# Securities Finance 2019

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Securities Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Indonesia, Monaco and Russia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andrew Pitts of Cravath, Swaine & Moore LLP, for his continued assistance with this volume.

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Getting The Deal Through

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For further information please contact editorial@gettingthedealthrough.com

# Contents

# Indonesia

**Leoni Silitonga, Sandro Mieda Panjaitan and Grace Novia**
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## LEGAL AND REGULATORY FRAMEWORK

### Laws and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The main statute for securities offerings is regulated under Law No. 8 of 1995 concerning capital market (Capital Market Law). Other main implementing regulations governing securities offerings are issued by the Financial Services Authority of Indonesia (OJK) in the form of OJK regulations and OJK circular letters.

The OJK is the regulatory authority for securities offerings. It was established under Law No. 21 of 2011 and has replaced the functions of the Capital Market and Financial Institutions Supervisory Agency or (Bapepam-LK). The OJK is responsible for regulating and supervising financial services activities in banking, capital markets, and non-banking financial industry sectors.

Some regulations issued previously by Bapepam-LK related to securities offerings have not been replaced by OJK regulations. As such, some Bapepam-LK regulations are still referred to in conducting the securities offering procedure. For example, concerning price stabilisation, Bapepam regulation No. IX.B.1 is still applicable. However, most of the main rules governing securities offering have been replaced by OJK regulations, among others: (i) OJK regulation No. 7/POJK.04/2017 concerning documents of registration statement in the context of public offering of equity securities, debt securities and/or sukuk which supersedes Bapepam regulation No. IX.C.1; and (ii) OJK regulation No. 8/POJK.04/2017 concerning forms and substances of prospectus and summary prospectus in respect of public offering of equity securities and OJK regulation No. 9/POJK.04/2017 concerning forms and substances of prospectus and summary prospectus in respect of public offering of debt securities which supersedes Bapepam regulation no. IX.C.2.

Along with OJK regulations, there are other main regulations issued by the self-regulatory organisation, namely the Indonesian Stock Exchange (IDX), the Indonesian Central Securities Depository (KSEI) and the Indonesian Clearing and Guarantee Corporation (KPEI).

The IDX is the securities market in Indonesia. Both equity and debt securities can be listed in the IDX. The common types of securities listed and traded in IDX are shares and bonds. For the purpose of listing, the IDX issues securities listing requirements and procedures. Such regulations are set out under IDX Rule No. I-A concerning Listing of Shares (Stock) and Equity-Type Securities other than Stock Issued by the Listed Company as lastly amended on 27 December 2018 and IDX Rule No. 1-F.1 concerning Listing of Debt Securities.

The KSEI provides central custodian and securities transaction settlement services. KSEI Regulation No. Kep-0013/DIR/KSEI/0612 concerning the central custodian services regulates, among other things, securities registration in KSEI.

Among other things, the KPEI facilitates securities exchange transaction clearing and settlement guarantee of stock exchange transactions. The relevant regulation is regulation No. II-1 concerning clearing and guarantee services for the settlement of scripless stock exchange transactions.

## PUBLIC OFFERINGS

### Mandatory filings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Securities defined under the Capital Market Law are promissory notes, commercial paper, shares, bonds, evidences of indebtedness, participation units of collective investment contracts, futures contracts related to securities, and all derivatives of securities. For the purpose of this questionnaire, equity securities mean shares and debt securities mean bonds.

Under the Capital Market Law, a securities offering constitutes a public offering if it is made within the territory of Indonesia or to Indonesian citizens outside the territory of Indonesia and it is offered to more than 100 parties or purchased by more than 50 parties. Any securities offering offered through mass media such as newspaper, brochure, television and other electronic media are also considered public offerings. A party carrying out a public offering is referred to as the issuer. The primary public offering or initial public offering is subject to the registration statement requirement from the OJK. The issuer may only carry out the public offering once the registration statement has been declared effective by the OJK.

Under the OJK regulation No. 7/pojk.04/2017 concerning registration statement documents in public offerings of equity securities, debt securities or sukuk (POJK 7), an issuer needs to submit the following documents to apply for registration statement to the OJK, among other things:

- a covering letter of registration statement in accordance with the format of covering letter attached to POJK 7;
- a prospectus;
- a preliminary prospectus (if any); and
- other documents to be submitted as part of the registration statement, which include, among others:
  - the public offering schedule;
  - a copy of the latest articles of association of the issuer;
  - the legal due diligence report;
  - audited financial statements;
  - a comfort letter from the public accountant who audited the latest financial statements;
  - legal opinion on the issuer to be issued by the appointed legal counsel (who must also be a registered legal counsel in OJK)

for the relevant public offering after it has conducted legal due diligence exercise on the issuer; and
- the underwriting agreement (if any).

In offering debt securities, the abovementioned documents are also required to be submitted with the following additional supporting documents:
- credit rating of the bonds;
- trust agreement; and
- underwriting agreement (if any).

The OJK allows an issuer to conduct a public offering of more than one type of securities at the same time. In such a case, the issuer may opt to submit one prospectus instead of a number of separate prospectuses. However, the issuer must comply with the requirements of forms and prospectus content for public offering of equity and debt as set out under OJK regulation No. 8/POJK.04/2017 and OJK regulation No. 9/POJK.04/2017 respectively.

The OJK sets out the minimum of information that should be included in the prospectus such as details of the public offering, the use of funds generated from the public offering, financial statements of the issuer, risk, information on the issuer, business activity, underwriter, legal opinion, and appraisal report.

Requirements for the secondary offering or public offering initiated by the shareholders do not differ from those of the public offering. The shareholders are required to submit a registration statement to the OJK and it must then be declared 'effective.'

To have its shares listed in the IDX (in the context of an initial public offering), the company must submit a number of documents, which includes evidence of the effectiveness of the registration statement as declared by the OJK, copies of the relevant prospectus and the company's statement that it is willing to comply with the applicable capital market and IDX rules and regulations.

The IDX will give its approval for listing no less than five days after all documents have been submitted and requirements completed and will announce the listing of the securities at least one day prior to the shares commencing trading.

### Review of filings

**3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?**

After all documents required for the submission of registration statement have been submitted to the OJK, it may request that additional documents be provided. The review process of registration statement will take 45 days subsequent to the complete submission of the registration statement documents to the OJK or 45 days subsequent to the submission of any changes or additional documents to the OJK. After the reviewing process, the OJK will declare the registration statement effective.

The process of bookbuilding and distribution of preliminary prospectus for the public offering can be started once the issuer or the offering shareholders has submitted the registration statement to OJK. However, the application to subscribe for the securities can only be made after the registration statement has been declared effective by the OJK or during the offering period.

### Publicity restrictions

**4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?**

The OJK does not restrict other publication material for the promotion purposes of the securities such as advertising, brochure or research reports. OJK sets out the main restrictions for such promotion material whereby it must not contain any inaccurate information; fail to disclose any material facts that can lead to misinterpretation; or give a misleading picture.

If the promotion publication contains a recommendation to purchase, sell or hold certain securities, it must contain (at least) the following information:
- the date of recommendation;
- the market price on the recommendation date;
- the party that gives the recommendation; and
- information on whether the recommending parties or their affiliates have traded the securities regularly or own such securities at the minimum value of 25 million rupiahs.

If the promotional materials provide opinions, projections or predictions of certain securities, they must be provided in a straightforward manner. Information on securities that are only suitable for certain investor and investment risks shall also be provided.

In respect of the public offering, the promotion materials must provide information that the proposed investors should read the prospectus before making any purchase and subscribe to the securities after the registration statement has been declared effective.

### Secondary offerings

**5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?**

The rules that govern primary and secondary offerings are set out in different regulations. However, since both primary and secondary offerings require an effective statement from the OJK, the differences between the procedures for primary and those for secondary offerings lie in the documents that need to be submitted under the registration statement. For example, a statement letter from the issuer is required by the OJK in order to submit the registration statement for primary offerings while for secondary offerings, the OJK requires a statement letter from the shareholders as the initiator of the offering.

The issues the offering shareholders in a secondary offering have to deal with are the fact that they will be held liable for any false, inaccurate and misleading statement they make under the registration statement, while for the primary offering such liability is assumed by the issuer as a company.

### Settlement

**6 What is the typical settlement process for sales of securities in a public offering?**

Since 2000 the Indonesian capital market has adopted scripless trading transactions. For the purpose of equity trading in the IDX, the shares must be desposited in electronic form. Physical conversion of shares shall be made to the C-BEST system administered by KSEI after the public offering period.

Settlement for the scripless shares is made by KSEI as the custodian through its central depository and book entry settlement system (C-BEST). It is a centralised depository for securities, which records and provides settlement of securities transactions.

As regards an initial public offering, the KSEI will distribute the shares to subscribers through its account holders (ie, securities companies). The account holder can monitor their KSEI account through a system called AKSes facilities. This provides information through the internet for the investor to monitor the position and fluctuation of securities owned and kept in a subsecurities account in KSEI where investor is registered as the client.

## PRIVATE PLACINGS

### Specific regulation

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Private placement of securities is not specifically regulated under OJK regulations. It is categorised as a condition where the securities are offered to less than 100 parties or sold to less than 50 buyers. The OJK, however, regulates requirements for private placement for a public company where it is usually conducted for the purpose of capital increases without pre-emptive rights. Under Capital Market Law, public company is defined as a limited liability company owned by at least 300 shareholders and a minimum issued and paid up capital of 3 billion rupiahs.

In general, capital increases of a public company must be made with pre-emptive rights whereby the existing shareholders must be offered the issuance of new shares on a pro rata basis. Capital increases without pre-emptive rights must be preceded by the General Meeting of Shareholders' (GMS) approval of the public company and is allowed for the purpose of correcting the company's financial position or for other purposes.

A public company that conducts capital increases without pre-emptive rights for the purpose of correcting the company's financial position must meet the following conditions:

- it is a bank that received a loan from Bank Indonesia or other government institution amounting to more than 100 per cent of its issued and paid up capital or other conditions that could result in the bank's restructurisation by the authority;
- it is a non-banking institution with negative net working capital and liabilities of up to 80 per cent of its assets at the point when the GMS approved an increase of capital without pre-emptive rights; or
- it failed to meet its financial obligations to the non-affiliated creditor on the provision such creditor agreed to receive shares or a convertible bond of the company to settle such obligations.

Aside from correcting its financial position, a public company is only allowed to increase its capital without pre-emptive rights for the maximum of 10 per cent of its issued and paid-up capital under the following conditions. The increase must be held within five years after the relevant GMS if the capital increase is made for the purpose of an employee stock option programme and within two years after the relevant GMS if the capital increase is not for such purposes.

In the event that a private placement carried out by a public company triggers a change of control of the public company, the new controller is required to make a tender offer for the remaining shares, unless the change of control occurs in relation to the capital increases without pre-emptive rights to correct the financial position, as mentioned above.

### Investor information

8 What information must be made available to potential investors in connection with a private placing of securities?

A private placement does not require a prospectus. However, a public company that increases its capital without pre-emptive rights must announce that plan to all of its shareholders along with the announcement from the GMS. The announcement must be published in at least one national newspaper or on the IDX's website and the company's website. The OJK must receive evidence of its publication within two working days. The transparency principle must be met by providing, among other things, the following information:

- the reasons and purposes of the capital increases without pre-emptive rights;
- an estimated schedule of capital increases;
- how the funds generated from capital increases will be used;
- analysis of the company's financial situation before and after increasing the capital;
- the risk of increasing capital without pre-emptive rights to the shareholders including the number of diluted shares; and
- information on the detail of capital structure before and after increasing the capital;

In practice, private placement of debt securities is based on a contractual arrangement between the issuer and the subscriber. Any custodian agent, such as the KSEI, and any arranger, such as a commercial bank, may be appointed in such a contractual arrangement. Disclosure of information on the private placement of debt securities shall be subject to the agreement between the parties thereto.

### Transfer of placed securities

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are no laws or regulations that restrict the transfer of securities acquired in a private placement to a third party. For the debt securities, restriction for transfer shall be subject to the provisions set out in the contractual arrangement between the issuer and the subscriber.

There are also no laws or regulations that specifically regulate the mechanism to enhance the liquidity of securities. In practice, the credit rating and establishment of security or guarantee of third party are usually required to enhance the liquidity of debt securities.

## OFFSHORE OFFERINGS

### Specific regulation

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

If the offshore offering is made to the Indonesian citizens located outside of Indonesia and it falls under the definition of a public offering set out under Capital Market Law, then the issuer must submit a registration statement to the OJK.

## PARTICULAR FINANCINGS

### Offerings of other securities

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

When the offerings of exchangeable or convertible securities trigger a public offering then it must be subject to the applicable rules and requirements on the public offering of securities under the Capital Market Law and its implementing regulations. Further, the conversion of those securities in the future must also be subject to the relevant provisions under the Indonesian companies law and regulations and, if the holder of securities are foreign parties, then the capital investment laws and regulations apply.

Warrants and rights offerings can only be carried out by a public company, whereby warrants are typically offered as sweetener in a rights issue. Thus, the offering of warrants are usually attached to the rights offering in a rights issue.

## UNDERWRITING ARRANGEMENTS

### Types of arrangement

12 What types of underwriting arrangements are commonly used?

Underwriting arrangements are not mandatory in a public offering. The issuer can conduct a public offering without any underwriting arrangement.

If the issuer opts to use underwriting arrangements for the public offering, the issuer can enter into an underwriting agreement with the underwriter. There are two types of underwriting agreement recognised in Indonesia: full commitment or best effort. Under the full commitment agreement, the underwriter is responsible for purchasing all unsold securities. Under the best effort agreement, the underwriter is not responsible for purchasing all unsold securities but must make its best effort to sell the shares offered.

### Typical provisions

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and overallotment options?

The OJK does not provide specific guidelines for the drafting of underwriting agreement. It is purely a contractual agreement between the underwriter and the issuer.

### Other regulations

14 What additional regulations apply to underwriting arrangements?

The name and profile of the underwriter, and the underwriting agreement shall be included in the prospectus. If the underwriter is a securities company, the prospectus needs to disclose whether there is any affiliation or any other material relationship between the underwriter and the issuer.

## ONGOING REPORTING OBLIGATIONS

### Applicability of the obligation

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

The issuer is subject to periodic reporting obligations to the OJK once the registration statement has become or declared effective by the OJK. Reporting to the OJK also needs to be made on any material event that could affect the securities price at the latest by the end of two working days after the occurrence of the material event. The issuer is also subject to ongoing reporting obligations to the IDX after its shares are listed.

### Information to be disclosed

16 What information is a reporting company required to make available to the public?

In principle, the OJK requires any information regarding the company to be made available and accessible to the public. This is to protect the interests of the public (who is also the investor and the proposed investor).

The OJK requires every issuer to have and maintain their own website. The website must contain, among other things, the following information in (at least) Bahasa Indonesia and English:

- the organisation structure;
- the shareholding structure;
- a profile of each member of its board of directors and board of commissioners;
- an annual financial statement for the last five years;
- any corporate action conducted by the issuer; and
- corporate governance.

## ANTI-MANIPULATION RULES

### Prohibitions

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The Capital Market Law regulates prohibited activities such as fraud, manipulative practices and insider trading. Prohibited activities include, among other things, the following:

- deceiving the other party;
- making inaccurate statements;
- failing to disclose any material fact with the intention of benefitting or avoiding any loss or influencing the other party to purchase or sell certain securities;
- creating a false or misleading picture regarding the trading activity, market situation or market price at the securities exchange; or
- conducting two transaction or more, whether direct or indirectly, which can cause the securities price at securities exchange remain the same, increase, or decrease with the intention of influencing the other party to purchase, sell or retain the securities.

Trying to obtain insider information is also a restrictive practice. An insider who has insider information shall neither purchase nor sell securities of the issuer or other company who will conduct any transaction with the issuer, persuade other party to purchase or sell securities and provide insider information to other party who may use such information to purchase or sell securities. A securities company who has insider information is prohibited from conducting securities transaction based on such information. However, if such securities transaction was a request or initiated from the customer then the securities company is allowed to conduct the transaction.

A party who violates the abovementioned requirements can be punished with imprisonment for up to 10 years and may be fined up to 15 billion rupiahs.

## PRICE STABILISATION

### Permitted stabilisation measures

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

The underwriter or broker is permitted to carry out price stabilisation to maintain the market price of the securities in the securities market by offering to purchase or purchasing the securities. Price stabilisation must be carried out during the public offering period and cannot be extended beyond that period. In conducting price stabilisation, the OJK requires that the stabilisation price must not differ from the official public offering price.

If it is possible for the underwriter to carry out price stabilisation during public offering, that plan must be disclosed in the relevant prospectus. The information should include, among other things, the stabilisation measures and when the stabilisation will be carried out.

Further, the underwriter also has an obligation to make sure that their client has received information or has the opportunity to read a written statement that the securities company purchases in respect of price stabilisation that are being made when it purchases the securities during the stabilisation period for the benefit of its client.

## LIABILITIES AND ENFORCEMENT

### Bases of liability

19 What are the most common bases of liability for a securities transaction?

The Capital Market Law prohibits insiders from influencing other parties to purchase or sell the company's securities and providing inside information to other parties. Any party is also prohibited from making false statements on material facts or making misleading statements with the intention of gaining profit or avoiding losses, or with the intention of influencing other parties to purchase or sell securities. The securities transaction must also be carried out properly, reasonably and efficiently.

### Remedies and sanctions

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

In imposing sanctions, the OJK may independently investigate any alleged violations of the law. It can impose administrative sanctions such as a written notice or penalty to revoke business licence. The administrative sanctions do not preclude criminal sanctions being applicable under capital market laws and regulations.

In addition to an independent investigation, OJK also requires any party to report any criminal allegation of the other party in the capital market transaction to the OJK. Article 68 of the Capital Market Law requires that an accountant registered with the OJK and other parties engage in capital market activities to deliver confidential information in respect of any alleged violation of the Capital Market Law within three working days after such findings.

Any interested party may seek legal remedies through civil or litigation proceedings. In current practice more parties are keen to seek legal remedies through the Indonesian Capital Market Arbitration Board (BAPMI). That is because the parties can choose a mediator, an adjudicator or an arbitrator who has extensive knowledge in the capital market area. Furthermore, the arbitral proceeding is private.

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An agreement between the disputing parties that the dispute will be settled through BAPMI must be available in order to choose BAPMI as the dispute settlement. Usually, the parties incorporate this agreement in the relevant agreement.

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