Revised Indonesian Public Company takeover rules introduced

The Indonesian Capital Markets Supervisory Agency, Bapepam-LK, has now issued the long anticipated revised version of its Takeover Regulation (No. KEP259/BL/2008). The revisions effect some important changes which will impact upon the conduct and consequences of public company takeovers in Indonesia. The new regulation is effective from 30 June 2008.

Following is a summary of the new main features/changes introduced by the new Bapepam-LK Takeover Rule.

1. A Controller is now defined as a party either (i) owning more than 50% of the issued shares (increased from the previous 25% threshold) or (ii) having the ability to determine, directly or indirectly by any means, the management and/or policy of the public company.

2. Disclosure of a public company takeover can be done either:
   a. two working days following the closing of the takeover transaction (by announcement to the public and informing Bapepam-LK); or
   b. upon negotiation of a proposed takeover (by informing the target company, Bapepam-LK and the Indonesian Stock Exchange and making an announcement to public).

   The announcement to public must be made in an Indonesian newspaper having national circulation.

3. The mandatory tender offer triggered by a public company takeover must be made to holders of all shares, except for shares owned by:
   a. substantial shareholders holding 20% or more of target;
   b. another Controller;
   c. the seller in the relevant takeover transaction;
   d. a party who has received the same offer from the new Controller; or
   e. a party who is making a competing tender offer for the target company.

4. If following a tender offer, a new Controller owns more than 80% of the issued shares of target, the new Controller is obliged to transfer a portion of the shares to the public within two years after completion of the tender offer, so that there will be at least 20% of shares in target owned by at least 300 parties by that time. Indonesian public companies are required to have at least 300 shareholders.

5. If a public company takeover itself results in the new Controller owning more than 80% of the shares of the target company, the new Controller is obliged within two years to transfer to the public “at least the percentage of shares further acquired in the tender offer” and there must then be at least 300 shareholders. This new obligation suggests that where a public company takeover results in ownership of more than 80% of target, a
mandatory tender offer must still be made to give the public shareholders the chance to benefit from the offer price determined under the regulation, even though the Controller must later divest the number of shares acquired through such tender.

6. The obligation imposed on the Controller in paragraphs 4. and 5. above does not apply if the target company undertakes a corporate action (such as a rights issue) following the takeover which results in compliance with the minimum public shareholding requirement described in paragraphs 4. and 5. above.

7. The tender offer price in a direct takeover of a public listed company will now be determined based on the higher of: (a) the takeover sale price or (b) the average of highest daily market prices of the stock during the previous 90-day period from either (i) the day before the announcement to the public and notification to Bapepam-LK under paragraph 2(a) above [post takeover disclosure] or (ii) the day before the proposed acquirer informs the target company, Bapepam-LK and the Stock Exchange and announcement to the public under paragraph 2(b) above [disclosure of pre-takeover negotiation].

8. The tender offer exception in the previous version of the regulation in case of ‘creeping’ acquisition of shares in a public company in any 12-month period without triggering an obligation to make a tender offer has now been increased to 10% of the issued shares (previously 5%).

9. As a new exception, the requirement to make a tender offer following a public company takeover does not apply in the case of a takeover which is undertaken indirectly through another Indonesian public company acquirer, provided that the revenue contribution of the target company to the acquiring public company is less than 50% at the time the takeover takes place based on their consolidated financial statements.

10. The new rule also introduces new sanctions for breach of the Takeover Regulation, such as monetary penalties, a right of Bapepam-LK to order compensation to be paid to shareholders who suffer loss due to a breach or to cancel a transaction which is in breach of the Takeover Regulation.

Bapepam-LK has indicated that it intends to introduce consequential changes to the related Bapepam-LK Tender Offer Regulation shortly.

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