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**ADDRESS**

Summitmas I, 16th & 17th Floors  
Jl. Jend. Sudirman Kav. 61-62  
Jakarta 12190

**PHONE**

+6221 5080 8300 | +6221 252 1272

**FAX**

+6221 252 2750/51

 makarim.com  Makarim & Taira S.

## Government Regulation No. 23 of 2022 on Amendments to Government Regulation No. 45 of 2005 on The Establishment, Management, Supervision and Dissolution of State-Owned Enterprises

On June 8, 2022, President Joko Widodo signed Government Regulation No. 23 of 2022 (“GR No. 23/2022”) on Amendments to Government Regulation No. 45 of 2005 (“GR No. 45/2005”) on The Establishment, Management, Supervision and Dissolution of State-Owned Enterprises. GR No. 23/2022 amends several provisions of GR No. 45/ 2005.

GR No. 23/2022 introduces new and stricter rules on the Board of Directors, the Board of Commissioners and Supervisory Board of BUMNs including a new provision on professional hires in BUMNs.

These provisions were drafted in the hopes of improving the operation and development of BUMNs by improving their human resources. GR No. 23/2022 also aims to ensure the proper conduct of BUMNs’ senior officers and their employees through the following measures:

### **A. The Use of Lists and Track Records in the Recruitment of members of the Board of Directors.**

In appointing members of Boards of Directors, the Minister of State-Owned Enterprises (the “MSOE”) will provide a list and the track records of the current and prospective Directors. GR No. 23/2022 does not explain what list is being referred to. It only states that the list and track records will be determined by the MSOE as part of its considerations when assessing the integrity, good behavior and honest conduct of potential Directors. To do so, the MSOE may request input from relevant government institutions or agencies. The MSOE will then consider

these track records before appointing new Directors of BUMNs. This track records requirement does not apply to the appointment of members of the Board of Commissioners or Supervisory Board.

## **B. Prohibited Parallel Activities**

Members of the Board of Directors, Board of Commissioners and Supervisory Board are prohibited from becoming staff members of political parties, candidates for or incumbent members of legislative institutions, or candidates for or incumbent heads/deputy heads of regional government offices.

Specifically for members of the Board of Directors, GR No. 23/2022 provides a further explanation in the elucidation that the prohibition is meant to prevent conflicts of interest between their obligations to their BUMNs and their obligations to a political party, legislative institution, or government agency. Included in the list of posts a director is barred from concurrently filling are the following:

- a member of the House of Representatives (*Dewan Perwakilan Rakyat Republik Indonesia* (“DPR”));
- a member of a Regional Representatives Council (*Dewan Perwakilan Daerah* (“DPD”));
- a member of a Provincial House of Representatives (*Dewan Perwakilan Rakyat Daerah Provinsi* (“DPRD Provinsi”));
- a member of a Regional House of Representatives (*Dewan Perwakilan Rakyat Daerah Kabupaten/Kota* (“DPRD Kabupaten/Kota”));
- a Deputy Governor or Governor;
- a Deputy Mayor or Mayor; and
- a Deputy Regent or Regent.

Details of this prohibition that applies to members of the Board of Directors, Board of Commissioners and Supervisory Board will be provided in a subsequent MSOE regulation.

## **C. The Daily Conduct of a BUMN's Leaders and Employees**

GR No. 23/2022 expressly requires members of a BUMN's Board of Directors, Board of Commissioners and Supervisory Board as well as its employees to remain true and adhere to the State ideology *Pancasila*, the 1945 Indonesian Constitution, the Republic of Indonesia, and the Government of Indonesia. A BUMN's leaders and employees are prohibited from taking part in extremist or terrorist activities. Although taking part in extremist or terrorist activities is generally prohibited, it is interesting to note that this provision was intentionally included in GR No. 23/2022.

#### **D. Grounds for the Dismissal of a Leader of a BUMN**

Something new in GR No. 23/2022 is the inclusion of 'engaging in acts that violate the code of ethics or propriety' as grounds for dismissing members of a BUMN's Board of Directors, Board of Commissioners and Supervisory Board. Another new provision of GR No. 23/2022 allow a leader of a BUMN to be dismissed on other grounds that are deemed appropriate by the General Meeting of Shareholders or the MSOE for the best interests and objectives of the BUMN.

#### **E. The Duties and Authorities of a the Leaders of a BUMN**

Under GR No. 23/2022, a BUMN's Board of Directors, Board of Commissioners and Supervisory Board will be held fully and personally responsible for losses suffered by the BUMN, if it is found at fault or negligent in performing its duties. The Board of Directors may be cleared of responsibility if it can prove that:

- 1) the losses incurred were not caused by any fault or negligence on its part;
- 2) it has managed the BUMN in good faith and prudently according to the interests and purpose and objectives of the BUMN;
- 3) no conflict of interest could directly or indirectly have caused the action that caused the losses; and
- 4) it has taken every possible action to prevent or mitigate the losses.

Meanwhile, the Board of Commissioners and Supervisory Board may be cleared of responsibility if it can prove that:

- 1) it has supervised the BUMN in good faith, according to the purpose and objectives of the BUMN;
- 2) its members have no personal stake, either direct or indirect, in the action of the Board of Directors that caused the losses; and
- 3) it has given advice to the Board of Directors to prevent or mitigate the losses.

The MSOE has the right to file a suit against the Board of Directors, the Board of Commissioners and Supervisory Board of a BUMN that is fully owned by the State (or *Perum*) for the faults or negligence that caused the losses.

#### **F. BUMN Employees Filling Board of Directors Positions**

Under GR No. 23/2022, a BUMN's Board of Directors may, in order to meet certain demands or to boost performance, recruit professionals as employees or to fill positions directly under the Board of Directors. This provision provides experienced professionals an opportunity to fill positions in BUMNs. It is worth noting that this provision is absent from GR No. 45/2005.

If BUMN employees are promoted to the Board of Directors, they must retire as BUMN employees with the highest employee rank and the right to receive the highest pension that

the BUMN has to offer. If a BUMN employee is promoted to the Board of Directors of another BUMN, he/she has the same rights under the terms and conditions of employment of the BUMN in question and can ask for a pension upon reaching the age of 50, either during or after taking office. If a BUMN employee is promoted to the Board of Directors but does not retire, his/her rank will be raised according to the terms and conditions of employment of the BUMN in question. This is a notable development introduced by GR No. 23/2022, as previously, GR No. 45/2005 contained no provision expressly guaranteeing the right of BUMN employees promoted to the Board of Directors to receive a pension according to their new position.

GR No. 23/2022 came into effect on June 8, 2022. Any applicable implementing regulation of GR No. 45/2005 remains in effect as long as it is not contrary to GR No. 23/2022.

As a whole, GR No. 23/2022 applies stricter rules to leaders of BUMNs and grants much needed entitlements to BUMNs' employees. GR No. 23/2022 is intended to nurture a culture based on good corporate governance exercised by those in leadership positions in BUMNs and to further improve the quality and productivity of these enterprises. Unlike under GR No. 45/2005, under GR No. 23/2022 the leaders of BUMNs are no longer free to fill government positions and may be dismissed on the ground that they have violated the code of ethics or propriety. GR No. 23/2022 also introduces track records as part of the MSOE's considerations for appointing or dismissing members of a BUMN's Board of Directors.

The most notable development, perhaps, is the fact that under GR No. 23/2022 the leaders of a BUMN will be held fully and personally responsible for any losses incurred by the BUMN caused by their fault or negligence while performing their duties. The term 'losses incurred by the BUMN' is absent from GR No. 45/2005. Under GR No. 23/2022, one may argue that the leaders of BUMNs only bear civil liability (ie, personal liability). However, keeping in mind that according to Law No. 17 of 2003 on State Finances, State and region owned assets managed by BUMNs are considered State finances, the leaders of a BUMN may still be held criminally liable under Law No. 31 of 1999 on the Eradication of Criminal Acts of Corruption if criminal intent can be proved and the losses incurred are deemed detrimental to State finances.

GR No. 23/2022 also updates the provisions on regular BUMN employees. GR No. 23/2022 allows BUMNs to fill employee positions with experienced professionals, in an effort to bridge gaps in skills or knowledge and to boost their overall productivity. GR No. 23/2022 also guarantees that a BUMN's employees will receive a pension upon being promoted to its Board of Directors. These provisions of GR No. 23/2022 reflect the Indonesian Government's commitment to revitalizing BUMNs, first and foremost through their leaders and employees.

Please do not hesitate to contact us if you need further information regarding the above.



**Aurelia Livya**

*Trainee Associate*

aurelia.livya@makarim.com



**Mutiara Handaniah**

*Associate*

mutiara.handaniah@makarim.com



**Rahayu Ningsih Hoed**

*Partner*

rahayu.hoed@makarim.com