

## OJK Continues Tightening its Grip on Public Companies: New Rule on Affiliated Party and Conflict of Interest Transaction



On 1 July 2020, Indonesia's Financial Services Authority, the OJK, issued a new regulation on affiliated party and conflict of interest transaction, OJK Regulation No. 42/POJK.04/2020. This regulation revokes and replaces the existing regulation on the same matter, OJK Regulation No. IX.E.1 and will apply from 21 October 2020.

This regulation is another step by the OJK in tightening the rules for issuers and public companies, after previously issuing new regulations on material transactions, trustee agreement and most recently, private placements for equity-linked debt and/or sukuk issuance.

### Affiliated Party Transaction

#### *New requirements introduced*

The new regulation prescribes new and additional requirements for public companies entering an affiliated transaction.

First, they must keep an adequate procedure to compare terms and conditions of an affiliated party transaction with non-affiliated party transaction to ensure that the former is carried out based on generally accepted business principle and in arms' length.

Second, and perhaps the more burdensome requirement, is for listed companies to obtain the approval of the independent shareholders if:

1. the value of the affiliated party transaction falls under the threshold of material transaction which must be approved by the shareholders;
2. the affiliated party transaction could affect the business activities of the company; and/or
3. it is required based on OJK's discretion.

While the first two requirements are clear, the third requirement is potentially a "catch-all" requirement. Pursuant to this requirement, the OJK can step in to require the public company to obtain independent shareholders' approval even if the affiliated transaction does not satisfy the value or affect the business activities of the company. It is unclear whether the public company should consult the OJK before entering into any affiliated party transaction or whether the OJK could request the public company to have an independent shareholders' approval after the fact.

### ***Exempted transactions***

With respect to the requirement to obtain independent shareholders' approval, the new regulation exempts an issuer or a public company from having to obtain their independent shareholders' approval and an appraisal by an independent appraisal if the transaction is:

1. a facility agreement that is directly entered with a bank, venture capital company, financing company or infrastructure financing company, either onshore or offshore, including the provision of securities to secure the facility agreement;
2. an increase or decrease of capital participation in a subsidiary that is done to maintain the public company's shareholding percentage within one year from the implementation of such capital participation;
3. a transaction with a subsidiary that engages in the provision of Shariah financial services to develop such subsidiary if the relevant company is a financial services institution; and
4. a restructuring transaction if the government controls the relevant company either directly or indirectly.

These exempted transactions only need to be reported to the OJK within two business days after the date of the transaction.

Also, an issuer or a public company does not have to obtain their independent shareholders' approval and procure an appraisal from an independent appraiser if the affiliated party transaction generates profit for the company and the transaction is to be carried out continuously. But the company must still compare the terms and conditions of the affiliated transaction against those of a non-affiliated transaction before commencing the transaction.

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If there is any change to the terms or conditions that may potentially be unfavourable for the public company, the terms and conditions must go through the comparison procedure as detailed previously.

### ***Removal from the previous regulation's exemptions***

The new regulation has taken out an exemption under the previous regulation, with the result that a transaction between a public company and its subsidiary will still be deemed as an affiliated party transaction if the shares of such subsidiary are not entirely owned by the public company, any of its directors, or a substantial shareholder of the public company; and the financial statements of the subsidiary are not consolidated with that of the public company.

### **Conflict of Interest Transaction**

Compared to the provisions for affiliated transactions, the new regulation made fewer changes to conflict of interest transactions.

The first change for a conflict of interest transaction is the broadening of the definition of a conflict of interest transaction to now mean a transaction between a public company or a controlled company with any party, either affiliated or non-affiliated party, that contains a conflict of interest.

Similar to affiliated transactions, the new regulation also exempts the following transactions and only requires them to be reported to the OJK within two business days after the date of the transaction:

1. a transaction with a subsidiary that engages in the provision of Shariah financial services for the purpose of developing such subsidiary if the relevant company is a financial services institution; and
2. a restructuring transaction if the government controls the relevant company either directly or indirectly.

### **Conclusion**

Like the regulation on material transactions, the OJK adopts a rigorous approach by requiring independent shareholders' approval for affiliated party and conflict of interest transactions. In practice, this creates an additional threshold for the company and may potentially hinder the business activities of the company.

Further, despite the clear-cut requirements, OJK may still prevent companies from executing transactions within a short timeframe based on the 'catch-all' requirement. In a situation where the OJK deems a transaction to be potentially problematic, despite not satisfying the threshold of the affiliated party transaction, the company may be required to engage in a consultation or discussion with the OJK.

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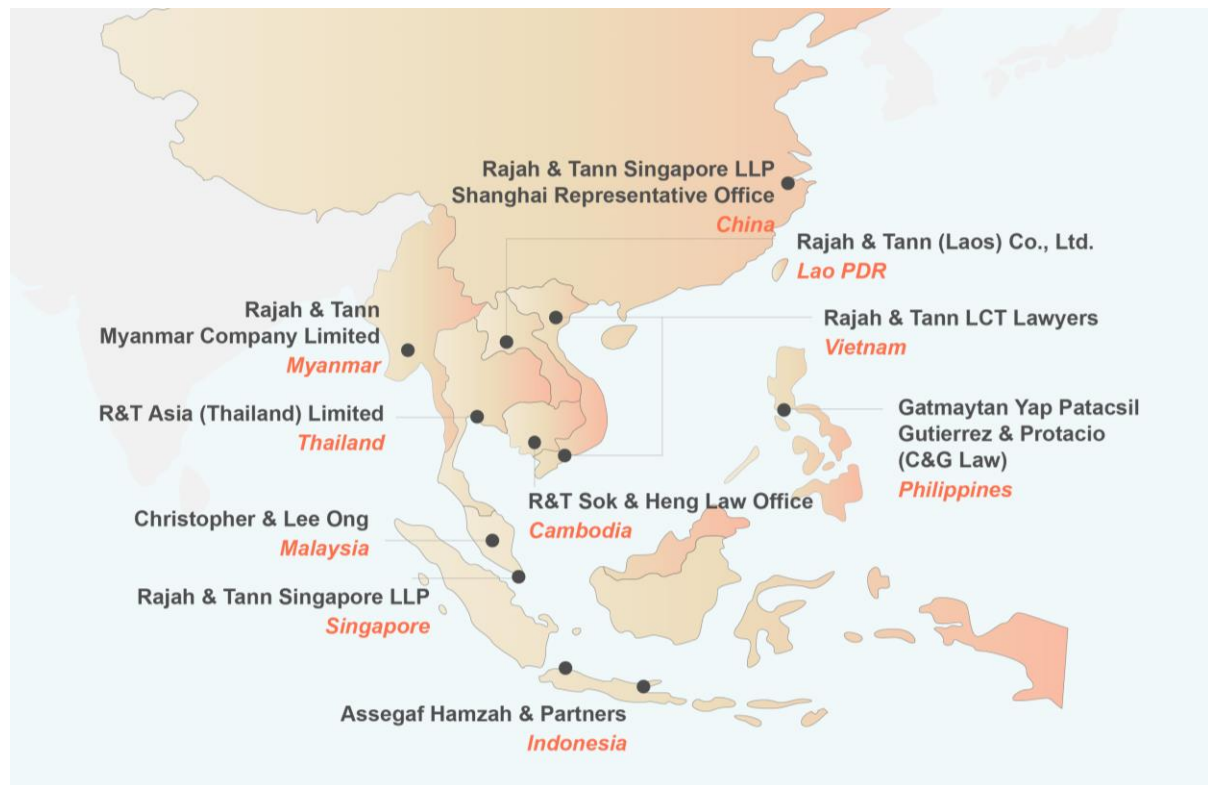
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