



ANALYSIS OF ISLAMIC LAW ON THE REQUIREMENTS OF A MAXIMUM OF 10% OF NON-HALAL INCOME IN THE ISSUANCE OF THE SHARIA SECURITIES LIST IN INDONESIA

Frizka Oktaviani

Legal Consultant of Jallu and Patners Associates

E-mail: frizkaoktaviani93@gmail.com

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Abstract

The Financial Services Authority (OJK) as the authorized institution to supervise and make regulations on economic activities in Indonesia has issued OJK Regulation Number 35/POJK.04/2017 about the criteria and issuance of the Sharia Securities List. One of the criteria is that it is permissible for companies with a maximum of 10% of non-halal income to be included in sharia securities. This causes the mixing of halal and haram assets. This study is aimed at finding out how the criteria for the issuance of the Sharia Securities List are in the Financial Services Authority Regulation Number 35/POJK.04/2017 and why the Financial Services Authority determines the non-halal income requirement of a maximum of 10% in the criteria for the issuance of the Sharia Securities List and how the analysis of Islamic law on it in the criteria for the issuance of the Sharia Securities List. This is a qualitative research with the type of library research. The results of this study conclude that the criteria for the issuance of the Sharia Securities List in the Financial Services Authority Regulation Number 35 of 2017 are divided into

qualitative and quantitative criteria. This rule is enforced because of Indonesia's economic conditions that it is impossible to get issuers who are not involved with interest in their business activities. The analysis of Islamic law on the rules of a maximum of 10% of non-halal income does not violate the provisions of fiqh muamalah.

Keywords: *Islamic Law, a Maximum of 10% of Non-Halal Income, Sharia Securities List (DES).*

Abstrak

Otoritas Jasa Keuangan (OJK) sebagai lembaga yang berwenang mengawasi dan membuat peraturan atas kegiatan ekonomi di Indonesia mengeluarkan Peraturan OJK Nomor 35/POJK.04/2017 tentang kriteria dan penerbitan Daftar Efek Syari'ah. Salah satu kriterianya adalah diperbolehkannya perusahaan berpendapatan non-halal maksimal 10% masuk dalam efek syari'ah. Hal ini menyebabkan bercampurnya harta yang halal dengan haram. Penelitian ini bertujuan untuk mengetahui bagaimana kriteria penerbitan Daftar Efek Syari'ah dalam Peraturan Otoritas Jasa Keuangan Nomor 35/POJK.04/2017 dan mengapa Otoritas Jasa Keuangan menentukan syarat pendapatan non-halal maksimal 10% dalam kriteria penerbitan Daftar Efek Syari'ah serta bagaimana analisis hukum Islam terhadap pendapatan non-halal maksimal 10% dalam kriteria penerbitan Daftar Efek Syari'ah. Penelitian ini merupakan penelitian kualitatif dengan jenis penelitian kepustakaan (*library research*). Hasil penelitian ini menyimpulkan bahwa kriteria penerbitan Daftar Efek Syari'ah dalam Peraturan Otoritas Jasa Keuangan Nomor 35 Tahun 2017 terbagi menjadi kriteria kualitatif dan kriteria kuantitatif. Aturan ini diberlakukan karena kondisi perekonomian Indonesia yang tidak mungkin mendapatkan emiten yang tidak terlibat dengan bunga dalam aktivitas bisnisnya. Analisis hukum Islam terhadap aturan pendapatan non-halal maksimal 10% tidak menyalahi ketentuan fikih muamalah.

Kata Kunci: *Hukum Islam, Pendapatan Non-Halal Maksimal 10%, Daftar Efek Syari'ah (DES)*

INTRODUCTION

The development of human life continues to grow rapidly in various aspects such as information and communication technology, transportation, and the economy. Several aspects that develop

continuously are mutually supportive to each other, for instance, economic activities are getting easier and faster with the latest sophisticated technologies. In line with the development of this globalization era, activities that were previously carried out using a manual system are now moving to a digital system.

One of the impacts of the development of economic activity is Financial Technology (Fintech). Financial technology is the use of technology in the financial system that produces new products, services, technology, and/or business models and can have an impact on monetary stability, financial system stability, and/or efficiency, smoothness, security, and reliability of the payment system (Bank Indonesia Regulation Number 19/12/PBI/2017, 2017, article 1). One of the financial technology activities that is currently being used by the community is investment.

Investment is defined as a commitment to a number of funds or other resources carried out at this time, with the aim of obtaining a number of benefits in the future (Huda and Nasution, 2008: 7). In choosing investment products, investors must ensure that these products have been registered and supervised by the state, in Indonesia, of course, with the authorities from the Financial Services Authority (OJK) as assigned by the state to avoid fraud under the guise of investment (Berutu, 2020: 161).

Investment is allowed in Islam, as stated in the story of the Prophet Yusuf as the word of Allah SWT Q.S Yusuf verses 46-49 which means:

O Joseph ! ” (he said). “O man of truth ! Expound To us (the dream) Of seven fat kine Whom seven lean ones Devour, and of seven Green ears of corn And (seven) others withered: That I may return To the people, and that They may understand. (Joseph) said: “ For seven years Shall ye diligently sow As is your wont: And the harvests that ye reap, Ye shall leave them in the ear,— Except a little, of which Ye shall eat. Then will come After that (period) Seven dreadful (years), Which will devour What ye shall have laid by In advance for them,— (All) except a little Which ye shall have (Specially) guarded. Then will come After that (period)

a year In which the people will have Abundant water, and in which
They will press (wine and oil).

The verse above is interpreted as delaying desire by setting aside something we have now for future use. Besides, it can also be interpreted as a suggestion to prepare supplies for the future, one of which is through this investment (Berutu, 2020: 161).

Investment itself is divided into 2 types, namely direct investment ,where the investor is directly involved in the investment activities. The second one is indirect investment, where the investor does not need to be physically present and is not directly involved in investment activities because the main purpose of this type of investment is to buy shares for resale in the capital market (Untung, 2010: 13). Indirect investments are transacted in the capital market, the financial instruments traded in the capital market in the form of stocks, obligations, warrants, rights, *reksadana*, and various derivatives such as options, futures, and others.

The capital market is generally a place for sellers and buyers to conduct transactions in order to obtain capital. As a Muslim-majority country, the government provides a platform for Muslim capital market customers or investors by creating a sharia capital market. Sharia instruments are almost the same as the conventional ones, namely sharia stock, sharia obligation, sharia *reksadana* and others. The difference lies in its implementation which must be based on sharia principles. Sharia principles are based on Islamic teachings in which the stipulation is carried out by the DSN-MUI, both stipulated in this fatwa and in other related fatwas (DSN MUI Fatwa NO: 40/DSN-MUI/X/2003, 2003: Article 1).

The sharia capital market in Indonesia was officially launched on March 14, 2003 (Mulyaningsih, 2008: 183). The sharia principles in the sharia capital market applied Islamic law in their activities based on the fatwa of DSN-MUI. The regulations is created because of the effects contained in the capital market that are not entirely in accordance with sharia because most of them are conventional institutions, and usury,

which are clearly prohibited in Islam, will be hard to avoid. As written in Al-Baqarah verse (278):

"O ye who believe! fear God and give up what remains of your demand for usury if ye are indeed believers."

In Fatwa Number 40/DSN-MUI/X/2003 about Capital Markets and General Guidelines for the Application of Sharia Principles in the Capital Markets, it is stated that securities criteria can be categorized according to sharia principles. So, to avoid the usury, a screening must be done first. The screening process is aimed to identify stocks that violate sharia principles such as usury, gambling, and *gharar* (uncertainty) (Sutedi, 2012: 39). Screening activities are carried out twice a year, so the Indonesia Sharia Stock Index is evaluated by the Stock Exchange and DSN-MUI every six months.

The Financial Services Authority becomes an independent institution which replace the duties, functions, and authorities of the financial regulation previously carried out by the Ministry of Finance through the Capital Market and Financial Institutions Supervisory Agency (Bapepam-LK). OJK then issued a regulation, namely POJK Number 35/POJK.04/2017 about the Criteria and Issuance of Sharia Securities List, where one of the criteria is stated in Article 2 paragraph (1) letter b that issuers is included in the category of sharia securities if the total interest income and other non-halal income compared to the total operating income and other income is not more than 10% (ten percent). It means that there are still 10% of non-halal clauses allowed by OJK to be included in the Sharia Securities List. This causes the inconsistency in avoiding the usury which has been very clearly prohibited in Islam.

While the DSN-MUI, as the ones who issue sharia fatwas which is used as the basis for the OJK to make various sharia economic rules, in its fatwa regarding the capital market does not mention textually it is permissible for non-halal income of a maximum of 10% to be included in the Sharia Securities List (DES). However, practically, the regulation is still used as a reference in the screening process for sharia shares

carried out by the Financial Services Authority with the supervision of the DSN-MUI. Regarding this, there is still a lot of arguments over whether or not the non-halal income requirement of a maximum of 10% is included in the Sharia Securities List (DES). The rules that allow a maximum of 10% of non-halal income in the Sharia Securities List cause the mixing of halal and haram assets. This issue has encouraged the authors in this study to re-explain the DSN-MUI Fatwa law regarding the terms of a maximum of 10% of non-halal income in the Sharia Securities List by using Islamic law so that the legal clarity in the fatwa becomes clear and can be used as a reference for the public in addressing this problem.

DISCUSSION

Sharia Capital Market

The definition of the capital market in accordance with Law Number 8 in 1995 concerning the Capital Market (UUPM) is an activity about public offering and trading of securities of public companies related to the securities issued, as well as institutions and professions related to securities. The capital market is a market that provides a source of spending with a longer period of time (more than one year), which is invested in capital goods to create and multiply the means of production, which in turn will create a job market and promote healthy economic activities (Manan : 2012: 168).

The sharia capital market is a capital market, as defined in the Capital Market Law as described above, which does not contradict with sharia principles. The Sharia Capital Market is part of the Indonesian capital market industry. The activities of the Sharia Capital Market are in line with the capital market in general. However, there are some characteristics of the sharia capital market, namely the product and transaction mechanism that must not contradict with the sharia principles in the capital market.

The application of sharia principles in the capital market comes from the Qur'an, as the highest source of law, and the Hadith of the

Prophet Muhammad SAW. The scholars then made the interpretation of both sources which is called as *fiqh*. One of the discussions in *fiqh* is the *muamalah* which refers to the relationship between humans regarding trading. So the sharia capital market activities are developed on the basis of *fiqh muamalah*. There is a *fiqh muamalah* rule which states that:

الْأَصْلُ فِي الْأَشْيَاءِ إِلَّا بَاطِنًا حَتَّى يَدُلَّ الدَّلِيلُ عَلَى التَّحْرِيمِ

Meaning: "Basically, all forms of *muamalah* can be done unless there is evidence that forbids it."

Various things that are being considered by the National Sharia Council in determining the capital market as part of the Islamic economic system in accordance with the DSN fatwa no. 40/DSN-MUI/X/2003 are as follows:

- a. The economic development of a country cannot be separated from the development of the capital market.
- b. Capital markets based on sharia principles have been developed in various countries.
- c. Indonesian Muslims need a capital market which is based on sharia principles.
- d. Therefore, to meet this need, the MUI of National Sharia Council deems it necessary to stipulate a fatwa on the capital market and general guidelines for the application of sharia principles in the capital market sector.

The legal basis for the DSN fatwa related to the capital market is based on the al Qur'an verse:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبُطْلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ ۚ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا

Meaning: "O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you (Surah an-Nisa [4]: 29).

Shaykh Dr. 'Umar bin 'Abdul 'Aziz al-Matrak (Al-Matrak, al-Riba wa al-Mu'amalat al-Mashrafiyyah, [Riyadh: Dar al-'Ashimah, 1417 H], pp. 369-375) states:

Shares contained in permitted companies, such as trading companies or permitted manufacturing companies. *Muusahamah* (mutual shares) and *sharikah* (share) in the company as well as buying and selling shares, if the company is known and does not contain significant uncertainty and ambiguity, then it is allowed. This is because shares are part of capital that can provide benefits to their owners as a result of trading and manufacturing businesses. It is indeed *halal* (DSN MUI Fatwa NO: 40/DSN-MUI/X/2003, 2003: 4-5).

Sharia capital market products are sharia securities. Sharia securities are securities that do not contradict with sharia principles in the capital market. Sharia capital market products that have been issued are sukuk, sharia stocks, sharia mutual funds. Sharia Asset Backed Securities (Shari'ah EBA), and Sharia Real Estate Investment Funds (Sharia DIRE).

List of Sharia Securities (DES)

Sharia Securities List (DES) is a collection of sharia securities determined by the Financial Services Authority (OJK) or issued by the Issuing Party of the Sharia Securities List. Meanwhile, the issuer of DES according to POJK No.35/POJK.04/2017 article 1 paragraph (7) are:

- a. A party that has obtained approval from OJK to issue a Sharia Securities List;
- b. Sharia Investment Manager who has fulfilled the conditions required to carry out activities as the issuer of the Sharia Securities List as stipulated in this OJK Regulation;
- c. Investment Manager who has a sharia investment management unit that has met the conditions required to carry out activities as the issuer of the Sharia Securities List as regulated in this OJK Regulation

The list of Sharia Securities determined by OJK must be used as a reference for parties issuing domestic sharia securities indexes,

investment managers who manage investment portfolios of sharia securities in the country, securities companies that have a Sharia Online Trading System, other parties who undertake the preparation and/or management of domestic sharia securities investment portfolios for the benefit of other parties as long as they are regulated in the provisions of laws and regulations.

Sharia Securities List Screening is a screening carried out for issuers on the stock exchange to be classified into a sharia stock index. In general, the screening process is divided into two parts, namely business screening and financial screening or it can also be called as qualitative and quantitative criteria. Qualitative criteria are guidelines from the sharia board regarding whether or not an issuer is categorized in the sharia index, which includes the type of issuer's business and the products produced by the issuer. The qualitative aspect includes the criteria for the object of business, whether the company is engaged in a prohibited sector with elements of usury, *gharar*, and *maisir*. While the quantitative criteria are criteria that include financial ratios, debt ratios and non-halal income (Muin, 2020:117).

The screening process for sharia stocks is carried out to determine shares that do not contradict with sharia criteria in the capital market. The screening process is carried out by OJK along with DSN-MUI. Stocks that have been selected and included in the sharia criteria will be included into the Sharia Securities List and grouped into three sharia stock indexes listed on the Indonesia Stock Exchange. The three indexers are as follows (Berutu, 2020: 161):

a. Indonesia Sharia Stock Index (ISSI)

The Indonesia Sharia Stock Index (ISSI) has been on the IDX since mid-2011. The stocks included in the ISSI index are all of the Islamic stocks listed in the Sharia Securities List issued by the OJK periodically once per 6 months.

b. Jakarta Islamic Index (JII)

JII was listed on the Indonesian capital market in 2000, more precisely on July 3rd, 2000. The stocks that are included in this index only

consist of 30 sharia shares contained in the DES. The 30 shares of JII are the mostly liquid shares traded on the Indonesia Stock Exchange. JII constituents will also be reviewed periodically in May and November every year.

c. Jakarta Islamic Index 70 (JII70)

The Jakarta Islamic Index 70 (JII70) is one of the Islamic stock indexes launched by the IDX on May 17th, 2018. The companies that enter JII70 are the 70 mostly liquid Islamic stocks listed on the Indonesia Stock Exchange. The JII index is also renewed twice a year.

With the existence of these three sharia stock indices in Indonesia, sharia capital market players have no more difficulty in determining what kind of shares to use as investment instruments, because by capitalization, the company has been grouped in the sharia stock index, namely ISSI, JII and JII 70.

Criteria for Issuance of Sharia Securities List according to Financial Services Authority Regulation Number 35/POJK.04/2017

Article 2 paragraph (1) POJK Number 35/POJK.04/2017 explains the securities and criteria of securities in the Sharia Securities List, for issuers which, in their activities, do not state that the type of business, management method, and/or services provided are based on the principles of Sharia stocks in the capital market (passive stock) can be included in the Sharia Securities List as long as the issuer or public company:

1. Do not conduct activities or types of business that contradict the sharia principles in the capital market as stated in the Financial Services Authority Regulation Number 35/POJK.04/2017 article 2 paragraph (1) which includes:
 - a) Gambling or games which are classified as gambling, meaning that companies or industries involved in gambling or casino activities.
 - b) *Ribawi* (usury) financial services, including bank and non-bank financial institutions, insurance companies, financial

technology and others that are conventional and contain elements of *gharar*, *maisir* and usury in their transactions.

- c) Selling and buying risks that contain elements of uncertainty (*gharar*) and/or gambling (*maisir*), such as conventional insurance products.
 - d) Produce, distribute, trade and/or provide:
 - 1) *Haram* goods or services (*haram li-dzatih*), for example pork, dogs, wild animals and liquor (*khamr*) containing intoxicating alcohol.
 - 2) *Haram* goods or services not because of their substance (*haram li-ghairih*) as stipulated by the National Sharia Council - Indonesian Ulama Council (MUI), such as companies involved in corruption, slaughtering halal animals not according to Islamic law (not in the name of Allah).
 - 3) Goods or services that damage morals and are harmful, such as cigarette companies, night entertainment companies, and pornography providers.
 - 4) Other goods or services that are in contrary to sharia principles based on the provisions of the National Sharia Council - Indonesian Ulama Council (MUI);
 - e) Carry out other activities that contradict the sharia principles based on the provisions of the National Sharia Council - Indonesian Ulama Council (MUI).
2. Do not conduct transactions that are contrary to sharia principles in the capital market as stated in the Fatwa of DSN-MUI Number 80/DSN-MUI/III/2011 concerning the Application of Sharia Principles in the Mechanism of Trading Equity Securities in the Regular Market of the Stock Exchange, namely manipulation, transactions with no goods and/or services (index trading), buying and selling of securities that utilize insider information from issuers, and other actions containing *dharar* (harming other parties), *gharar* (uncertainty), *usury* (interest), *maisir* (gambling),

risywah (bribes), immorality and injustice, *taghrir* (lies to others), *ghisysy* (preferring goods to hide defects), *tanajusy/najsy* (false bargaining), *ikhtikar* (hoarding), *bai' alma'dum* (sale and purchase of goods that did not exist at the time of the contract/not yet owned), *talaqqi al rukban* (buying and selling at prices far below the market price), *ghabn* (unbalanced), and *tadllis* (fraud).

3. Meet the following financial ratios:
 - a) Total interest-based debt compared to total assets does not exceed 45% (forty five percent); and
 - b) Total interest income and other non-halal income compared to total operating income and other income is not more than 10% (ten percent).

The Reason of the Financial Services Authority to Determine the Requirement of a Maximum of 10% of Non-Halal Income in the Issuance Criteria for the Sharia Securities List

The rule for the issuance of the Sharia Securities List regarding the determination of the ratio of interest income and other non-halal should not be more than 10% of total income is based on the discussions between DSN MUI and Bapepam LK which refers to the materiality aspect. It is stated in the Attachment to the Decree of the Chairman of the Capital Market Supervisory Agency Number KEP-06/PM/2000 on March 13rd, 2000 in the Attachment to Regulation Number VIII.G.7: concerning Guidelines for the Presentation of Financial Statements (Prastyo, 2017:166).

In the Appendix to the regulation, it is stated that income is material or affects the total income, explained in number 2 letter g point 1: "Material" is a term used to express something that is considered reasonable for users of financial statements and Bapepam to know. The material definition is 5% of the total assets for asset accounts, 5% of the total liabilities for liability accounts, 5% of the total equity for equity accounts, 10% of income for profit and loss accounts, and 10% of profit before tax for the effect of transaction such as a change in an accounting estimate. So, the percentage of non-halal income of sharia issuers is

determined to not exceed 10% referring to the income materiality aspect for profit and loss accounts.

The concession in Indonesia for issuers whose business has non-halal income not more than 10%, is carried out on the grounds that it is almost impossible to get issuers who are not involved with interest in their business activities. There are several countries that apply financial ratio rules in screening Islamic issuers such as Malaysia which sets various limits, about 5%, 10%, 20%, and 25% depending on the level of emergency of a company itself, while for DJIMI (Dow Jones Islamic Market Index) is not based on the percentage of non-halal income but on the amount of cash and placement of company funds in securities with a ratio below 33% (Hanafi, 2011: 142).

Non-halal income does not only come from business or work that is not in accordance with Islamic law, but it can also be found in business and work that is halal but the implementation process and the object of work does not comply with Islamic rules. The existence of non-halal income is caused by several things, such as sharia companies that collaborate with conventional companies, the mechanism of sharia companies that still contain usury, and sharia companies that accept deposits and lend funds to companies whose sharia position is not yet clear. So, non-halal income must have a separate record in its financial reporting so that it can be separated between halal and non-halal income (Utomo, 2017: 63).

The Financial Services Authority (OJK) as a policy maker plans to tighten the selection of securities included in sharia securities list. OJK plans to narrow this non-halal income ratio. According to Sarjito, OJK Deputy Commissioner for Supervision I, "Non-halal income to total revenue is planned to be changed to only 5%, but the changes will be carried out in several stages" (Hasniawati, 2020). This is because the screening system for Islamic stocks in Indonesia is relatively loose compared to foreign exchanges, such as the Dow Jones and the United States.

However, until now the discourse has not been implemented by the OJK due to several reasons. OJK's Director of Sharia Capital Market Supervision Fadilah Kartikasari added, "The Financial Authority is considering the number of sharia shares which will decrease drastically if the criteria for sharia stocks are tightened. OJK has simulated if the requirements for sharia stocks are tightened by reducing a certain percentage, it turns out that many are out and the companies that are thrown out are actually a portfolio of sharia mutual fund financial products (*reksadana*). The Indonesia sharia capital market industry was shaken, meaning that Indonesia was not ready to apply stricter regulations (Dinar, 2020).

According to Fadilah Kartikasari, as Director of Sharia Capital Market Supervision at OJK, "The sharia capital market industry in Indonesia is still growing, so the non-halal income criteria of a maximum of 10% will not be lowered at this time. But one day, it will be 100% halal income." If it is lowered now, the stock market may go down and Investment Managers will find it difficult to find underlying sharia mutual funds (*reksadana*)" (Aziz, 2020).

The Requirements of Maximum of 10% of Non-Halal Income in the Criteria for Sharia Securities List Issuance According to the Fatwa of DSN-MUI

DSN-MUI requires companies to be included in the Sharia Securities List as stated in the DSN-MUI Fatwa Number 40/DSN-MUI/X/2003 concerning Capital Markets and General Guidelines for the Implementation of Sharia Principles in the Capital Market Sector. The problem that the researcher takes regarding the criteria for the issuance of the Sharia Securities List by the OJK is the financial ratio points, especially regarding non-halal income of a maximum of 10%. Because the first point regarding the debt ratio of not more than 45% has been explained in the DSN-MUI fatwa Number 40/DSN-MUI/X/2003 about the Capital Market and General Guidelines for the Application of Sharia Principles in the Capital Market Sector above. Article 3 paragraph (2) letter e states that investors are allowed to invest in issuers (companies),

if the company's ratio (debt) to usurious financial institutions is not more dominant than its capital. The maximum percentage given by OJK of 45% does not exceed that stipulated by DSN-MUI.

To avoid falling into debt to conventional financial institutions, with an interest system is no exception for companies that are included in sharia companies, is difficult not only in Indonesia, even Malaysia and the Dow Jones Islamic Market Index (DJIMI). DJIMI is the first Islamic index in the Muslim world which consist of 64 country indexes. The availability of non-interest funds by Islamic financial institutions has not been able to meet the company's financial needs. Because the use of debt to usury financial institutions is still difficult to avoid, the sharia boards agreed to limit the amount of debt with an interest system (Hanafi, 2011: 1419-1420).

As for the next point regarding non-halal income, a maximum of 10% is not clearly stated in the DSN-MUI fatwa. However, it is impossible for OJK to make policies regarding sharia provisions without obtaining a recommendation from the DSN-MUI as the basis for making policies. The regulation regarding the non-halal income requirement of a maximum of 10% was originally made by the Capital Market and Financial Institution Supervisory Agency (Bapepam-LK) as the institution authorized to make policies regarding the capital market before being transferred or replaced by the OJK.

This rule is contained in Bapepam-LK Regulation No.II.K.1 Concerning Criteria for Issuance of Sharia Securities Lists through the Decree of the Chairman of Bapepam-LK Number KEP-208/BL/2012 in April 24th, 2012. To make regulation, Bapepam-LK consider the letter of the National Sharia Council-Indonesian Ulema Council (DSN-MUI) Number: B-370/DSN-MUI/X/2011 dated October 20, 2011 regarding the explanation of the DSN-MUI on Total Assets as the Change of Total Equity in Ratio Sharia Stock Finance (Prasetyo, 2014: 164).

Analysis of *Fiqh Muamalah* on the Requirements of a Maximum of 10% of Non-Halal Income of in the Issuance Criteria for the Sharia Securities List

The existence of terms and conditions for issuers which do not state that the type of business, management method, and/or services based on sharia principles in the capital market must meet quantitative criteria (financial ratios), explained clearly in the Financial Services Authority Regulation Number 35/ POJK.04/2017. The regulation on a maximum of 10% of non-halal income causes the mixing of both halal and non-halal income, where the non-halal income must contain usury, *maisir*, or *gharar* which is clearly prohibited in Islam.

Regarding the mixing between halal and haram, there is a text that states:

وَلَا تَلْبِسُوا الْحَقَّ بِالْبَاطِلِ وَتَكْتُمُوا الْحَقَّ وَأَنْتُمْ تَعْلَمُونَ

Meaning: "And do not mix the truth with falsehood or conceal the truth while you know [it]" (Surat al-Baqarah [2]: 42).

This verse emphasizes on the Jewish scholars who were ordered not to mix truth with lies by distorting their own Taurat verses and hiding revelations about the apostles. When they were given an order, they actually know the truth but they hide it (Faqih, 2006: 183). This verse is actually addressed to those who have an obligation to convey Islamic teachings not to confuse the truth with lies that he made himself in order to mislead the understanding about religion. So, this paragraph is irrelevant if it is related to the mixing of halal and non-halal assets on the condition that the maximum income is 10% in the criteria for the issuance of DES. The verse explains more about something that cannot be separated between truth and falsehood, while in economics (mixing of assets), it can be determined and separated which ones are obtained lawfully and which ones are obtained in non-halal way.

Regarding the mixing of substances between halal and haram, there is a hadith as written follows:

مَا اجْتَمَعَ الْحَلَالُ وَالْحَرَامُ إِلَّا غَلَبَ الْحَرَامُ الْحَلَالَ

Meaning: " If *Halal* and *Haram* are mixed then *Haram* overwhelms"

But the quality of the hadith does not reach the degree of *shahih*, Abu al-Fadhl Al-Iraqi argues that the source of the mentioned hadith is unclear (*la ashl lah*), Al-Subki explains that the hadith comes from Imam al-Baihaqi narrated from Jabir al-Ju'fi is weak (*dha'if*). While the *sanad* of hadith narrated from al-Sha'bi and Ibn Mas'ud is considered *munqathi*, Imam al-Subki also explained that the hadiths were narrated from Abd al-Razzaq in his *Mushnaf*, the hadith is *mauquf* to Ibn Mas'ud (*not marfu*) (Amin, 2017: 37).

Therefore, the scholars revealed the rules in order to explain the law on mixing halal and haram substances:

إِذَا اجْتَمَعَ الْحَلَالُ وَالْحَرَامُ غُلِبَ الْحَرَامُ

Meaning: "If there is a mixture of what is halal and haram, then the mixing is considered haram."

In some *fiqh* books, this rule is used to explain the law of objects that are mixed between halal and haram, or between unclean objects and sacred objects (*at-thuhr*). In general, this rule is used to describe food, drink, and purification (water for purification), it is more appropriate to apply it to liquid and soluble objects so that they cannot be distinguished. This rule only applies to cases of mixing halal (sacred) objects with other haram (*najis*) objects where both are liquids, thus allowing soluble mixing to occur. Meanwhile, if the object is not a liquid, another approach can be taken (Amin, 2017: 39).

Regarding the problem of mixing halal and haram assets, Ibn Taimiah explains that:

1. If the property of the entrepreneur or leader is mixed between what is halal and haram because his business is considered doubtful, then it should not be judged as haram unless it is known for sure that it is haram, and it is also not allowed to make it halal unless it is confirmed that it is halal. If the majority of their property is halal, then it should not be considered haram. Meanwhile, if the majority of their wealth is haram, then it can be considered haram.
2. If the halal and haram assets are mixed (*ikhhtilath*), then the haram property is legally haram, and the halal property is legally halal. What

may be used is the halal property by taking property based on factual analysis.

Ibn Taimiah's explanation is then used in the rules:

مَنْ اَخْتَلَطَ بِمَا لِهٖ الْحَلَالُ وَالْحَرَامُ اُخْرِجْ قَدْرُ الْحَرَامِ وَالْبَاقِي حَلَالٌ لَهٗ

Meaning: "Anyone whose wealth is mixed between halal and haram, take out the haram assets, and the remaining assets (after separating or taking out the haram assets) are halal assets for him."

In *Mausu'at al Qawa'id al Fiqhiyyah*, Athiyah Adlan Athiyah Ramadhan explains that if a person's property which is the result of a lawful business is mixed with the property of an illegal business income, then there are two ways to proceed. First, if the property can be separated (differentiated which is halal and which is haram) then the haram property must be taken out, but if the property cannot be separated (for example money), then a careful calculation must be carried out, then the haram property must be separated and the rest is halal property for him. The illegitimate part must be returned to the rightful owner, if the owner is not known then the property is donated to public (Amin, 2017: 41). In addition, there are *fiqh* rules that explain the majority law:

لِأَكْثَرِ حُكْمِ الْكُلِّ

Meaning: "The law of the majority is like the law of the whole."

From the above rules, if halal assets are more dominant than non-halal assets, the law of the entire property is the same as halal. On the other hand, if non-halal assets dominate, then the law of the entire property becomes haram. The provisions of issuers that can include the sharia category in POJK Number 35 in 2017 provide a small level of non-halal tolerance and non-halal income does not dominate all income earned by issuers. So, the 10% tolerance does not violate the provisions of the *fiqh* rules above.

Property that is mixed between halal and haram is doubtful property. This property can actually be owned as long as the haram part is set aside and removed from the halal part. Actually, the property that

cannot be clearly distinguished (between halal and haram) is in terms of its value, not the material itself. So, if the property is damaged, it must be replaced with other valuable assets, thus this property becomes clear both physically and in terms of its value (Lam, 2005: 62).

The theory of *tafriq al-halal min al-haram* (separation between the halal and the haram) was developed with the consideration that in Indonesia's sharia economic activities it cannot be completely separated from the usurious conventional economic system. At least, sharia economic institutions are related to usurious conventional economic institutions from the aspect of capital, product development, and profits. The separation of halal assets from those that are haram can be done in the case that what is forbidden is not haram because of its substance but is haram because of the method in obtaining it is not in accordance with the Sharia. Therefore, the haram part in mixed assets is calculated and taken out, meaning the remaining money is halal. This theory refers to the rules by Ibn Taimiyah based on the fatwas of Ibn Salah, Imam Nawawi, and Ibn Qayyim al-Jauziyyah as follows (Amin, 2017: 43-44):

- a. Ibn Salah said that in the mixing of halal and haram money which cannot be clearly distinguished, the solution is to take out the haram money, and use the rest (halal). If the owner of the illicit money can be identified, then the money must be returned to the owner. If the owner is not known, the money must be donated.
- b. Imam al-Nawawi argues that the Shafi'iyah scholars agreed on the method of resolving the mixing of halal and haram assets. If the oil or wheat produced by *ghasab* (haram because of the process) is mixed with similar assets obtained in a halal way, then they agreed that the haram property must be taken out according to the right level or measure, and the rest (after removing the haram) means halal for those who do the *ghasab*.
- c. Ibn Qayyim al-Jauziyyah confirms Ibn Taimiah's opinion on *tafriq al-halal min al-haram*, by stating that repentance for people whose wealth is mixed between halal and haram so that it is difficult to

distinguish between them, is by donating property which is believed to be haram, and the rest means halal and good (*thayyib*).

The theory of *tafriq al-halal min al-haram* is an exception to the general rule known to the public as "*idza ijtama'a al-halal wa al-haram ghuliba al-haram*". This exception is important to be developed, especially in the case of mixing halal assets with haram assets not because of the substance (*lidzatihi*) because of the process (*lighairihi*). This theory was applied by DSN-MUI in making fatwas related to the establishment of sharia banks or Sharia Business Units (UUS) by conventional banks and the formation of sharia mutual funds (Amin, 2017: 45-46).

DSN-MUI in Fatwa Number 20/DSN-MUI/IV/2001 concerning Guidelines for the Implementation of Investment for Sharia Mutual Funds has explicitly stipulated that in determining and distributing investment returns, it must be free from non-halal elements. The Investment Manager must separate the portion of income that contains non-halal elements from income that is believed to be halal. While the investment returns that must be separated (derived from non-halal elements) are used for the benefit of the people (not for personal use) whose use will be determined by the National Sharia Council and reported transparently. The calculation of acceptable investment returns and investment returns that must be separated is carried out by the Custodian Bank which is reported every three months to the Investment Manager to be submitted to the investors and the National Sharia Council.

CONCLUSION

There are two criteria for the issuance of the Sharia Securities List (DES) in the Financial Services Authority Regulation Number 35/POJK.04/2017, namely qualitative and quantitative criteria. The reason why the Financial Services Authority determines the non-halal income requirement is a maximum of 10% because it is impossible to get issuers with no interest in their business activities. The regulation on

requirement of a maximum of 10% of the non-halal income is the result of a discussion between DSN MUI and Bapepam-LK which refers to the materiality aspect. The analysis of Islamic law on this issue in the criteria for the issuance of the Sharia Securities List (DES) does not violate the provisions of *fiqh.muamalah*.

REFERENCES

- Amin, Ma'ruf. 2017. *Solusi Hukum Islam Sebagai Pendorong Arus Baru Ekonomi Syari'ah di Indonesia (Kontribusi Fatwa DSN MUI dalam Peraturan Perundang-undangan RI)*. Malang: Kementerian Agama UIN Maulana Malik Ibrahim.
- Aziz. *Khawatir Kapitalisasi Pasar Modal Syariah Turun, Kriteria Pendapatan Haram 10% Dipertahankan*. <https://pasardana.id/news/2019/3/18/khawatir-kapitalisasi-pasar-modal-syariah-turun-kriteria-pendapatan-haram-10-dipertahankan/>. akses 3 Oktober 2020
- Berutu, Ali Geno. 2020. "Memahami Saham Syariah: Kajian atas Aspek Legal dalam Pandangan Hukum Islam di Indonesia". *VERITAS: Jurnal Program Pascasarjana Ilmu Hukum* Vol. 6 No. 2.
- Dinar. *Syarat Saham Syariah Diperketat, Bursa RI Bisa Terguncang*. <https://m.dream.co.id/dinar/terbilang-longgar-aturan-saham-syariah-tidak-akan-diubah-ojk-161129j.html>. akses 3 Oktober 2020.
- Faqih, Allahamah Kamal. 2006. *Tafsir Nurul Qur'an*. alih bahasa R. Hikmat Danaatmaja. Jakarta: Al-Huda.
- Fatwa DSN MUI Nomor 40/DSN-MUI/X/2003 Tentang Pasar Modal dan Pedoman Umum Penerapan Prinsip Syari'ah di Bidang Pasar Modal.
- Fatwa DSN-MUI Nomor 80/DSN-MUI/III/2011 Tentang Penerapan Prinsip Syari'ah Dalam Mekanisme Perdagangan Efek Bersifat Ekuitas Di Pasar Reguler Bursa Efek.

- Hanafi, Syafiq M. 2011. "Perbandingan Kriteria Syari'ah pada Indeks Saham Syari'ah di Indonesia, Malaysia, dan Dow Jones". *Jurnal Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum* Vol. 45 No. 2
- Hasniawati, Amalisa Putri. *Ketentuan Efek Syariah akan Diperketat*. <https://amp.kontan.co.id/news/ketentuan-efek-syariah-akan-diperketat/>. akses 3 Oktober 2020.
- Huda, Nurul dkk. 2008. *Investasi Pada Pasar Modal Syari'ah*. Jakarta: Kencana.
- Ibrahim, Abdullah Lam bin. 2005. *Fiqh Finansial*. alih bahasa Abu Sarah. Surakarta: Era Intermedia.
- Manan, H. Abdul. 2012. *Hukum Ekonomi Syari'ah Dalam Perspektif Kewenangan Peradilan Agama*. Jakarta: Kencana.
- Muin, Rahmawati. dkk. 2020. "Tinjauan Metode Screening Saham Syari'ah Pada Bursa Efek Indonesia". *Laa Maisyir: Jurnal Ekonomi Islam* Vol. 7 No.1.
- Mulyaningsih, Yani. 2008. *Kriteria Investasi Syari'ah dalam Konteks Kekinian*. Yogyakarta: Kreasi Wacana.
- Pengantar Daftar Efek Syariah, <https://www.ojk.go.id/id/kanal/pasar-modal/Pages/Syariah.aspx>, akses 25 September 2020.
- Pengantar Pasar Modal-IDX. <https://www.idx.co.id/investor/pengantar-pasar-modal/>. diakses pada tanggal 4 September 2020.
- Peraturan Bank Indonesia. Nomor 19/12/PBI/2017 tentang Penyelenggaraan Teknologi Finansial.
- Peraturan Otoritas Jasa Keuangan Nomor 35/POJK.04/2017 Tentang Kriteria dan Penerbitan Daftar Efek Syari'ah
- Prasetyo, Yoyok. 2017. "Rasio Keuangan sebagai Kriteria Saham Syari'ah". *Jurnal EKUBIS* Vo.1 No. 2
- RI, Departemen Agama. 2006. *Al-Aliyy Al-Qur'an dan Terjemahannya*. Bandung: Diponegoro.
- Sutedi, Andrian. 2011. *Pasar Modal Syari'ah Sarana Investasi Keuangan Berdasarkan Prinsip Syari'ah*. Jakarta: Sinar Grafika.
- Undang-Undang Nomor 8 Tahun 1995 Tentang Pasar Modal
- Untung, Hendrik Budi. 2010. *Hukum Investasi*. Jakarta: Sinar Grafika.

Analysis of Islamic Law on The Requirements of a Maximum ... (Frizka Oktaviani)

Utomo, Huzain Sholeh. 2017. *Kajian Pendapatan Non Halal dan Dampak Penggunaannya Terhadap Reputasi dan Kepercayaan Nasabah Perbankan Syari'ah*. Skripsi. Universitas Islam Negeri Alauddin Makassar.