

NEW OJK REGULATION ON PUBLIC OFFERING OF DEBT SECURITIES TO PROFESSIONAL INVESTORS – A HISTORICAL LANDMARK

An Overview

The Financial Services Authority (Otoritas Jasa Keuangan/OJK) recently issued OJK Regulation No. 11/POJK.04/2018 on the Public Offering of Debt Securities and/or Sukuk (Islamic Bonds) to Professional Investors (“OJK Regulation No. 11/2018”) on 1 August 2018.

Given the maturing capital market industry and the tremendous growth of professional investors in Indonesia, the issuance of this long-awaited regulation serves as a historical landmark. Finally, OJK introduces simplified procedures for issuers of debt securities to conduct public offering which will allow them to minimize the paperwork and overall costs of offering, and thus, stimulating the growth of Indonesian debt capital market to greater heights.

Background

To further stimulate the growth of capital market industry and in line with the increasing need for access to affordable financing schemes for market players and industries, alternative financing sources are urgently needed. OJK Regulation No. 11/2018 provides such alternative by simplifying the procedures of public offering of debt securities/sukuk that targets a specific set of investors, namely, the Professional Investors.

Main Provisions

Below is the summary of OJK Regulation No. 11/2018 main provisions.

1. Definition & Criteria of Professional Investors

Professional Investors are defined as parties who have the capability to purchase securities and analyze the related risks of such investment, which consist of:



Ahmad Zakaria

Head of Capital Market &
State-Owned Enterprises Practice
+62 21 5082 0911
+62 81808675834
(zaka@umbra.law)

Pramudya A. Oktavinanda

Managing Partner
+62 21 5082 0900
+62 811165906
(pramoctavy@umbra.law)

Paula Aprijanto

Associate
+62 21 5082 0980
+62 818888375
(paula@umbra.law)

UMBRA – Strategic Legal Solutions

Telkom Landmark Tower,
Tower 2, 49th Floor
Jl. Gatot Subroto Kav. 52
Jakarta 12710 – Indonesia
+62 21 5082 0999



UMBRA - Strategic Legal Solutions



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- (a) financial services institutions, such as: (1) banks (including conventional banks, shari'a banks, or branch office of a foreign bank), (2) pension funds, (3) insurance companies (including insurance companies, shari'a insurance companies, reinsurance companies, and shari'a reinsurance companies), (4) investment managers (including the investment products that are managed by them and/or the customers they represent), and (5) securities companies; and
- (b) other parties who fulfill the criteria of Professional Investors, namely:
 - (i) any individual who is capable to analyze investment risks of securities, has investment experience in the capital market for at least 1 year, and meets the following criteria:
 - (1) has net assets of at least IDR10 billion, excluding land, buildings, and intangible assets; or
 - (2) has an average investment portfolio in the capital market of at least IDR3 billion within 1 year prior to the date of the relevant public offering of debt securities/sukuk; or
 - (ii) any legal entity, joint venture, association, or organized group who is capable to analyze the investment risks of securities, has investment experience in the capital market for at least 1 year, and meets the following criteria:
 - (1) has net assets of at least IDR20 billion, excluding land, buildings, and intangible assets; or
 - (2) has an average investment portfolio in the capital market of at least IDR6 billion within 1 year prior to the date of the relevant public offering of debt securities/sukuk.

The ability to perform risk analysis of investments in the securities as discussed in point (i) and (ii) above may be deemed satisfied by using investment advisory services. Do note that given the language of the regulation, the use of investment

advisory services does not necessarily replace the requirement to satisfy the criteria of having certain minimum net assets or minimum average investment portfolio, namely, the capital market investment experience criteria.

Such investment experience must be supported by evidence of securities account ownership. For individuals, evidence of net assets shall be in the form of statement supported by assets ownership documents, while for legal entities, joint ventures, associations, or organized groups, the evidence shall be in the form of latest audited financial report prior to the relevant public offering of debt securities/sukuk.

Another notable thing is that Professional Investor who is going to purchase the debt securities and/or sukuk must declare to the issuer or to the underwriter, that the Professional Investor meets the criteria as Professional Investors mentioned above. Such declaration is an integral part of the debt securities/sukuk order form.

2. Submission of Registration Statement to OJK

The Registration Statement for public offering of debt securities/ sukuk to Professional Investors (“**Special Public Offering**”) must at least consist of (a) a cover letter using the format as attached in OJK Regulation No. 11/2018, (b) a prospectus (similar to the prospectus prepared for ordinary public offering but without sections on statement of debt and summary of material financial data), and (c) other documents.

These other documents include: (a) the issuer’s audited financial report for the past 2 years, (b) a legal opinion from an independent legal consultant (covering all legal aspects, though (i) review of the issuer’s articles of association is strictly limited to its deed of establishment and latest articles of association (it is unclear whether the same requirement can be applied to the issuer’s subsidiaries), and (ii) review of the issuer’s capital and shareholding structure is strictly limited to the past 2 years or, in case the issuer is established less than 2 years prior to submission of the Registration Statement, since the issuer’s establishment), (c) rating of the debt securities/sukuk from rating companies (if applicable as will be discussed below), (d) underwriting agreement, (e) trustee agreement,

as well as (f) various statement letters from the issuer, capital market supporting professionals, and underwriter(s). In short, documents required for the Special Public Offering are less extensive compared to the usual public offering.

More importantly, under OJK Regulation No. 11/2018, issuers that have issued equity securities and/or issuers that have issued debt securities/sukuk which have not matured yet ("**Exempted Issuers**") are not required to submit audited financial report and legal opinion to OJK. Consequently, these Exempted Issuers (which would cover publicly listed companies and issuers of existing debt securities/sukuk) are also not required to put these documents in the prospectus.

It can be argued that in the above circumstances, OJK expects Professional Investors to instead rely on the availability of public information from the Exempted Issuers, assuming that they comply with the disclosure requirements under Indonesian capital market regulations.

And while OJK no longer requires the submission of legal opinion and audited financial report as part of the registration statement and prospectus, it does not necessarily mean that we will no longer see the involvements of lawyers and auditors in a Special Public Offering made by Exempted Issuers. Traditionally, these supporting professionals are involved in the drafting of prospectus and relevant agreements for the public offering, and in any case, OJK Regulation No. 11/2018 still requires statement letter from the relevant capital market supporting professionals for the registration statement. However, it is still unclear whether OJK still requires a legal due diligence report submitted to them in the event of a Special Public Offering made by Exempted Issuers.

Furthermore, based on market practice for similar type of offering to qualified investors in international landscape (usually based on US regulations), the underwriters would typically still require legal opinion and audited financial statements. We expect that a new market practice will arise in Indonesia once more issuers implement this Special Public Offering.

3. Rating Result is No Longer Required

Under OJK Regulation No. 7/POJK.04/2017 on Registration Statement Documents for Public Offering of Equity Securities, Debt Securities and/or Sukuk, an issuer is required to obtain a rating result issued by a rating agency for debt securities/sukuk.

However, according to OJK Regulation No. 11/2018, an issuer is not required to obtain a rating result as a part of the Registration Statement when the issuer conducts Special Public Offering, unless the issuer intends to conduct a shelf offering.

4. New Obligation to Announce Disclosure of Information

Within 1 business day following the submission of the Registration Statement to OJK, the issuer must announce a disclosure of information regarding the Special Public Offering. The disclosure of information shall cover, at least:

- (a) propose schedule of the Special Public Offering;
- (b) type, maximum amount of the offered securities, and interest rates estimation or, for sukuk, the estimated amount of the profit-sharing payments, margins, or service fees in accordance with the characteristic of shari'a agreement;
- (c) plan regarding the use of proceeds obtained from the Special Public Offering;
- (d) summary of management discussion & analysis;
- (e) summary of risk factors; and
- (f) information stating that the prospectus and the order form are available at the issuer's office, the underwriter's office, and/or the issuer's website or the underwriter's website.

The disclosure of information must be announced in at least:

- (a) 1 daily newspaper with nationwide circulation in Bahasa Indonesia or the website of the underwriter(s); and
- (b) the issuer's website.

However, for Exempted Issuers, the disclosure of information may be announced in at least:

- (a) 1 daily newspaper with nationwide circulation in Bahasa Indonesia, or the website of the underwriter(s), or the IDX's website; and
- (b) the issuer's website.

The evidence of announcement must be reported to OJK within 2 business days after the announcement.

5. Initial Offering Prior to Pre-Effective Statement

Based on Bapepam-LK Regulation No. IX.A.2 on Public Offering Registration Guidelines, no issuer can conduct initial offering before obtaining a pre-effective statement from OJK.

As opposed to that, OJK Regulation No. 11/2018 allows the relevant issuers to conduct initial offering following the announcement of the disclosure of information in accordance with OJK Regulation No. 23/POJK.04/2017 on Initial Prospectus and Info Memo without obtaining pre-effective statement from OJK.

6. Shorter Public Offering Period

For ordinary public offerings, the relevant issuers must conduct the public offering within 2 business day after obtaining the effective statement from OJK. The offering period itself is minimum 1 business day and maximum 5 business days.

OJK Regulation No. 11/2018 enacted shorter offering period; the issuer must conduct the Special Public Offering within 1 business day following the effective statement by OJK and the Special Public Offering period is at least 1 business day and maximum 3 business days.

7. Shorter Offering Period for Shelf Offering

The Special Public Offering may be done in several stages in accordance with OJK Regulation No. 36/POJK.04/2014 on Shelf Public Offering of

Debt Securities and/or Sukuk, however the period of each Special Public Offering shall be at least 1 business day and no later than 3 business days.

If the issuer intends to conduct shelf offering, in the cover of the prospectus, the issuer must include (a) a statement of "Prospectus of Shelf Public Offering of Debt Securities and/or Sukuk to Professional Investors", also mentioning the name of the securities, and (b) the total amount of funds that will be collected and the type of debt securities that will be issued during the period of the Special Public Offering.

8. Additional Obligation for Broker and Custodian

Since the Special Public Offering is targeted towards Professional Investors, if the securities trading is conducted by or through a securities broker, the broker must ensure that the purchaser is a Professional Investor. However, if it is not conducted by or through a securities broker, the custodian must ensure that the purchaser is a Professional Investor. The Purchaser shall declare to the broker or custodian that it has fulfilled the criteria of a Professional Investor.

Closing

OJK Regulation No. 11/2018 is Indonesia's very-own qualified institutional buyer offering regulation which is expected to cater the needs of those Professional Investors who are considered to be financially sophisticated and require less protection than most public investors.

Given the simpler and potentially faster process than the usual public offering to non-Professional Investors, we expect that this regulation would further stimulate the growth of Indonesian debt capital markets and would incentivize issuers to tap into this exciting opportunity.

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