

# NEWSLETTER

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## NEW OJK GUIDELINES ON IMPLEMENTATION OF A SECURITIES OFFERING WHICH IS NOT A PUBLIC OFFER

On 30 December 2022, the Indonesian Financial Services Authority (“OJK”) issued new guidelines on the implementation of securities offering which is not a public offer by virtue of OJK Circular Letter No. 33/SEOJK.04/2022 on Guidelines for the Implementation of Securities Offering which is not a Public Offer (“OJK Circular Letter 33/2022”).

OJK Circular Letter 33/2022 is the implementing regulation of OJK Regulation No. 29/POJK.04/2021 on Securities Offering which is not a Public Offer (“POJK 29/2021”). POJK 29/2021 increased the offering amount threshold for a securities offering to be deemed as a public offer from Rp 1 billion to Rp 5 billion. POJK 29/2021 also provides that OJK may determine other thresholds different from (presumably higher than) Rp 5 billion (“OJK Determination”) for certain types of offering to be deemed as “securities offering which is not a public offering” i.e.,:

1. Equity securities offering in the framework of employee share ownership program, either by an Indonesian public company (Perusahaan Terbuka) to its employees and/or the employees of its subsidiaries (“Public company ESOP”) or by a foreign company listed on a stock exchange to its Indonesian subsidiaries’ employees (“Foreign Company ESOP”);
2. Debt securities/sukuk offering carried out by a multilateral institution (called “supranational agency”, such as the World Bank, the International Monetary Fund, the Asian Development Bank, the Islamic Development Bank);

3. Securities offering for purpose of market penetration as determined by OJK; and
4. Securities offering for purpose of supporting government policy as determined by OJK.

### KEY POINTS

Under OJK Circular Letter 33/2022, a new procedure has been introduced for the above-listed offerings to obtain the OJK Determination, particularly on 1, 2 and 3 above, which will allow the offering to be implemented without undergoing “public offer” procedures and requirements even though it is offered to more than 100 parties with an offering amount which exceeds the public offer threshold of Rp 5 billion within a 12-month period.

The procedures to obtain the OJK Determination are generally, as follows:

- Parties that can carry out this offering and therefore can apply for the OJK Determination are:
  - Indonesian public company conducting Public Company ESOP;
  - Foreign company listed on a stock exchange conducting Foreign Company ESOP;
  - Multilateral institution conducting debt securities/sukuk offering;
  - A party conducting securities offering for purpose of market penetration; and/or
  - A party conducting securities offering for purpose of supporting government policy.



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- For Public Company ESOP and Foreign Company ESOP, the shares to be offered may originate from newly issued shares or shares from the treasury stock of the relevant company.
- The applicant is required to submit to OJK the offering documents consisting of, at least, the following:
  - a. Application letter to obtain the OJK Determination, in a form as attached to the OJK Circular Letter 33/2022.
  - b. Information Memorandum (“**Info Memo**”) which must be made in the Indonesian language (or if bilingual, the Indonesian language must be the prevailing language) and contain minimum material information or facts as provided in OJK Circular Letter 33/2022 for the relevant offering, including:
    - 1) Offering date or distribution date;
    - 2) Certain disclaimers to be placed at the beginning of the Info Memo and printed in capital letters;
    - 3) Information on party conducting the securities offering; and
    - 4) Other minimum information as set forth in OJK Circular Letter 33/2022 depending on the type of the offering.
- Upon the submission of the required offering documents, OJK will examine the documents and may request for an alteration and/or additional information as well as for any other supporting documents. In such a case, the relevant applicant shall comply with any such requests within 20 (twenty) working days upon the receipt of the said request; failure to comply with the request within such period will result in the application being deemed as cancelled.
- The issuance of the OJK Determination is on a discretionary basis and OJK may either approve or reject the application.
- Upon the submission of the required offering documents, OJK will examine the documents and may request for an alteration and/or additional information as well as for any other supporting documents. In such a case, the relevant applicant shall comply with any such requests within 20 (twenty) working days upon the receipt of the said request; failure to comply with the request within such period will result in the application being deemed as cancelled.
- The issuance of the OJK Determination is on a discretionary basis and OJK may either approve or reject the application.
- If approved, the implementation of the offering must commence within 12 (twelve) months after the issuance of the OJK Determination.
- The party may only carry out the offering in Indonesia after obtaining the OJK Determination.
- Upon OJK issuing the OJK Determination, the Info Memo is also required to be notified to the candidate recipients or purchasers no later than 2 (two) working days prior to the start of the offering in Indonesia and evidence thereof must be submitted to OJK no later than 2 (two) working days after the implementation of the securities offering.

#### APPLICABILITY

Multilateral institutions which intend to conduct debt securities/sukuk offering, Indonesian public companies and foreign multinational companies which intend to conduct employee share ownership program involving employees in Indonesia must carefully consider the provisions of OJK Circular Letter 33/2022 prior to implementing the relevant program/offering. The new guidelines under OJK Circular Letter 33/2022 can also be viewed as adding additional requirements to the existing practice / policy / regulation.

For example, for Indonesian public companies conducting Public Company ESOP, in addition to observing the requirements under OJK Regulation on the Increase of Capital with Rights Issue, additional obligations / requirements under OJK Circular Letter 33/2022 must also be observed (e.g., preparation of an Info Memo).

The OJK Circular Letter 33/2022 also significantly affects the implementation of a global employee share ownership program in Indonesia by foreign multinational companies to its Indonesian subsidiaries, as described below.

#### IMPACT TO THE IMPLEMENTATION IN INDONESIA OF GLOBAL EMPLOYEE SHARE OWNERSHIP PROGRAM BY FOREIGN MULTINATIONAL COMPANIES WITH SUBSIDIARIES IN INDONESIA

The OJK Circular Letter 33/2022 provides a degree of certainty in terms of regulatory procedures, particularly in relation to foreign



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listed companies that wish to implement a global ESOP program for its subsidiaries' employees in Indonesia, particularly if the number of eligible employees in Indonesia is more than 100 and the aggregate offering amount in Indonesia is expected to exceed Rp 5 billion. Previously, for such a global ESOP program to be implemented in Indonesia (where there is a large number of eligible employees involved), there was only a policy implemented by OJK where OJK would issue a "waiver" exempting the program from the registration statement and prospectus requirements upon request from the relevant foreign listed company. The procedure to obtain such "waiver" was, however, not specifically regulated and was only based on practice and unwritten policy.

The OJK Circular Letter 33/2022 basically amended the existing policy and provided a new regulatory procedure on this matter.

Even though the OJK Circular Letter 33/2022 provides a legal basis and certainty in terms of regulatory procedure, it may also be seen as more onerous than the existing OJK practice and policy:

- There is an additional document to be prepared and notified to the employees in Indonesia, namely the Info Memo, in addition to the existing offering documents which are normally prepared under the requirements pursuant to the applicable laws and regulations of the foreign listed company (e.g., brochure, local supplement, offering regulation document). Further, as the program is usually governed under and subject to foreign laws (including foreign securities law requirements), additional difficulties may be expected in preparing the Info Memo as the Info Memo minimum content requirement under OJK Circular Letter 33/2022 may not be in line with what is required under the applicable foreign laws.
- Different from the previous OJK policy on "waiver", there will be a new ceiling/threshold determined by OJK in the OJK Determination letter for the offering to be deemed as not a public offer (previously, if a waiver was granted, no new ceiling was determined and therefore the offering could still be deemed as not a public offer regardless of the aggregate offering amount). This new ceiling/threshold is based on the request from the applicant. Consequently, the foreign listed company, when applying for

The OJK Determination, must calculate the aggregate offering amount in Indonesia as this will be set by OJK as the new ceiling which the applicant must then observe

