The International Capital Markets Review

Third Edition

Editor
Jeffrey Golden

Law Business Research

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THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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EDITOR'S PREFACE TO THE THIRD EDITION

As I write the preface to this third edition of *The International Capital Markets Review*, my morning newspaper reports that one of the major global banks, having shrunk its workforce by more than 40,000 employees over the past two years, will now embark on a hiring spree to add at least 3,000 additional compliance officers.

It would be nice if the creation of these new jobs evidenced new confidence that capital markets activity is on the rise in a way that will justify more hands on deck. In other words, capital markets lawyers will have something to celebrate if this bolstering of the ranks was thought necessary to ensure that requisite regulatory approvals and transactional paperwork would be in place for a projected expansion in deal flow.

And, indeed, my morning newspaper also reports a new transaction of some significance, namely, Twitter's filing for a multi-billion dollar international public offering, accompanied by a tweet, of course – but with a true sign-of-the-times disclosure: 'This Tweet does not constitute an offer of any securities for sale'!

Yes, confirmation of an uptick in deal flow – especially 'big deals' flow – would be nice. In the preface to the last edition of this work, I speculated that there were 'signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing'. All the better if the current newspaper reports provide continued and further support for that inference. After all, when our first edition appeared a little over two years ago, the newspapers were saying terrible things about the capital markets.

What is more likely, however, is that this increased staffing aims to cope with regulatory complexity that will now impact the financial markets regardless of any growth and perhaps may even have been designed to slow down the business being done there. That complexity, but also just the scale of recently promulgated new regulation and the practitioner's resulting challenge in 'keeping up' have all encouraged this new third edition. The 8,843 pages of Dodd-Frank rule-making that I reported in my preface to the last edition have now grown to more than 14,000 pages at this time of writing – and approximately 60 per cent of the job remains unfinished. Other key jurisdictions have been catching up. Plus the rules are purposive and aim to change the way things have been done. If compliance and even ethics in the capital markets were ever instinctual, rather than matters to be taught and studied, that is probably a thing of the past.

The thickness of this volume has grown as well because of the increased number of pages and coverage in it. Nine new contributors (Finland, Indonesia, Italy, the Netherlands, the Philippines, Spain, Switzerland, Tanzania and the UAE) and an overview of EU Directives have been added. Banks are lending less to corporates, which in turn are having to issue more to meet liquidity needs. Moreover, with the low interest rate environment of quantitative easing, central banks are encouraging risk-taking rather than hoarding. For investors, risk-free assets have become very expensive. So we see a growing willingness to get off the traditional highway in search of yield. Investment banks are, as a result, often taking their clients (and their clients' regular outside counsel) to difficult, or at least less well-known, geographies.

Having a pool of country experts and jurisdictional surveys that facilitate comparative law analysis can be very helpful in this instance. That is exactly what this volume aims to provide: a 'virtual' legal network and global road map to help the reader navigate varying, and increasingly difficult, terrain to arrive at right places.

There has been much relevant change in the legal landscape surveyed in the pages that follow. However, what has not changed is our criteria for authors. The invitation to contribute continues to go to 'first in class' capital market specialists from leading law firms. I shall be glad if, as a result, the biographical notes and contact details of the contributing firms prove a useful resource as well.

The International Capital Markets Review is not a novel. Impressed I might be, but I would certainly also be surprised by anyone picking up and reading this volume from cover to cover. What I expect instead, and what is certainly the publisher's intention, is that this work will prove a valuable resource on your shelf. And I hope that you will have plenty of opportunities to take it off the shelf and lots of excuses to draw on the comparative jurisdictional wisdom it offers.

Let me again express my sincere gratitude to our authors for their commitment to the task and their contributions. It remains a privilege to serve as their editor and a source of great pride to keep their company in the pages of this book.

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
October 2013

EDITOR'S PREFACE TO THE SECOND EDITION

It was my thought that we should also include in this second edition of *The International Capital Markets Review* my preface to the first edition. Written less than a year ago, it captures relevant background and sets out the rationale for this volume in the series. The contemporary importance of the global capital marketplace (and indeed you must again admire its resilience), the staggering volume of trading and the complexity of the products offered in it, and the increased scrutiny being given to such activity by the courts all continue. And, of course, so does the role of the individual – the difference that an informed practitioner can make in the mix, and the risk that follows from not staying up to date.

However, I was delighted, following the interest generated by our first edition, by the publisher's decision to bring out a second edition so quickly and to expand it. There were several reasons for this. The picture on the regulatory front is much clearer for practitioners than it was a year ago – but no less daunting. According to one recent commentary, in the United States alone, rule-making under the Dodd-Frank report has seen 848 pages of statutory text (which we had before us when the first edition appeared) expand to 8,843 pages of regulation, with only 30 per cent of the required regulation thus far achieved. Incomplete though the picture may look, the timing seems right to take a gulp of what we have got rather than wait for what may be a very long time and perhaps then only to choke on what may be more than any one person can swallow in one go! Regulatory debate and reform in Europe and affecting other key financial centres has been similarly dramatic. Moreover, these are no longer matters of interest to local law practitioners only. Indeed, the extraterritorial reach of the new financial rules in the United States has risen to a global level of attention and has been the stuff of newspaper headlines at the time of writing.

There are also signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing. In the debt markets, the search for yield continues. Equities are seen as a potential form of protection in the face of growing concerns about inflation. Participants are coming off the sidelines. Parties can be found to be taking risks. They are not oblivious to risk. They are taking risks grudgingly. But they are taking them. And derivatives (also covered in this volume) are seen as a relevant tool for managing that risk.

Most importantly, it is a big world, and international capital markets work hugs a bigger chunk of it than do most practice areas. By expanding our coverage in this second edition to include six new jurisdictions, we also, by virtue of three of them, complete our coverage of the important BRIC countries with the addition of reporting from Brazil, Russia and China. Three other important pieces to the international capital markets puzzle – Belgium, the Czech Republic and New Zealand – also fall into place.

The picture now on offer in these pages is therefore more complete. None of the 24 jurisdictions now surveyed has a monopoly on market innovation, the risks associated with it or the attempts to regulate it. In light of this, international practitioners benefit from this access to a comparative view of relevant law and practice. Providing that benefit – offering sophisticated business-focused analysis of key legal issues in the most significant jurisdictions – remains the inspiration for this volume.

As part of the wider regulatory debate, there have been calls to curtail risk-taking and even innovation itself. This wishful thinking seems to miss the point that, if they are not human rights, risk-taking and innovation are hardwired into human nature. More logical would be to keep up, think laterally from the collective experience of others, learn from the attention given to key issues by the courts (and from our mistakes) and 'cherry-pick' best practices wherever these can be identified and demonstrated to be effective.

Once again, I want to thank sincerely and congratulate our authors. They have been selected to contribute to this work based on their professional standing and peer approvals. Their willingness to share with us the benefits of their knowledge and experience is a true professional courtesy. Of course, it is an honour and a privilege to continue to serve as their editor in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2012

EDITOR'S PREFACE TO THE FIRST EDITION

Since the recent financial markets crisis (or crises, depending on your point of view), international capital markets (ICM) law and practice are no longer the esoteric topics that arguably they once were.

It used to be that there was no greater 'show-stopper' to a cocktail party or dinner conversation than to announce oneself to be an ICM lawyer. Nowadays, however, it is not unusual for such conversations to focus – at the initiation of others and in an animated way – on matters such as derivatives or sovereign debt. Indeed, even taxi drivers seem to have a strong view on the way the global capital markets function (or at least on the compensation of investment bankers). ICM lawyers, as a result, can stand tall in more social settings. Their views are thought to be particularly relevant, and so we should not be surprised if they are suddenly seen as the centre of attention – 'holding court', so to speak. This edition is designed to help ICM lawyers speak authoritatively on such occasions.

In part, the interest in what ICM lawyers have to say stems from the fact that the amounts represented by current ICM activities are staggering. The volume of outstanding over-the-counter derivatives contracts alone was last reported by the Bank for International Settlements (BIS) as exceeding $700 trillion. Add to this the fact that the BIS reported combined notional outstandings of more than $180 trillion for derivative financial instruments (futures and options) traded on organised exchanges. Crisis or crises notwithstanding, ICM transactions continue apace: one has to admire the resilience. At the time of writing, it is reported that the 'IPO machine is set to roar back into life', with 11 flotations due in the United States in the space of a single week. As Gandhi said: 'Capital in some form or another will always be needed.'

The current interest in the subject also stems from the fact that our newspapers are full of the stuff too. No longer confined to the back pages of pink-sheet issues, stories from the ICM vie for our attention on the front pages of our most widely read editions. Much attention of late has been given to regulation, and much of the coverage in the pages of this book will also report on relevant regulation and regulatory developments; but regulation is merely 'preventive medicine'. To continue the analogy, the courts are our 'hospitals'. Accordingly, we have also asked our contributors to comment on any lessons to be learned from the courts in their home jurisdictions. Have the judges got it right? Judges who understand finance can, by fleshing out laws and regulations and applying them to facts perhaps unforeseen, help in the battle to mitigate systemic risk. Judges who do not understand finance – given the increase in financial regulation, the amounts involved, and the considerable reliance on standard contracts and terms (and the need therefore for a uniform reading of these) – may themselves be a source of systemic risk.

ICM lawyers are receiving greater attention because there is no denying that many capital market products that are being offered are complex, and some would argue that the trend is towards increasing complexity. These changing financing practices, combined with technological, regulatory and political changes, account for the considerable challenge that the ICM lawyer faces.

ICM activity by definition shows little respect for national or jurisdictional boundaries. The complete ICM lawyer needs familiarity with comparative law and practice. It would not be surprising if many ICM practitioners felt a measure of insecurity given the pace of change; things are complex and the rules of the game are changing fast – and the transactions can be highly technical. This volume aims to assuage that concern by gathering in one place the insights of leading practitioners on relevant capital market developments in the jurisdictions in which they practise.

The book's scope on capital markets takes in debt and equity, derivatives, high-yield products, structured finance, repackaging and securitisation. There is a particular focus on international capital markets, with coverage of topics of particular relevance to those carrying out cross-border transactions and practising in global financial markets.

Of course, ICM transactions, technical though they may be, do not take place in a purely mechanical fashion – a human element is involved: someone makes the decision to structure and market the product and someone makes the decision to invest. The thought leadership and experience of individuals makes a difference; this is why we selected the leading practitioners from the jurisdictions surveyed in this volume and gave them this platform to share their insights. The collective experience and reputation of our authors is the hallmark of this work.

The International Capital Markets Review is a guide to current practice in the international capital markets in the most significant jurisdictions worldwide, and it attempts to put relevant law and practice into context. It is designed to help practitioners navigate the complexities of foreign or transnational capital markets matters. With all the pressure – both professional and social – to be up to date and knowledgeable about context and to get things right, we think that there is a space to be filled for an analytical review of the key issues faced by ICM lawyers in each of the important capital market jurisdictions, capturing recent developments but putting them in the context of the jurisdiction's legal and regulatory structure and selecting the most important matters for comment. This volume, to which leading capital markets practitioners around the world have made valuable contributions, seeks to fill that space.

We hope that lawyers in private practice, in-house counsel and academics will all find it helpful, and I would be remiss if I did not sincerely thank our talented group of authors for their dedicated efforts and excellent work in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2011

Chapter 13

INDONESIA

Yozua Makes[1]

I INTRODUCTION

The existence of a capital market has been a significant part of Indonesia's economic growth since the 1980s. The milestones of capital market legal development in Indonesia are the post independence reactivation, the deregulation policy of 1987–1988, the enactment of Law No. 8 of 1995 on Capital Market (Law 8/1995), and regulations enacted after the 1997 financial crisis that focus on advancing principles of good corporate governance (GCG). As of 2013, the authority overseeing all capital market activities has been transferred to the Indonesian Financial Service Authority (OJK), merging the previous Capital Market and Financial Institution Supervisory Authority (Bapepam-LK) and the financial supervisory role of the central bank (BI). In 2007 the Jakarta Stock Exchange and the Surabaya Stock Exchange merged to become the country's sole stock exchange, the Indonesian Stock Exchange (IDX).

Law 8/1995 was the first attempt at establishing a solid and modern legal foundation to the Indonesian capital market in response to the global market and the more sophisticated development of the global capital market industry. Two government regulations were enacted to equip the Law with operational procedures, namely Government Regulation No. 45 of 1995 on the Operation of Capital Market Activities (PP 45/1995) and Government Regulation No. 46 of 1995 on Capital Market Investigation (PP 46/1995). Law 8/1995 introduced new concepts, which are still relevant and apply at present. Bapepam-LK (now OJK) enacted extensive regulations to further implement the Law through technical regulations. In addition to OJK as the regulatory and supervisory authority, the Indonesian capital market also recognises three self-regulatory organisations (SROs) as corporations with particular authority

1 Yozua Makes is senior partner at Makes & Partners Law Firm.

and rule-making capacities, namely the stock exchange (IDX), the central securities depository (KSEI) and the clearing and guarantee institution (KPEI).

The IDX Composite Index has fluctuated considerably in 2013. It opened at 4,316.68 at the beginning of 2013 and reached an all-time high of 5,214.97 on 20 May 2013. However, the composite index dropped to its lowest point in 2013 at 3,994.46 on 27 August 2013, amid fear of potential financial crisis.[2] Market capitalisation has increased 12.79 per cent from 4.217 trillion rupiah to 4.655 trillion rupiah as of 14 August 2013. As of 31 July 2013, there are 24 new companies that have listed their shares in the IDX, and 45 new bond issues from 40 issuers. From January to July 2013, the IDX raised 38.4 trillion rupiah from the equity market (including IPOs, rights issues and warrants), as well as 43.84 trillion rupiah from the debt market.[3] Potential financial crisis led OJK to issue a new OJK Rule 02/POJK.04/2013, which enables an issuer to buy back a maximum of 20 per cent of its shares (out of the paid-up capital), without approval from the general meeting of shareholders (GMS), when there is a sharp decline of the IDX Composite Index, subject to mandatory disclosure requirements. Such a sharp decline is stipulated when the IDX falls cumulatively more than 15 per cent or more within three consecutive days, or any other situation as stipulated by the OJK.

II THE YEAR IN REVIEW

i Developments affecting general rules on securities law

Public companies, public offerings and disclosure rules

Indonesian companies must comply with securities regulations if they are considered as public companies or issuers. A public company is one that has at least 300 shareholders and a paid-in capital of at least 3 billion rupiah, or such other number of shareholders and paid-in capital that may be stipulated in government regulations. In addition, when a company conducts a public offering, it will be considered as an issuer subject to the securities law regime. A public company or an issuer is required to obtain a registration statement before it becomes eligible to carry out actions within the capital market. To do so, extensive information must be disclosed and submitted to OJK and made available to the public for this purpose. This information is contained in the prospectus and, along with other documents, forms part of the registration statement for the public offering, as detailed in, among others, Bapepam-LK Rule IX.A.1, IX.C.1, and IX.C.2.

After the registration statement of a public company or issuer has been deemed effective, the company or issuer will have to comply with securities regulations and will be under OJK supervision, especially with regard to the disclosure principle. This principle is the general guideline that requires an issuer or a public company to disclose to the public within a certain time material information in respect of their business or

2 The price movement of securities can be observed on the IDX website, at www.idx.co.id.

3 See the 1st Semester of 2013 Report of the Indonesian Stock Exchange, 'BEI and the Capital Market January–July 2013', 15 August 2013, in www.idx.co.id/Home/NewsAndAnnouncement/PressRelease/ReadPressRelease/tabid/191/ItemID/2277aea5-635b-44e9-b107-ec05ae090d2b/language/id-ID/Default.aspx (last accessed 6 September 2013).

securities when such information may influence decisions of investors in such securities, or the price of the securities. In this case, materiality is an important concept in the disclosure rule. According to Article 1, point 7 of Law 8/1995, material information is any important and relevant fact concerning events, incidents or data that may affect the price of a security on an exchange or that may influence the decisions of investors, prospective investors or others that have an interest in such information.

Mandatory disclosure is implemented by various rules, including mandatory financial statements and annual reports, disclosure of the use of funds appropriated from an IPO and corporate actions that trigger an IPO.

Pursuant to Bapepam-LK Rule X.K.1 on Disclosure of Information That Must Be Made Public Immediately, a public company or issuer with an effective registration statement must submit to Bapepam-LK and announce publicly any new material fact or information that may affect the corporate or securities value or affect investors' decisions, no more than two days after its occurrence. Pursuant to the same rule, Bapepam-LK issues a general list of events or transactions that trigger disclosure requirements for issuers and public companies. The regulation lists the following material facts as a basis for disclosure:

a a merger, consolidation, takeover, or formation of a joint venture;
b a stock split or dividend distribution;
c an irregular dividend increase;
d the gain or loss of an important contract;
e a significant new product or innovation;
f a change in control or significant change in management;
g a call for the purchase or redemption of debt securities;
h the sale of a material amount of securities to the public or in a limited manner;
i a purchase, or loss from the sale, of a material asset;
j a relatively important labour dispute;
k any important litigation against the company or the company's directors or commissioners;
l an offer to purchase securities of another company;
m the replacement of the accountant who audits the company;
n the replacement of the company's trust agent; and
o a change in the company's fiscal year.

There are also disclosure requirements for certain shareholders, as stated under Bapepam-LK Rule X.M.1. Directors, members of the board of commissioners and shareholders holding more than 5 per cent ownership of an issuer or a public company must disclose to OJK and the public any change related to such ownership no later than 10 days after the transaction that causes such a change.

Pursuant to the mandatory disclosure rule, and also in accordance with the IDX rule, the company is obliged to make the information publicly available and to submit it to the IDX and OJK. In practice, this requirement is carried out by the securities custodian handling the company's shareholder register. This public announcement is made either through the electronic trading system (Jakarta Automated Trading System), published on the company's website or announced on the trading floor.

Material transactions

The regulation on material transactions is significant because it covers a wide range of transactions that fall within the scope of the regulation. The first regulation was enacted in 2001 and amended in 2009. However, after receiving heavy criticism for the uncertainty it had created, the regulation was amended further in 2011. Below are crucial issues that trigger regulatory changes from time to time in Indonesia.

According to the 2011 regulation, a 'material transaction' is defined as participation in a company, project or any business; purchase, sale, transfer, asset swap, or business swap; asset lease; loan; provision of asset collateral; or provision of corporate guarantee with a value equivalent to more than 20 per cent of the company's equity, either in one transaction or in a series of transactions for one specific purpose. A similar definition was adopted in the second 2009 regulation but with the addition of a 'purchase of shares for the purpose of takeover and share disposal'. The two actions are no longer mentioned in the regulation, even though the 2011 regulation does not make a distinction between share and non-share assets with regard to the definition of 'material transaction'. Further detailed provisions in the 2011 regulation express that a purchase of shares (or share disposal for that matter) is considered a material transaction.

The first 2001 regulation provides an option to determine material transactions (i.e., from the company's revenue (10 per cent) or from the company's equity (20 per cent)). Because of the unifying basis of company equity, it becomes less ambiguous to determine whether a material transaction has occurred or not. Compared with the 2001 regulation, the 2009 and 2011 regulation provide a clearer method to determine 20 per cent of equity, which will be based on the most recent of the audited annual financial statement, the mid-term financial statement with CPA report or the audited mid-term financial statement. The first 2001 regulation did not mention any method to determine the 20 per cent equity, or 10 per cent of revenue.

The currently prevailing 2011 regulation provides clear and separate guidelines on disclosure. A company carrying out a material transaction with a transaction value of between 20 and 50 per cent of the company's equity is not required to obtain GMS approval but is required to disclose the information to the general public no later than two days after the signing of the agreement containing the material transaction. When a material transaction is worth more than the equivalent of 50 per cent of the company's equity, GMS approval is required.

Affiliated and conflict of interest transactions

Regulation of affiliate transactions and conflict of interest (COI) transactions, governed under Bapepam-LK Rule IX.E.1, serves a pivotal role in safeguarding public shareholders and market integrity in the Indonesian capital market. The idea is to empower minority shareholders with actions they can take, informed feedback or other methods to protect their interests. The first regulation concerning affiliate and COI transactions was enacted in 1997 and, following the effort to reform GCG in Indonesia, a regulation was enacted in 2000. In 2008, the regulation was amended, but the new regulation received heavy criticism for its failure to provide clearer legal certainty. The prevailing regulation, dated 2009, is more acceptable and provides better guidelines regarding the issue.

The Indonesian regulation adopts a distinction between 'affiliate transaction' and 'COI transaction'. According to the latest 2009 regulation, a conflict of interest is a 'difference between the economic interest of a company and the personal economic interest of a director, a member of the board of commissioners, or a major shareholder of the company in a transaction that may inflict a financial loss upon the company'. This is a simplification of the previous 2008 rule that defines COI as a 'difference between the economic interest of a company and the personal economic interest of a director, member of the board of commissioners or a major shareholder of the company in a transaction that may inflict financial loss upon the company because of unfair pricing'. However, the 'fair-pricing requirement' was eliminated in the most recent regulation due to the difficulty in assessing the 'fair price'. An 'affiliate transaction' is defined as a transaction between the company, or a company under its control (controlled company), and an affiliate of either the company or an affiliate of the director, member of the board of commissioners or a major shareholder of the company. The previous 2008 regulation defined affiliate transaction as a transaction between the company and its affiliate. Therefore, the currently prevailing definition covers a broader range of affiliates to include affiliates of a controlled company.

Affiliate and COI transactions are subject to two different requirements. An affiliate transaction may not necessarily have an adverse impact on the company. Therefore, the requirement is only limited to disclosing the transaction to the public, without requiring the company to obtain the approval of independent shareholders. Meanwhile, a COI transaction may be either an affiliate transaction or a non-affiliate transaction, but the benchmark for assessment is the difference in economic interest. An affiliate transaction may also be a COI transaction, in which case the applicable regime is the COI rule, not the affiliate transaction rule. In the event of a COI transaction, the regulation requires the company to obtain assessment and approval from the independent shareholders. An independent shareholder is defined as a shareholder that does not have any COI with respect to the particular transaction or that is not an affiliated party of a director, a commissioner or major shareholder that has a COI in the transaction.

To proceed with an affiliate transaction, an issuer or public company must first obtain a fairness opinion from an independent appraiser and submit the transaction to OJK, and announce it to the public within two business days after the date of the transaction. There is, however, no requirement to obtain approval from independent shareholders. There are basically two types of exceptions for affiliate transactions: one from having to engage an independent appraiser (but it is still disclosed), and an exception from engaging an independent appraiser and from having to disclose. For a COI transaction, there is a requirement to first obtain approval from independent shareholders. This approval is carried out by a majority decision (more than 50 per cent) of an independent GMS.

ii Developments affecting debt and securities offerings

Debt (bond) and equity (shares), both corporate and government, are traded on the IDX either by outright continuous auction or on the negotiated board, known together as the centralised trading platform (CTP) as well as over-the-counter. The over-the-counter (OTC) equity market is unregulated, but may be settled in the Indonesia Central Securities Depository (KSEI) system. All bond transactions, even OTC, are to be reported to CTP in accordance with Bapepam-LK rules. The following are rules closely related to corporate actions carried out by issuers.

Rights issues

Pursuant to Bapepam-LK Rule No. IX.D.1 on Rights Issue (Pre-emptive Rights), it is possible for a publicly listed company to make additional public offerings, issue warrants or convertible securities to raise additional funding and thus increase the number of shares traded in the stock market. In such an event, the existing shareholder holds a pre-emptive right to purchase the new securities – including shares, convertible securities and warrants – before they are offered to the public, proportionate to the number of currently held shares. Such a right is transferable and thus, if the existing shareholder does not plan to exercise its right, it can be sold into the market as a 'derivative product'.

There is also a method to increase the raising of additional funds from the public by issuing new shares but without granting pre-emptive rights to existing shareholders. In this event, pursuant to Bapepam-LK Rule No. IX.D.4, disclosure is required for the purpose of GMS preparation, and also public announcement before and after the execution of a capital increase without pre-emptive rights. A capital increase without pre-emptive rights is an alternative only if the company fulfils several requirements, including:

a within two years, the capital increase is a maximum of 10 per cent of the paid-up capital; or

b the purpose of the capital increase is to restructure the financial performance of the company for the following reasons:
- the company is a bank under a government restructuring programme in which the government subscribes more than 100 per cent of the paid-up capital;
- the company is in the state of negative working capital with liabilities of more than 80 per cent of assets; or
- the company fails or is unable to repay its unaffiliated creditor and such creditor approves the transfer of shares or convertible bonds to settle the loan.

In summary, there are restrictions limiting availability of a capital increase without pre-emptive rights to a certain amount or when the company is in financial distress.

Takeover, mandatory tender offer (MTO) and voluntary tender offer (VTO)

Takeover, or change of control of a company, is governed under Bapepam-LK Rule No. IX.H.1. A takeover (or acquisition of a publicly listed company) in general corporate legal terms affects the interests of various parties, including creditors, public shareholders or employees. The Regulation IX.H.1 that was enacted in 2008 stipulated the definition of a controlling shareholder, and this prevails in the present regulation: any person that owns 50 per cent of a company's paid-up shares or more, or any person that directly or indirectly has the ability to determine in any way whatsoever the management or policy of the public company. A takeover triggers a mandatory tender offer (MTO), in which other shareholders, whose shares are not acquired, must be given the right to sell their shares to the new controlling shareholders to uphold the principle of fairness. A mandatory tender offer must follow various rules, including the reporting requirement to OJK and the setting of the price for the mandatory tender offer.

There are several exemptions to the MTO obligation including, among others, to shares owned by a shareholder that has made another takeover transaction with the new controller of that company; shares owned by any other person that has already made an offering with similar terms and conditions as those of the new controller of that company; shares owned by substantial shareholders or shares owned by other controllers of that company.

There are various important issues governed by Bapepam-LK Rule No. IX.H.1. Price formulation is a main issue in the Indonesian MTO rules. The price of an MTO is essential because the public must receive the same price as that which the acquirer offered to the controlling shareholder. The 2008 rule and the prevailing 2011 version of Bapepam-LK Rule No. IX.H.1 state that the MTO price is to be set higher than the average of the highest daily trading prices on the IDX within the 90-day period before the announcement of the MTO or before the negotiation concerning the takeover deal is publicly announced.

The mandatory sell-down to maintain free-float shares is a controversial stipulation of Bapepam-LK Rule No. IX.H.1. The 2008 version of the rule introduced a new obligation to resell shares to maintain the availability of float shares in the event of a takeover that triggers an MTO. Under the 2008 Regulation, when a takeover, or an MTO following a takeover, results in the new controller owning more than 80 per cent of the company's shares, the new controller must transfer or float at least 20 per cent of the shares back to the public and the company must be owned by at least 300 parties within two years of the offer. This rule is expected to increase market liquidity, provide greater opportunity for public investors to own shares of the public company after a takeover and prevent listed companies from going private. After a series of attacks, the 2011 updated version of Bapepam Regulation No. IX.H.1 stipulates the conditions under which Bapepam-LK can prolong the period for the mandatory sell-down of shares to relax the sell-down requirements.

There is also a rule on voluntary tender offers (VTO), in which anyone can launch a public bid to purchase shares in, or even take over, a publicly-listed company, as governed under Bapepam-LK Rule No. IX.F.1. All VTO-related rules aim to uphold the principle of fairness and accountability, especially within the context of protecting the rights of public shareholders. Within this framework, there are provisions concerning defences against hostile takeovers carried out by the board of directors (BoD) or the board of commissioners (BoC) of the target company, by virtue of a statement of encouragement or discouragement, or a public statement when there is evidence that the information contained in a VTO statement is incorrect or deceitful. However, in practice, there have been no instances of hostile takeovers in the Indonesian market.

Merger and consolidation

A 1997 Bapepam rule is the prevailing rule on merger and consolidation of public companies; however, following enactment in 2007 of Law 40/2007 (New Company Law), there have been several updates that apply to public companies or issuers. According to Law 40/2007, merger means a legal action taken by one or more companies to merge with another existing company, causing the transfer of assets and liabilities of the merging companies by operation of law, to the surviving company and thereafter the legal entity status of the merging companies ceases by operation of law. Consolidation means a legal action taken by two or more companies to consolidate themselves by establishing a new company, which by operation of law obtains the assets and liabilities from the consolidating companies, and the legal entity status of the consolidating companies ceases by operation of law. This definition sets out a more advanced concept than that provided under the 1997 Bapepam rule.

In a privately held company, merger and consolidation starts with the drawing up of a merger or consolidation plan regarding all relevant entities, upon which the board of commissioners and the GMS will give approval or disapproval. As for public companies or issuers, the requirements and procedures are generally the same as those for a privately held company. However, public disclosure and a fairness opinion are important to promote a level playing field.

Initial information regarding merger or consolidation must be submitted at the earliest stage, despite no clear definition as to the exact time when to do so. Presumably, this must be carried out before the merger or consolidation plan is drafted (the rule uses the term 'feasibility study', which is not recognised under the New Company Law). The rule states that the information is to be submitted to Bapepam-LK two days after its approval by the BoC. Upon the finalisation of the merger or consolidation plan, such information must also be disclosed again to OJK. A summary of the merger or consolidation plan must be announced to the public in two Indonesian newspapers, one of which must have national circulation. At this stage, the company is required to conduct a GMS to obtain approval, the invitation to which must also be made public. Finally, the Bapepam-LK rule also compels the companies to obtain an independent opinion, to maintain transaction fairness. Therefore, in summary, a merger or consolidation must be made public in several stages: upon the approval by the board of commissioners, after the merger or consolidation plan is complete and before the GMS. Each of the steps may affect the share price of the relevant companies.

Quasi-reorganisation

Pursuant to Bapepam-LK Rule IX.L.1, quasi-reorganisation is reorganisation without true reorganisation, or without true corporate restructuring, which is carried out by reassessing the assets and liabilities of the company based on their reasonable value and disposal loss balance. The company commencing quasi-reorganisation must disclose to Bapepam-LK when submitting the agenda for a GMS to approve such a transaction, and an information disclosure must also be published in a national newspaper.

Share buy-back

Share buy-back (or repurchase) is governed under Bapepam-LK Rule No. XI.B.2, pursuant to which buy-back is defined as the reacquisition by a company of its own shares publicly traded in the market. Share buy-back is executed for the interest of the company and the shareholders. Shareholders who wish to receive payment for their shares may sell them back to the company. Shareholders who retain their shares might benefit from an increase in price due to the reduction in number of shares issued. The repurchased shares are kept inside the company as 'treasury shares' until they are reissued.

Under Law 40/2007, companies may repurchase issued shares provided that the repurchase of shares does not cause the net assets of the company to become less than the subscribed capital plus the mandatory reserves set aside; and the total nominal value of all the shares repurchased by the company plus any pledge of shares or fiduciary security over shares held by the company itself or by some other company whose shares are directly or indirectly owned by the company does not exceed 10 per cent of the total amount of capital subscribed in the company, unless otherwise provided in the securities regulations. Any transaction that violates the principle would be considered null and void. Further, the company may retain the repurchased shares for no more than three years. Under general corporate law, the repurchase of shares may only be carried out with the approval of a GMS, unless provided otherwise in the securities regulations.

In addition to a share buy-back initiated by the company, shareholders can also initiate the action. This happens in the event that a concerned shareholder requests that the company buy back its shares at a fair price because the shareholder does not approve a specific company plan (amendment of articles of association, or merger, consolidation, acquisition or spin-off). In the event that the shares requested to be bought exceed the limit on repurchase of shares by the company, the company must then endeavour to have the remaining shares bought by a third party.

In general, and pursuant to the buy-back rule, GMS approval is necessary for a buy-back to commence. However, during the 2008 global financial crisis, Bapepam-LK issued a regulation on share buy-back, entitled Rule No. XI.B.3 on Buy Back of Issuers or Public Companies Shares in a Potentially Crisis Market Condition. This was a response to the plunge of the composite index, which then led to a suspension of trading. In this context a buy-back may be necessary to hold the share price, but at the same time there is a problem with potential market manipulation and insider trading. Pursuant to the 2008 buy-back rule, issuers or public companies could conduct share buy-backs without seeking approval from a GMS, provided that it was limited to 20 per cent of the paid-up capital of the issuer or public company, but the most recent Bapepam rule, Rule XI.B.2, revoked this, disallowing share buy-backs without GMS approval. However, the latest OJK Rule, enacted in August 2013, prepares for situations of potential financial risk and has again allowed share buy-back without GMS approval, under certain conditions.

A buy-back can be carried out either in the market or OTC. In the latter case, there are rules regarding the price to ensure market integrity and prevent any insider dealing. A share buy-back can trigger a price change in the market from which some parties can extract rent. When a company buys back its own shares, it reduces the number of floating shares (publicly traded shares) held by the public. Therefore, if profits remain the same, the earnings per share increase. Therefore, share buy-back is relevant to the price formation of the company.

iii Developments affecting derivatives, securitisations and other structured products

Regulations concerning asset-based securities (ABS) have been enacted since 2003, yet to date there are only a few practices within the Indonesian market. There are discussions to further utilise ABS as instruments to promote liquidity in the banking and capital market sector. In a standard ABS issuance, the original creditor, or the originator, will separate assets (securities or receivables) by virtue of a sale, or any other form of transfer, to a special purpose vehicle (SPV) that will hold the underlying asset and issue the ABS; this SPV is usually in the form of a trust. The SPV will have no other commercial activity, apart from managing the underlying assets and the ABS. As the Indonesian civil law-influenced system does not recognise the concept of trusts, Bapepam-LK provides a legal scheme by virtue of a collective investment contract (CIC). A CIC is entered into by and between the fund manager underwriting the ABS and the custodian bank holding the ABS. The CIC also binds the holders of ABS by virtue of accession. Similar to a trust scheme, the CIC can issue ABS, and it is also insolvency-proof.

ABS can be offered either to strategic investors or to the public by virtue of a public offering in the IDX. When offering an ABS instrument to the public, there are registration requirements with which the issuer needs to comply. The offering of ABS to strategic investors is subject to information disclosure requirements in accordance with the relevant disclosure rules. The first public offering of ABS, and which has been listed in the IDX, was carried out on 12 February 2009. Relevant regulations on ABS include:

a Bapepam-LK Regulation No. V.G.5 on the Role of Fund Manager in Relation to ABS;
b Bapepam-LK Regulation No. VI.A.2 on the Role of Custodian Bank in Relation to ABS;
c Bapepam-LK Regulation No. IX.C.9 on Registration Statement in Relation to Public Offering of ABS;
d Bapepam-LK Regulation No. IX.C.10 on the Guidelines of Form and Substance of Prospectus in Relation to Public Offering of ABS;
e Bapepam-LK Regulation No. IX.K.1 on the Guidelines of CIC in Relation to ABS;
f Decree of the Director General of Tax No. Kep-147/PJ/2003 dated 13 May 2003 on Income Tax for Revenue Earned or Acquired by CIC-ABS and its Investors; and
g Central Bank (BI) Regulation No. 7/4/2005 on Prudent Principles in Asset Securitisation for Commercial Banks.

Another form of structured product found in the Indonesian market is the real estate investment trust (REIT). As with ABS, REITs in Indonesia are structured to comply with the civil law-influenced system, which is incompatible with the concept of trusts. The CIC model (entered into by and between fund manager and custodian bank, binding to REITs holders through accession) is, therefore, adapted and implemented. In December 2007, Bapepam-LK issued four regulations to promote the issuance of REITs in the IDX by virtue of the following:

a Bapepam-LK Regulation No. IX.C.15 on the Registration Statement for Public Offering of REITs in the form of CIC;
b Bapepam-LK Regulation No. IX.C.16 on the Guidelines on the Form and Substance of Prospectus for the Public Offering of REITs;
c Bapepam-LK Regulation No. IX.M.1 on the Guidelines for Fund Manager and Custodian Bank on REITs; and
d Bapepam-LK Regulations on the Guidelines of CIC for REITs.

iv Role of the IDX

In addition to the formal regulator, the Indonesian securities legal system also recognises a system of 'self-regulatory organisations' (SROs) to support compliance and enforce the rules. The IDX is an example of one of the SROs. Legally, IDX is a limited liability company, operating privately as a stock exchange. However, IDX is granted the power to regulate and enforce. By virtue of Rule 1-E concerning the Obligation of Information Submission, in the form of Decision of IDX BoD 306/BEJ/07-2004, IDX exercises this authority with regard to information disclosure. To conduct orderly, proper and efficient stock trading and to enable the spread of information more widely at the IDX, the IDX may suspend the trade of a stock throughout the market or in a certain market, for a certain period. The suspension is not considered as a sanction against the listed company. The IDX will be entitled to demand a clarification, either in writing or through a hearing, from the listed company regarding the alleged IDX rule violation by the listed company. In the event that the clarification sought by the IDX cannot be published, is considered confidential or is not provided by the listed company, the company must submit information or a statement regarding its inability to fulfil the said inquiry and the reason.

The IDX can conduct research on information and documents submitted by the listed company and shall decide upon such matters, considering not only the formal aspects, but also the substance of the requirements. As an SRO, IDX is more flexible and resourceful in assessing compliance with the rules at the substantive level, not just the formalities. Listed companies must submit to the IDX a periodic report, an incidental report and conduct a public exposé. The periodic reports and incidental reports must be submitted by the listed company to the IDX simultaneously with the submission of the said information to the public.

Most of the regulated disclosure requirements in the IDX rules refer to Bapepam-LK rules, both on the periodic and transactional disclosure requirements. Therefore, all mandatory disclosure, from financial statements to annual reports to corporate actions (takeover, tender offer, rights issue and so on) are also subject to the IDX rules. There is one additional requirement for public exposition that is specific to IDX. According to IDX rules, any listed company must organise an annual public exposé at least once a year that can be conducted on the same day as the convening of the GMS. In addition to the annual public exposé, a listed company must also organise an incidental public exposé at the request of IDX, if according to the IDX, the listed company is experiencing an event or incident or there is information that can influence the security's value or investors' decisions and the written explanation submitted by the listed company is deemed to not be sufficient.

v Other strategic considerations

The intersection between the securities law regime and other industry or sector-specific regimes has been a controversial topic in Indonesia. There have been many cases involving contradictions between the securities law obligations and other rules, including foreign direct investment (FDI) rules, the Negative Investment List (DNI), the coal mining public contract rule and the broadcasting rule.

The recent Investment Coordinating Board of the Republic of Indonesia (BKPM) Regulation No. 5 of 2013 on the Guidelines and Procedures for Licences and Non-Licences for Capital Investment (BKPM Regulation 5/2013) addresses the question of controlling shareholders in publicly listed companies. A listed company will be categorised as a foreign investment company (PMA) if all or one of its controlling shareholders is a foreign individual, a foreign legal entity or a PMA company. In such an event, the listed company must apply for a PMA licence. The rule has ignited debate on whether a portfolio investment by virtue of an IDX transaction is also considered as FDI with the objective of effective control over such a listed company. The rule arguably challenges Article 4 of Presidential Regulation No. 36 of 2010 on the DNI, which states that the DNI does not apply to 'indirect or portfolio' investments. It remains to be seen how BKPM will implement the rule, especially in coordination with the policies of OJK.

III OUTLOOK AND CONCLUSIONS

The Indonesian capital market has fluctuated considerably in 2013, hitting an all-time high in May yet reaching its lowest point in August. The OJK itself is still in the process of institutional consolidation, having enacted only two rules this year, one on the protection of financial service consumers, and the other on conditions for share buy-back without GMS approval. The latter was issued in response to a potential risk of financial crisis following Indonesia's balance of payments deficit, balance of trade deficit, currency depreciation and a sharp decline of the IDX composite index.

In 2014, in addition to initiatives to prevent financial crisis the upcoming legislative and presidential election will definitely affect the Indonesian market. With regard to legal developments, the head of OJK has made a statement that Law 8/1995, the foundation of capital market law, will be revised in 2014. The process of revising controversial BKPM Regulation 5/2013 (see Section II.vi, *supra*) has also begun, although no projected completion date has been announced. Finally, another controversial rule currently under revision is the mandatory sell-down rule, following changes to the takeover process under Bapepam-LK Rule No. IX.H.1.

In conclusion, the capital market in Indonesia has demonstrated stable and robust growth, with continuous improvement in the regulatory environment providing better rules for investors and issuers. The newly established OJK is expected to play a more active role in 2014, after basic institutional consolidation in 2013. Potential global crisis and the upcoming election are two key factors that may significantly affect the market.

Appendix 1

ABOUT THE AUTHORS

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Yozua Makes is senior and managing partner at Makes & Partners Law Firm, a Jakarta-based leading law firm focusing on the areas of capital markets, mergers and acquisitions, corporate finance, banking and foreign investments. He has over 25 years of experience in these areas and has handled a broad range of complex cross-border commercial transactions.

Yozua is an alumnus of the Faculty of Law of the University of Indonesia, the University of California, Berkeley, Boalt Hall School of Law, the Asian Institute of Management and Harvard Business School. He is currently enrolled in a joint PhD programme at the University of Indonesia and Maastricht University in the Netherlands. Yozua is also actively involved in various professional and social organisations, and was the first appointed member of the National Committee for Corporate Governance and is a member of the board of experts of the Indonesian Association of Publicly Listed Companies. He is a registered legal consultant with the Indonesian Capital Market Supervisory Agency (Bapepam) and has formerly worked as special adviser to the Minister of Defence. He is a distinguished associate professor at the Faculty of Law at the University of Pelita Harapan and is also a professor at the Faculty of Law at the University of Indonesia. Yozua was a member of the expert staff of the State Ministry of Cooperatives and SMEs; the Steering Committee for Indonesian State Policy Guidelines and the Steering Committee for the merger of the Jakarta Stock Exchange and the Surabaya Stock Exchange. He is also on the board of trustees of World Vision Indonesia.

Yozua's paper, 'Challenges and Opportunities for the Indonesian Securities Takeover Regulations: General Framework and Analysis from Dutch Law and Theoretical Perspectives' has recently been published by the University of Pennsylvania East Asia Law Review. Yozua was nominated for the Managing Partner of the Year award and his law firm, Makes & Partners, was nominated for the Indonesia Deal Firm of the Year award at the 2013 *ALB* SE Asia Law Awards.

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