Capital Markets

New OJK Regulation on Capital Increase Aims to Provide Greater Protection for Minority Shareholders

Introduction

In April 2019, the Financial Services Authority (*Otoritas Jasa Keuangan* or "**OJK**") issued a new regulation on capital increase with pre-emptive rights under No. 14/POJK.04/2019 ("**New Regulation**"). The New Regulation amends the previous OJK regulation on the same topic (No. 32/POJK.04/2015) ("**POJK 32**"), as well as repeals the OJK regulation on capital increase without pre-emptive rights (POJK 38/POJK.04/2014) ("**POJK 38**").

In the introduction of the New Regulation, the OJK states that one of the considerations in enacting the New Regulation is to increase the protection of minority shareholders, especially in relation to an increase of capital by a public company whether through pre-emptive rights or not. One of the mechanisms of this protection is to impose certain requirements on the convening of a general meeting of shareholders ("**GMS**"). Furthermore, the OJK also hopes to centralise the previous capital increase-related regulations into one regulation.

It is important to note that there is no substantial alteration to the provisions governing capital increase with pre-emptive rights under the New Regulation. The same provisions still apply with respect to disclosure of information, registration requirements, required commitments and procedural timelines. However, the OJK has made several substantial, although not expansive, changes with respect to the capital increase without pre-emptive rights portion.

Below are the key changes to the New Regulation.

1. **Approval from the independent shareholders and non-affiliated shareholders.**

   Similar to the recently repealed POJK 38, in order to undertake a capital increase without pre-emptive rights, a public company must obtain the approval from the GMS. The GMS must be carried out in accordance with the capital markets regulation governing the GMS of a public company.

   Under the New Regulation, the OJK has added new requirements into the GMS provisions. First, if the capital increase without pre-emptive rights issue is undertaken for purposes *other than* to improve the financial position of the company, then the GMS approving such capital increase must be attended and approved by more than ½ of the total shares with valid voting rights held by:

(i) the independent shareholders; and

(ii) the shareholders that are not an affiliated party, member of the board of directors or board of commissioners, nor a majority shareholder or controlling shareholder, of the public company.

Essentially, this change tightens the GMS quorum and approval requirement by providing a degree of exclusivity and leverage to minority shareholders or shareholders holding a certain stake in the company's decision-making process in matters beyond the financial health of a public company. From the point of view of the public company, a tighter quorum would be difficult to achieve due to logistical reason. This is because in most cases, it is difficult to track down minority shareholders, especially if they are public shareholders. Furthermore, a tighter GMS quorum is more likely to be unfavourable to the issuer or public company that expects a direct investment by a potential investor as the decision to increase the capital of the company could now take a substantial amount of time to reach due to the risk of failure in achieving the necessary quorum in that GMS.

2. The allowed increase of capital threshold in respect to improving the financial position of the public company

In relation to capital increases for purposes other than to improve a company's financial position, the New Regulation still retains the 10% capital increase cap from POJK 38. The New Regulation further stipulates that the 10% capital increase cap may be based on:

(i) the number of shares that have been issued and fully paid; or

(ii) from the paid-up capital as stated in the amendment to the articles of association, which has been notified and received by the Ministry of Law and Human Rights at the time of the announcement of the GMS.

Unlike POJK 38, which only provides one mode of calculating the capital increase cap – specifically point (ii) above, the New Regulation provides another method in the event that the nominal amount of shares that have been issued and fully paid-up is different with the paid-up capital stated in the latest articles of association (i.e. in situations where a warrant is exercised within a public company). However, despite the two mentioned calculation options, the New Regulation requires the capital increase threshold to be based from a calculation that results in a smaller dilution effect for the shareholders, especially minority shareholders.

Conclusion

In conclusion, the New Regulation simplifies the two previous capital increase regulations by combining them into one single regulation. As we have seen from the above summary, the regulation on capital increase with pre-emptive rights remains unchanged. This is not the case for the capital increase without pre-emptive rights. We can see how the OJK aims to ensure that the minority shareholders' interest is accommodated, regardless of the purpose of the capital increase.

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While the Indonesian authorities, such as the Indonesia Stock Exchange, welcomed the New Regulation, it remains to be seen on whether the effect of the New Regulation would be burdensome to issuers and public companies.

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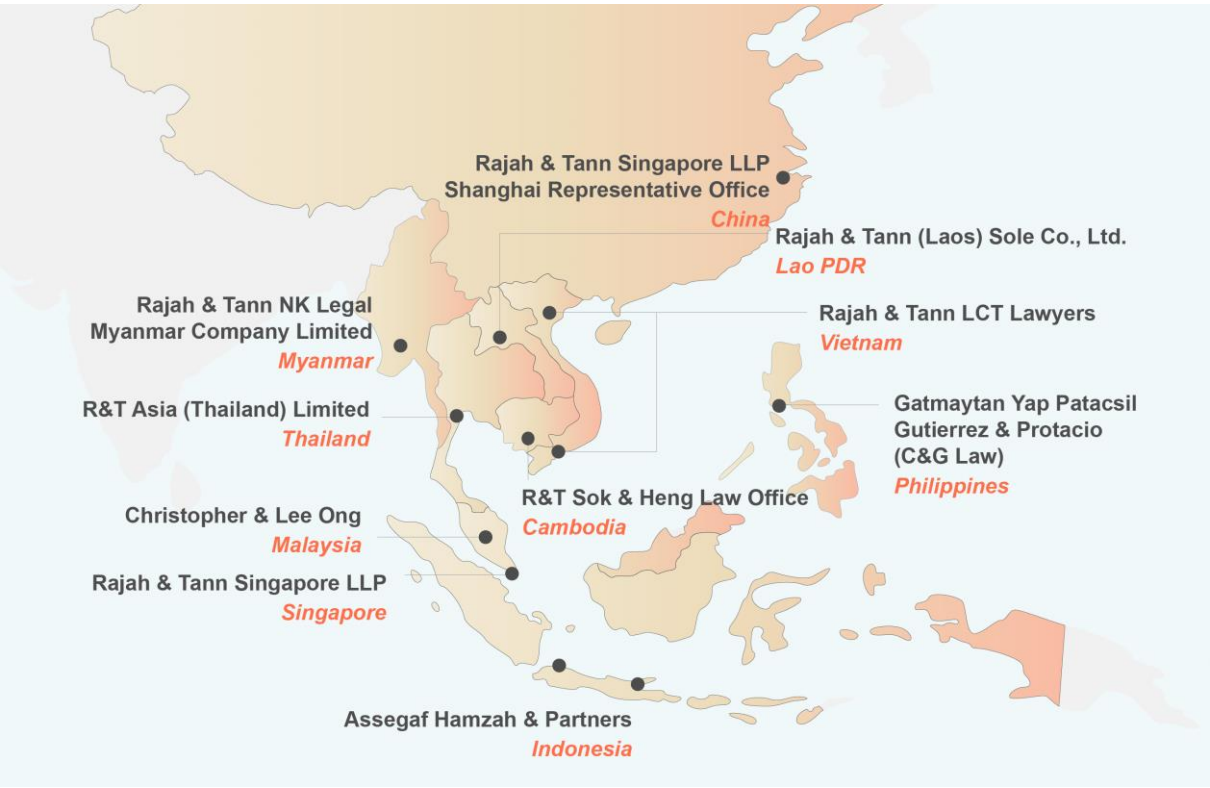

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