

1. obtain approval from their independent shareholders;
2. buyback all shares owned by its public shareholders until the number of shareholders is less than 50 (or any other number determined by OJK), except if there is a party who undertakes to buy all shares owned by the public shareholders;
3. announce the go private plan along with the announcement of GMS to approve such plan; and
4. applies to OJK for revocation of its effective registration statement.

The regulation states that OJK will revoke the effective registration statement at the latest 14 business days after OJK receives the application and supporting documents. Following the revocation, OJK will notify IDX to revoke the company's listed securities, and KSEI to revoke the company's securities from KSEI's collective depository. The revocations by IDX and KSEI must be made at the latest 14 business days after receipt by each IDX and KSEI of OJK's notification.

A voluntary buyback does not require a specific or standalone GMS' approval and must be completed at the latest 18 months following the announcement of the go private plan (see point 3 above). The regulation also sets out conditions for the pricing of the shares in a buyback.

Going private based on OJK's request

In certain situations, OJK may instruct a public company to go private. Upon receiving such instruction, the public company must buyback all shares owned by its public shareholders to reduce the number of shareholders to less than 50 (or any other number determined by OJK). However, unlike the voluntary go private, the buyback's timing will be determined further by OJK.

Situations where OJK will request a public company to go private include where such company violates the law, including if the violation occurs because the company's business activities can no longer be carried out by a public company, or if all the company's business licenses become invalid. OJK's request can also be based on the law or government's order or restriction. If the latter, the restriction must have caused disruption to the public company's business continuity for the last three years.

Lastly, OJK's can also request a public company to go private if such company has not been fully operational for the last three years or OJK cannot contact anyone (including any director, commissioner, or principal shareholder) from the company.

As mentioned previously, if OJK instructs a public company to go private, the timing for the buyback will be determined by OJK. Consequently, this could lead to a situation where there are no longer independent shareholders in the public company since the buyback can be conducted immediately after

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the GMS announcement and does not require the GMS' approval. Indeed, pursuant to OJK regulation regarding GMS, there is a gap of around 35 days between the GMS' announcement and the GMS date. That gap would allow the buyback to be completed before the GMS.

If this situation occurs, the public company would not be able to obtain independent shareholders' approval as required under the regulation.

Going private based on IDX's request

Other than as instructed by OJK, IDX can also revoke the listed securities of a public company if the public company experiences any condition or event that has a significant negative impact on its business continuity or if the public company no longer meets the listing requirements in IDX.

In this situation, IDX will notify OJK at the latest two business days after the relevant condition or event or before revoking the listed securities.

Tender offer

Where there is a party that agrees to purchase all the shares owned by the public shareholders to reduce the number of shareholders to less than 50, the public company will no longer be required to conduct a buyback.

Here, the purchaser will be required to conduct a tender offer based on the rules and procedures of a voluntary tender offer, except for pricing, which would follow the share buyback pricing under the regulation.

Disclosure of Controlling Shareholder

Previously, OJK may request a public company to disclose its controlling shareholders during the registration statement process. We have seen situations where OJK postponed the issuance of the effective statement for failure to disclose.

Now, there is an explicit requirement to disclosure, and a public company has no choice but to comply. A public company can disclose one or more controlling shareholders. The public company must make an initial disclosure when it submits its registration statement (and consequently, that disclosure must also be made in the prospectus) and an ongoing disclosure in the event of any change of control.

Liability of controlling shareholder

The regulation also details the controlling shareholder's liability. A controlling shareholder will be responsible for the public company's losses if such losses are caused by:

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1. the public company's action that was taken in bad faith for the controlling shareholder's personal gain;
2. an illegal act by the public company; or
3. the illegal use of the public company's assets by the controlling shareholder, resulting in the public company's inability to comply with its financial obligations.

The determination of the controlling shareholder's liability will depend on the independent shareholders' decision in an independent GMS, OJK's decision, or court decision.

Determination of controlling shareholder

The authority to determine controlling shareholder lies with either the shareholders or OJK.

The shareholders can determine the public company's controlling shareholders in a GMS if there is a shareholder who has the ability to control but does not declare itself as a controller.

Meanwhile, OJK can determine the controlling shareholders in specific situations, e.g. if such company cannot determine its controlling shareholders as the majority of the shares are owned by the public shareholders. OJK needs to base its determination on the relationship between the shareholders pursuant to an affiliated relationship or an agreement.

It is also important to note that the regulation prohibits any party from spreading its ownership in a public company to several parties, either directly or indirectly, with an intent to obscure its status as the controlling shareholder.

Other Points of Interest

The regulation states that shares ownership of at least 20% of the paid-up capital of a public company owned through or held by a securities portfolio managed by an investment manager will be excluded from the calculation of attendance and decision quorums in a GMS. However, this provision does not apply to limited participation mutual funds (*reksa dana penyertaan terbatas*) in the form of a collective investment contract. This concept may diminish shareholders' rights under the Companies Law (Law No. 40 of 2007), as amended by the Omnibus Law (Law No. 11 of 2020) because the Companies Law entrenched the rights of shareholders to attend and vote in the GMS.

Lastly, OJK can act against or order a violating public company to, among others, refund any profit generated or to pay compensation, suspend its rights and benefits (e.g. to receive dividends or exercise voting rights), restrict its activities, and postpones the issuance of the effective statement or licenses.

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Conclusion

As seen above, this regulation not only introduces the mechanism for going private, but also shows OJK's attempt to tighten its grip on public companies by mandating the disclosure of controlling shareholders.

On the latter, we advise all issuers and public companies to identify all their controlling shareholders and report the same to OJK. In the case of prospective issuers, they should be prepared to include disclosure of the controlling shareholders as part of the first registration statement and the prospectus.

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