

OJK Tightens its Grip on the Capital Markets Sector by Issuing Regulation on Private Placement



Back in November 2019, Indonesia's financial services authority, the OJK, issued a regulation on debt securities and sukuk. This regulation, OJK Regulation No. 30/POJK.04/2019 ("**POJK 30**"), deals specifically with private placement of debt securities and sukuk and has come into effect on 1 June 2020. This regulation is the first private placement regulation in Indonesia, and before this, private placement was only loosely regulated by regulatory supervision.

Now, under the new regulation, the OJK has introduced, among others, criteria for private placement, the concept of eligible issuers and purchasers, and procedures for private placement. This tightening of the private placement market could significantly deter companies from instituting a private placement not only to raise capital but also to restructure their debt and conduct acquisition.

On 12 June 2020, OJK has issued a letter on the implementation of POJK 30 ("**OJK Letter**"). The OJK Letter exempts any offshore issuance of debt securities and/or sukuk issued through a private placement that are offered to non-Indonesian investors (either individuals, institutions or any other forms of legal entity). It further explains that an issuer can either decide to voluntarily comply with POJK 30 or mandatorily comply as ordered by the regulator.

Criteria and Procedure

POJK 30 specifically regulates private placement for medium-term notes, sharia medium-term notes, long term notes, and perpetual bonds with:

1. maturity date of either more than one year; or
2. if less than one year and not supervised by any other authority, has a value of at least IDR 1 billion, or if less than IDR 1 billion, are issued in stages within one year so as to reach at least IDR 1 billion.

Further, a private placement must fulfil the following requirements:

1. issued in scripless form and deposited in collective custody at the Indonesian Central Securities Depository, KSEI;
2. if issued by a non-issuer, the securities must be rated or guaranteed by a guarantee valued at least 100% of the nominal value of the securities;
3. may be repurchased only after a year as of the date of issuance or distribution; and
4. having a transfer unit of at least IDR 25 million (or its multiples) and are held by less than 49 parties.

POJK 30 allows the securities to be issued in phases, provided that all securities are issued within two years, and the rating given must cover the total value of the issuance.

Eligible Issuers and Purchasers

POJK 30 limits the parties that can conduct a private placement to the following parties:

1. an Indonesian issuer (i.e. a party that has done a public offering) or a public company;
2. an Indonesian business entity or legal entity other than an issuer or a public company (e.g. a limited liability company, a foundation, a cooperative, a *commanditaire vennootschap* (CV), and a firm);
3. a supranational entity (e.g. the World Bank, IMF, Asian Development Bank, and Islamic Development Bank); or
4. a collective investment contract that can issue debt securities and/or sukuk based on the capital markets laws (i.e. a real estate investment fund and an infrastructure investment fund).

Meanwhile, securities from a private placement can only be sold to a party that has the capability to purchase securities and perform risk analysis on the investment in such securities, as regulated under OJK regulation on professional investors. POJK 30 goes further by requiring the purchaser to provide a statement that it qualifies as a professional investor to the issuer or arranger (if any). Conversely, the issuer or arranger must also ensure that the purchaser fulfils the criteria of a professional investor. If the trading is done by or through a broker, that broker will be subject to the same obligation. Otherwise, this obligation must be fulfilled by the custodian.

Arranger and Monitoring Agent

If the securities are not issued by an issuer or a public company, or a collective investment contract, the issuer must appoint an arranger and a monitoring agent, both of which must be registered with the OJK.

An arranger's duties include assisting the issuer in the private placement and ensuring that the purchasers of the securities have read the information memorandum or other disclosure documents before purchasing the securities.

On the other hand, a monitoring agent is responsible to monitor the issuer's compliance with obligations relating to the securities holder's interest, inform the securities holders of any breach by the issuer or circumstances that may harm their interest, periodically analyse and monitor the development of the issuer's business and provide information as requested by KSEI. POJK 30 requires a monitoring agent to act independently in monitoring the issuer.

Documentation and Reporting

POJK also introduces a new requirement for the issuer to submit offering documentation for the private placement to the OJK. If an arranger has been appointed, the submission can be made by the arranger on behalf of the issuer.

The minimum documentation that must be submitted includes a cover letter as prescribed by POJK 30 and an information memorandum. Further, POJK 30 also requires the issuance of the securities to be conducted within 30 days as of the date of submission of the documentation to the OJK.

With regards to the information memorandum, the types of information that must be included are quite extensive, and again, there are similarities with a prospectus for a public offering. For example, it must include information on the issuer, sponsor company (if any), issuance, use of proceeds, a summary of important financial data, management's discussion and analysis, risk factors, parties involved in the private placement and procedures for subscription. If the securities are issued in phases, any additional information relating to the second and subsequent phases must be submitted to the OJK no later than one business day before the scheduled date of issuance.

Meanwhile, POJK 30 prescribes reporting obligations not only to the issuer but also to the monitoring agent and purchasers of the securities in the secondary market. For the issuer, it must report the result of the private placement to the OJK. This report must be submitted at least five business days after the securities are issued. If the securities are issued in phases, a report must be submitted at least five business days after each phase. Any amendment to the terms and conditions of the securities after issuance must be approved by the securities holders, as well as reported to the OJK at least five business days after receipt of approval from the securities holders.

Meanwhile, the monitoring agent must submit a report to the OJK if it discovers negligence by the issuer or circumstances that may damage the securities holders' interests. Lastly, a purchaser of the securities in the secondary market must report the securities transaction to the OJK.

Conclusion

To conclude, the stringent and extensive requirements under POJK 30 may potentially decrease or even limit the number of companies conducting private placement to raise capital, to do an acquisition combined with the issuance of debt securities, or to restructure their debt.

Although we understand that OJK intends to give legal certainty and protection to Indonesian investors and the public, particularly in the context of securities issued by way of a private placement, the new regulation also brings new and further questions for the OJK. These questions would include, among others, is a foreign company still allowed to carry out a private placement in Indonesia, and whether Indonesian private entities can still issue mandatory convertible bonds or promissory notes (among other things) for internal restructuring.

Also, it is not clear whether the requirements under POJK 30 applies if an existing issuance of, for example, mandatory convertible bonds, is amended after 1 June 2020. While POJK 30 strictly excludes the issuance of securities in a private placement by a public company with an option for conversion into shares or other equity securities, such issuance will still be subject to OJK regulation on capital increase with pre-emptive rights (which are, arguably, equally stringent).

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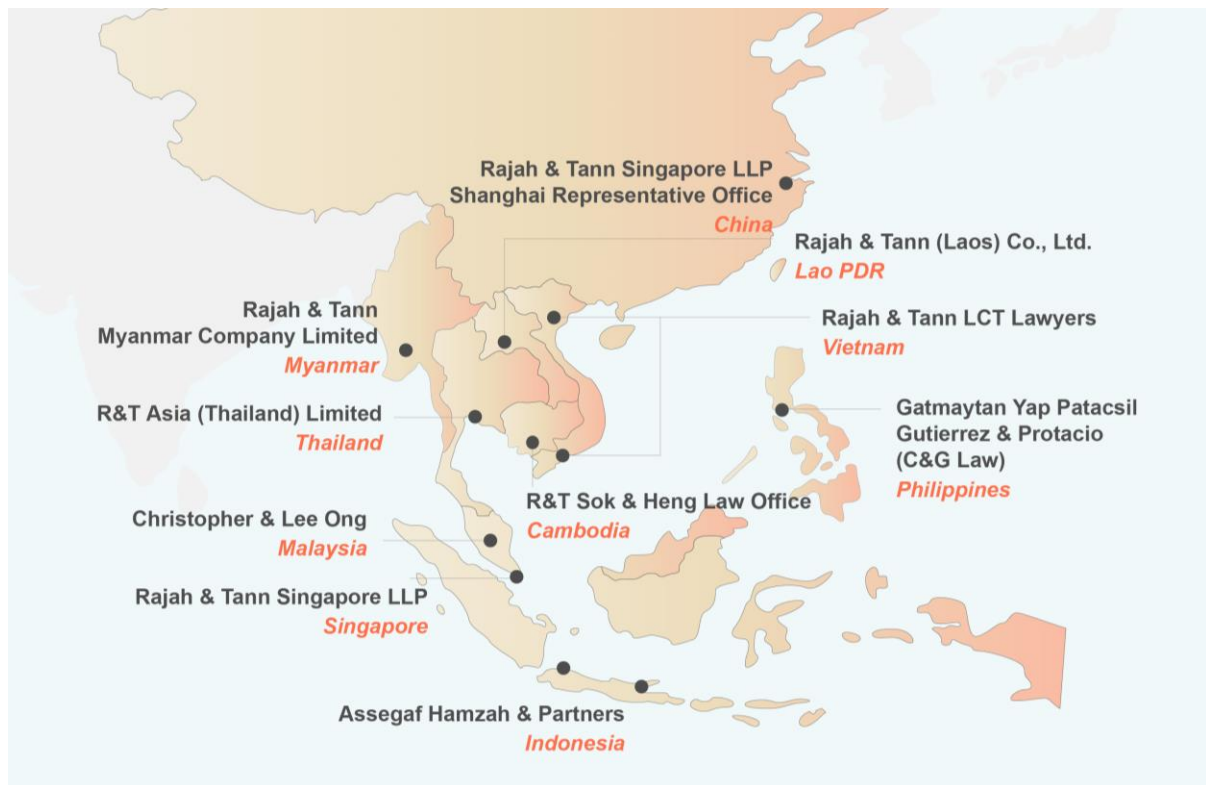
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