

## SUPERVISION OF THE IMPLEMENTATION OF NOMINATION FUNCTIONS RELATED TO CHANGES OF MANAGEMENT IN A PUBLIC COMPANY

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Received 27 Feb 2022 • Revised 26 Apr 2022 • Accepted 20 May 2022

### Abstract

This study discusses the conditions of supervision carried out by the Financial Services Authority (OJK) in supervising the implementation of the provisions contained in Article 7 and Article 26 of the Financial Services Authority Regulation Number 33/POJK.04/2014 concerning the Board of Directors and Board of Commissioners of Issuers or Public Companies and Article 8 point a Financial Services Authority Regulation No. 34/POJK.04/2014 concerning the Nomination and Remuneration Committee of Issuers or Public Companies regarding the obligation to obtain recommendations from the board of commissioners or the nomination committee for the appointment, replacement and/or dismissal of members of the board of directors and board of commissioners of a public company. The Board of Directors and the Board of Commissioners are organs of a limited liability company whose appointment, replacement and/or dismissal must be carried out in accordance with the provisions of laws and regulations. However, in reality there is a violation committed by the public company of the above obligations as can be seen based on the Central Jakarta District Court Decision Number 660/Pdt.G/2019/PN Jkt.Pst. The study was conducted using a normative juridical research method by examining secondary data in the form of documents and regulations. Furthermore, to strengthen and confirm the data, interviews were also conducted with authorized officials at OJK.

**Keywords:** supervision, public company, nomination function

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### INTRODUCTION

Law Number 40 of 2007 concerning Limited Liability Companies (Company Law) is the main legal product for limited liability companies, including public companies and/or issuers in the capital market. In addition to the provisions contained in the Company Law, Law Number 8 of 1995 concerning the Capital Market (UUPM) and its implementing regulations for public companies also applies. This is because a public company has a larger and more diverse number of investors than a closed limited liability company, then a management that meets the principles of good corporate governance is required to ensure professional and transparent management for its shareholders.

With the enactment of Law Number 21 of 2011 concerning the Financial Services Authority (UU OJK), the Financial Services Authority (OJK) has become an institution mandated by law to carry out the task of regulating and supervising financial service activities in the banking, capital market, insurance sectors, pension funds, financing institutions, and other financial service institutions. As an institution that functions to administer the regulatory and supervisory system, OJK has issued a series of regulations to create the application of good corporate governance principles in the financial services sector. In the capital market sector, one of the regulations issued by OJK is the Financial Services Authority Regulation Number 33/POJK.04/2014 concerning the Board of Directors and Board of Commissioners of Issuers or Public Companies (POJK No. 33/2014) and the Financial Services Authority Regulation No. 34/POJK.04/2014 concerning the Nomination and Remuneration Committee for Issuers or Public Companies (POJK No. 34/2014).

In general, POJK No. 33/2014 provides regulations regarding the requirements for the appointment, replacement and/or dismissal of members of the board of directors and members of the board of commissioners of a public company. One of these requirements is as regulated in Articles 7 and 26 of POJK No. 33/2014 which stipulates that the proposed appointment, dismissal and/or replacement of members of the board of directors and board of commissioners to the General Meeting of Shareholders (GMS) must take into account the recommendations of the board of commissioners or the committee that carries out the nomination function. This provision is also strengthened in Article 8 point a of POJK No. 34/2014 which regulates the duties and responsibilities of the nomination committee:

1. provide recommendations to the board of commissioners regarding:
  - a. composition of the positions of members of the board of directors and/or members of the board of commissioners;
  - b. policies and criteria required in the nomination process; and
  - c. performance evaluation policies for members of the board of directors and/or members of the board of commissioners;
2. assist the board of commissioners in evaluating the performance of members of the board of directors and/or members of the board of commissioners based on benchmarks that have been prepared as evaluation material;
3. provide recommendations to the board of commissioners regarding the capacity building program for members of the board of directors and/or members of the board of commissioners; and
4. provide proposals for candidates who meet the requirements as members of the board of directors and/or members of the board of commissioners to the board of commissioners to be submitted to the GMS.

The appointment, replacement and/or dismissal of members of the board of directors and members of the board of commissioners of a public company by the GMS must be carried out by fulfilling the obligations of the provisions above. Violation of these provisions results in the appointment of members of the board of directors and/or members of the board of commissioners being invalid. The actions of the board of directors and the board of commissioners whose appointments are carried out illegally, of course, will cause uncertainty to the company, especially regarding legal actions taken by the directors and the board of commissioners when carrying out their positions.

In the case contained in the Central Jakarta District Court Decision No. 660/Pdt.G/2019/PN Jkt.Pst, PT Kawasan Industri Jababeka, Tbk held a GMS to appoint and replace members of the

board of directors and members of the board of commissioners. The process of appointing and replacing members of the board of directors and members of the board of commissioners is carried out without a recommendation from the board of commissioners or the committee that carries out the nomination function. This is of course contrary to the provisions contained in Articles 7 and 26 of POJK No. 33/2014 and Article 8-point a of POJK No. 34/2014. This study was conducted to find out the conditions of supervision carried out by the OJK regarding the fulfillment of the obligations contained in Article 7 and Article 26 of POJK No. 33/2014 and Article 8-point a of POJK No. 34/2014 by the public companies and/or the issuers.

## RESEARCH METHOD

The research method used is normative juridical by examining secondary data in the form of documents and regulations. Furthermore, to strengthen and confirm the data, interviews were also conducted with authorized officials at OJK.

## RESULTS AND DISCUSSION

### **Recommendation of the Board of Commissioners or the Nomination Committee in the Appointment, Replacement and/or Dismissal of the Board of Directors and Board of Commissioners of a Public Company**

The application of good corporate governance principles is closely related to the laws and regulations in the capital market sector. The application of the principles of good corporate governance in the management of the company is very important because it directly provides clear instructions for the company to make decisions correctly and responsibly and allows the management of the company to be more secure, so as to increase the value of the company.

The application of good corporate governance is basically not imperative, in other words it is a choice because it is a business ethic rather than a necessity in its application (mandatory). However, in the event of a conflict between the interests of the company and the interests of the wider community (public), then the application of the principles of good corporate governance must be made mandatory by implying its elaboration into laws and regulations. Thus, all obligations related to the requirements and responsibilities of members of the board of directors and members of the board of commissioners as regulated in POJK No. 33/2014 and POJK No. 34/2014 becomes mandatory.

In line with the provisions of the Company Law, the appointment and dismissal of members of the board of directors and members of the board of commissioners is carried out by the GMS. GMS is a company organ that has authority that is not given to the board of directors or the board of commissioners within the limits specified in the Company Law and/or the articles of association. The interests of the shareholders are represented through the GMS including in relation to the appointment of members of the board of directors and/or members of the board of commissioners. In appointing members of the board of directors and members of the board of commissioners by the GMS, of course, all the requirements and obligations contained in the laws and regulations must be fulfilled, including the obligation to propose recommendations from the board of commissioners or the committee that carries out the nomination function. Violation of this obligation makes the appointment and/or replacement of members of the board of directors and members of the board of commissioners invalid.

### **Nomination Function in Public Company**

POJK No. 34/2014 provides the definition of "nomination is the proposal of a person to be appointed to a position as a member of the board of directors or a member of the board of commissioners". A public company must have a nomination function whose implementation must be carried out by the board of commissioners. In carrying out the nomination function, the board of commissioners can form a nomination committee which in carrying out its duties is responsible to the board of commissioners. The nomination committee has the duties and responsibilities as described above and is required to carry out procedures, such as:

- a. formulate the composition and process of nomination of members of the board of directors and/or members of the board of commissioners;
- b. formulate the policies and criteria required in the nomination process for candidates for members of the board of directors and/or members of the board of commissioners;
- c. assist in the evaluation of the performance of members of the board of directors and/or members of the board of commissioners;
- d. formulate a capacity development program for members of the board of directors and/or members of the board of commissioners; and
- e. review and propose candidates who meet the requirements as members of the board of directors and/or members of the board of commissioners to the board of commissioners to be submitted to the GMS.

In addition, the nomination committee also has the obligation to hold regular meetings, prepare binding guidelines for each member of the nomination committee and convey the implementation of the nomination function in the annual report and the issuer's website. In the absence of a nomination committee, all of these obligations must be carried out by the board of commissioners. Negligence in the implementation of the nomination function, including in providing recommendations for the appointment of members of the board of directors and members of the board of commissioners, is the responsibility of the board of commissioners.

### **Legal Consequences of Appointing Members of the Board of Directors and Members of the Board of Commissioners are Invalid**

Appointment of members of the board of directors and/or members of the board of commissioners who do not meet the requirements will certainly result in the appointment of members of the board of directors and/or members of the board of commissioners being invalid. The legal consequences for the appointment of members of the board of directors and/or members of the board of commissioners who do not meet the requirements are not explained in POJK No. 33/2014 and POJK No. 34/2014.

Referring to the provisions in the Company Law, the appointment of members of the board of directors and/or members of the board of commissioners who do not meet the requirements is null and void since other members of the board of directors or other board of commissioners know that these requirements are not fulfilled. The requirements that must be met are the requirements listed in the Company Law as well as additional requirements based on the laws and regulations stipulated by the authorized institution. The Company Law determines the cancellation of the appointment of members of the board of directors and members of the board of commissioners, legal actions that have been carried out for and on behalf of the company by members of the board of directors and/or members of the board of commissioners before their appointment is cancelled, remain binding and become the responsibility of the company, while legal actions taken after their appointment void, is

invalid and becomes the personal responsibility of the member of the board of directors and/or the member of the board of commissioners. This provision does not reduce the responsibility of the member of the board of directors and/or the member of the board of commissioners concerned for the company's losses.

### **Supervision of the Implementation of the Nomination Function for Violations in the Central Jakarta Court Decision Number 660/Pdt.G/2019/PN Jkt.Pst**

#### **Supervision of the Implementation of the Nomination Function through Report Submission**

OJK as a regulatory and supervisory agency is obligated to carry out its supervisory function for violations committed by issuers or public companies against the regulations it has issued. The form of supervision on the implementation of the obligations of the provisions contained in Articles 7 and 26 of POJK No. 33/2014 and Article 8-point a of POJK No. 34/2014, carried out by submitting a report on the implementation of the nomination function through the annual report and the website of the issuer or public company. The principle carried out by the OJK in supervising a public company is the principle of openness, so that the public company is required to disclose information about its actions in compliance with the provisions of the applicable laws and regulations to the public and the OJK.

Referring to the 2020 annual report of PT Kawasan Industri Jababeka. Tbk., there is no explanation of the procedures for the appointment and replacement of members of the board of directors and members of the board of commissioners at the Annual GMS on 26 June 2019. In relation to the nomination function, the 2020 annual report only states that "the company does not yet have a nomination and remuneration committee so that the nomination and remuneration as regulated in the regulation of the authority in the capital market sector is carried out by the board of commissioners". In the policy section on the performance appraisal of members of the board of directors and board of commissioners based on POJK No. 34/2014, there is also no explanation regarding the negligence of the board of commissioners in carrying out the nomination function at the time of appointment and replacement of members of the board of directors and members of the board of commissioners at the Annual GMS on 26 June 2019 in compliance with the provisions of Articles 7 and 26 of POJK No. 34/2014. 33/2014 and Article 8-point a of POJK No. 34/2014. Likewise in the information delivery section regarding the existence of a lawsuit against PT Kawasan Industri Jababeka. Tbk. It can be seen that the submission of the annual report is not effective in detecting a violation committed by a public company. The disclosure of information regarding violations committed by a public company is very important for the public to know. The supervision of the OJK is carried out is by examining the annual report submitted by issuers or public companies.

Currently, OJK has issued a Financial Services Authority Circular Letter Number 16/SEOJK.04/2021 concerning the Form and Content of the Annual Report of Issuers or Public Companies (SEOJK No. 16/2021) which provides more detailed provisions regarding the nomination function when compared to the previous provisions which contained in the Circular Letter of the Financial Services Authority Number 30/SEOJK.04/2016 concerning the Form and Content of the Annual Report of Issuers or Public Companies.

SEOJK No. 16/2021 determines that issuers or public companies need to contain nomination procedures, including a brief description of the policies and processes for nominating members of the board of directors and/or members of the board of commissioners in the annual report they submit. However, this provision does not explain

whether it includes the actual procedures that occur during the process of appointing or replacing members of the board of directors or commissioners at the time of the GMS or only general procedures that need to be enforced by issuers or public companies. If what is meant by this provision is only a general procedure, it is difficult to ensure that any violations related to the nomination function procedure will be submitted by the issuer or public company through the annual report.

### **Examination of Nomination Function Violations by the OJK**

Apart from submitting reports on the implementation of the nomination function through the annual report and website, OJK has the authority to conduct inspections of issuers or public companies for violations of the fulfillment of the obligations of the nomination function. Basically, the examination is carried out based on information submitted by the public or issuers or public companies such as complaints or news contained in the media as well as findings on reports submitted by issuers or public companies to OJK.

The first inspection carried out by OJK was known as a technical examination. This examination is carried out with the aim of finding indications of violations committed by the issuer or public company. If there are indications of a violation, an examination will be carried out by the Directorate of Capital Market Inspection in accordance with Financial Services Authority Regulation Number 36/POJK.04/2018 concerning Procedures for Examination of the Capital Market Sector (POJK No. 36/2018) to determine whether it is a crime which will then proceed to the investigation stage.

In the case of PT Kawasan Industri Jababeka, Tbk, the examination was carried out based on the shareholders' reports and claims as referred to in Central Jakarta District Court Decision No. 660/Pdt.G/2019/PN Jkt.Pst. The examination is only carried out at the technical examination stage and is not continued to the Directorate of Capital Market examination. After the technical examination, recommendations are given that the implementation of the nomination function can be improved and carried out in accordance with the provisions of the applicable laws and regulations without any sanctions, even though there are violations committed by PT Kawasan Industri Jababeka, Tbk against the fulfillment of obligations in Articles 7 and 26 of POJK No. 33/2014 and Article 8-point a of POJK No. 34/2014 which causes the appointment and replacement of members of the board of directors and members of the board of commissioners to be invalid.

### **CONCLUSION**

It can be seen that the implementation of supervision on the fulfillment of the obligations of the provisions in Articles 7 and 26 of POJK No. 33/2014 and Article 8-point a of POJK No. 34/2014 is difficult to do. This is because OJK cannot directly confirm every procedure for the nomination function carried out by each issuer or public company, especially regarding the recommendation from the board of commissioners or nomination committee at every GMS that appoints, replaces and/or dismisses members of the board of directors and/or members of the board of commissioners. Supervision is carried out from reports submitted by issuers or public companies, while reports submitted do not always convey what violations have been committed by the issuer or public company.

The invalidity of the process of appointing members of the board of directors and members of the board of commissioners can lead to unclear legal actions that have been carried out by the board of directors and the board of commissioners. It is recommended that the stipulation on the obligation to have a recommendation from the board of commissioners or the nomination committee for the appointment or replacement of members of the board of commissioners and members of the board of commissioners can still be submitted by the board of commissioners or the nomination committee at the time of the GMS, so that the

absence of a recommendation from the board of commissioners or the nomination committee prior to the implementation of the GMS does not result in the appointment a member of the board of directors or a member of the commissioner does not automatically become invalid, even though other GMS procedures have been carried out in accordance with the provisions of the applicable laws and regulations.

In addition, it is hoped that the OJK can regulate more concretely the provisions on the contents of the annual report regarding the implementation of the nomination function of issuers or public companies so that the annual reports submitted can effectively provide actual information if there is a violation of the implementation of the nomination function carried out by issuers or public companies.

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