

Inconsistency Between the Function and Position of the Board of Directors Under the Limited Liability Company Law and the Function and Position of the Board of Directors in Charge of Compliance Under the Circular Letter of the Financial Services Authority for Rural Banks in Indonesia

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ABSTRACT

Rural Banks (RB) have corporate organs consisting of the General Meeting of Shareholders, the Board of Directors, and the Board of Commissioners. The appointment of the Board of Directors and Commissioners is carried out by the General Meeting of Shareholders which is made in writing. The compliance function is a series of preventive actions or steps to ensure that the policies, provisions, systems and procedures, as well as the business activities carried out by RBs are in accordance with the regulations of the Financial Services Authority and other laws and regulations. In a RB there are members of the Board of Directors who take care of compliance issues. Furthermore, there will be a conflict of interest if the provisions governing the position of the Compliance Director are found to be incompatible. This discrepancy can be overcome if RBs apply the principle of *Lex Superior Derogat Legi Inferiori* (high rules beat lower rules). The discrepancy may also be subject to a material review, particularly on the Circular Letter issued by the Financial Services Authority No. 6/SEOJK03/2016, as well as the existence of an internal regulation for RBs that re-regulates the authority of the Board of Directors.

Keywords: Board of Directors, Function and Position, Financial Services Authority, Rural Bank

INTRODUCTION

To properly and sustainably support Indonesia's economic growth, it is vital to strengthen the national banking industry's resilience and competitiveness. There is a need for a RB, a financial organization that can expand the role and contribution of industry to the area's economy. RBs were set up to make businesses more competitive by increasing capital, reorganizing ownership, and improving the way rural banks are run.

RBs are those that do business in a traditional way, i.e., they do not provide payment traffic services as defined by the Banking Law. RBs serve the same purpose as common banks, which is to channel funds to the public in the form of credit and return them at the current market interest rate.

The Rural Bank is a legal entity limited liability company established in accordance with Law No. 40 of 2007 concerning limited liability companies. A limited liability company is a legal entity that is a capital partnership, established based on an agreement to conduct business activities

with authorized capital entirely divided into shares that meet the requirements specified in the law and its implementing regulations. The corporate organs of RBs are the shareholders' general meeting, the Board of Directors, and the Board of Commissioners. The Board of Directors and Commissioner are appointed by the General Meeting of Shareholders, which is conducted in writing. There is a separate compliance director or one of the directors is appointed to supervise the compliance role in RBs. The compliance function is a series of preventive actions or steps designed to ensure that the policies, provisions, systems, and procedures, as well as the business activities of RBs, are in accordance with the Financial Services Authority's regulations and other applicable laws and regulations. The functions of the Board of Directors in charge of the compliance function, as described in Circular Letter of the Financial Services Authority No. 6/SEOJK.03/2016 on the Implementation of the Compliance Function for Rural Banks, differ from the duties and authorities of the Board of Directors under Law No. 40 of 2007.

Based on the above summary, it is more interesting to discuss and explain the incompatibility between the functions of the position of the Board of Directors in Law No. 40 of 2007 and the function of the position of the Board of Directors in Charge of Compliance in Circular Letter No. 6/SEOJK03/2016 of the Financial Services Authority regarding the Compliance Function for Rural Banks. Keeping the above facts in mind, this paper addresses the issue as follows:

1. How does the legal arrangement that does not align the role and position of the Board of Directors in Law No. 40 of 2007 with the function and position of the Board of Directors charged with compliance under S.E. OJK No. 6/SEOJK03/2016 concerning Compliance Function for RBs?
2. What are the challenges and solutions to the disparity between the functions and

positions of the Board of Directors under Law No. 40 of 2007 and the Board of Directors in charge of compliance with S.E. OJK No. 6/SEOJK03/2016 regarding Compliance Function for RBs?

DISCUSSION

Functions and Positions of the Board of Directors According to Law No. 40 of 2007, compared to the function and position of the Board of Directors in charge of compliance according to OJK Circular Letter No. 6/SEOJK03/2016.

Limited liability companies, as one of the pillars of national economic growth, need a legal foundation to further accelerate national development, which is constructed as a collaborative effort based on the kinship concept (Fuady, 2017). A Limited Liability Company is a legal entity formed with Articles of Association governed by Limited Liability Company Law Number 40 of 2007. RBs created as limited liability companies have the status of a legal entity pursuant to Law No. 40 of 2007, in addition to other regulations governing the processes for establishing RBs and the implementation of rural bank governance.

RBs organized as legal entities follow the same structure as other legal companies, with a General Meeting of Shareholders, Directors, and Commissioners, each with particular roles and authority. The General Meeting of Shareholders, abbreviated as GMS, is the company's organ with jurisdiction not provided to the Board of Directors or the Board of Commissioners within the boundaries stipulated in the limited liability company's articles of association and/or the legislation. The Board of Directors is a company organ that is authorized and fully responsible for the company's interests, in accordance with the company's purposes and objectives, and represents the company, both inside and outside of court, in accordance with the provisions of the articles of association. The Board of Commissioners is the company's organ responsible for general and/or

specialized monitoring in line with the articles of association and advising the Board of Directors.

A limited liability company must have at least two members of both the Board of Directors and Board of Commissioners. If there are two directors, one will be called the president-director and the other the director. Similarly, if there are two Commissioners, one will be known as the President Commissioner. The Board of Directors is responsible for running a company, and the Commissioner is an organ of the firm whose role it is to monitor how the company is managed.

The position of the Board of Directors in an RB is primarily authorized to carry out management in accordance with appropriate policies, within the limits specified in the law and/or articles of association. The Board of Directors and Commissioners are appointed every 5 years, and those appointed must be capable of carrying out legal action. The Board of Directors is appointed by the General Meeting of Shareholders. The appointment of directors is carried out in accordance with the procedures and rules in accordance with Law No. 40 of 2007 concerning Limited Liability Companies.

The Articles of Association provide that the Board of Directors is permitted to represent the company both within and outside of court, and if the Board of Directors consists of two or more individuals, each member is entitled to represent the firm unless otherwise indicated. In the event of borrowing or lending money, however, Board of Commissioners permission is required. The Commissioner may join in the signing of any legal action that will be taken, or if he or she is unable to attend, the Commissioner's consent can be given in writing. In the case that the President Director is unable to attend, a member of the board of directors has the right and authority to represent the firm in his or her absence (Sjawie, 2017). In the case that there is only one member of the Board of Directors, all responsibilities and authority

granted to the President Director, and other members of the Board of Directors in these Articles of Association shall also apply to them.

In a RB, there are members of the Board of Directors who are appointed as compliance directors. The Compliance Director has the function of taking precautions to ensure that the policies, provisions, systems, and procedures, as well as the business activities carried out by RBs, are in accordance with the regulations of the Financial Services Authority and other laws and regulations. The compliance function is also created to ensure that RB holds its commitment as a financing institution to follow all the rules given by Bank Indonesia or the Financial Services Authority.

The Compliance Director is responsible for the execution of the compliance function at the RB, while the Board of Commissioners has the duty to monitor the implementation of the compliance function at the RB. The Compliance Director has the right to appoint a person to serve as an Executive Officer who is subordinate to the Compliance Director and has the task of managing or carrying out the compliance function of an RB. RBs with a core capital of less than IDR 50,000,000,000 must appoint an executive officer who is independent of the RB's operations to carry out the compliance function. Being independent of RB operations entails avoiding activities directly related to lending and fund-raising.

From the explanation above, it appears that there is a conflict of interest if there is a director position in charge of the compliance function. The authority of the director, in accordance with the articles of association, is to represent the company. If the president-director is unable to attend, it is automatically regulated in the articles of association. In accordance with the Financial Services Authority's Circular Letter No. 6/SEOJK.03/2016 on the Implementation of the Compliance Function for Rural Banks, the Director in Charge of the Compliance Function is prohibited from handling lending and fund-raising

operations.

It can be assumed that if the President Director is unable to attend, there will be a vacancy in terms of who will represent the President Director in carrying out the company's legal interests. Especially if the Board of Commissioners has not authorized the Director to participate in any company-related activities. This is a loss, of course, if a credit agreement will be made and the President-Director is unable to attend. If this occurs, the activities that should benefit the company result in losses for both the Bank and the Debtor.

Constraints and Solutions for Incompatibility Between the Functions and Positions of the Board of Directors in Law no. 40 of 2007 With OJK Circular Letter No. 6/SEOJK03/2016.

Constraints

RB is a Financing Institution that benefits from the community and is again routed in the form of credit to the public. RB's purpose is to establish interdependencies and deliver mutual benefits to the community (Prasetyo, 2019). Many factors can cause a loss of public trust in an RB, one of which is not being able to provide a solution to a problem, which is directly related to RB activities.

One of these factors is the existence of barriers during the process of credit binding, such as the absence of Bank authorities, in this instance the President Director. An unanticipated occurrence, such as force majeure or an authorized Bank employee being ill or passing away, occurs. If the RB is focused on following the Financial Services Authority Circular Letter No. 6/SEOJK03/2016 regarding the Compliance Function for Rural Banks, or if the RB's internal rules prohibit the Director in charge of the compliance function from replacing the President Director in credit binding, the debtor who is present to make a binding credit will be postponed until the President Director returns or until the Director is reappointed.

The obstacle that will befall the debtor and the RB is the loss of time that must be experienced by the debtor and the RB. Especially if the debtor has deposited the costs that are the initial conditions for the binding of credit. In addition to this, of course, there are still many losses that will be experienced by the debtor and the RB. It will be worse for the RB if the debtor tells other members of the community about the losses he has suffered due to the absence or absence of representatives in carrying out credit binding, thereby damaging the reputation of the RB. This is an absolute loss that must be borne by the RB.

Solutions

If there are obstacles, there must be a solution that can be given so that there are no losses experienced by the debtor or the RB. The first solution that can be implemented is to follow the laws and regulations in accordance with Law Number 40 of 2007 concerning Limited Liability Companies. This does not mean that this does not mean that the Financial Services Authority Circular Letter No. 6/SEOJK03/2016 concerning the Compliance Function for Rural Banks has been ruled out, only that it applies the *Lex Superior Derogat Legi Inferiori* (higher regulations beat the lower regulations). In this case, the position of the Financial Services Authority Circular Letter is not a rule that can defeat Law no. 40 of 2007 concerning Limited Liability Companies.

The next solution that can be applied is the existence of an internal RB policy which explicitly stipulates that the Director can represent the President Director if unable to attend. RB also does not immediately, without considering future events, immediately carry out all the orders that have been set. If only the law is subject to judicial review, then a circular letter may be subject to judicial review if it is not in accordance with the interests and does not take future events into account.

CONCLUSION & SUGGESTION

Conclusion

RBs are banks that carry out conventional business activities, which in their activities do not provide services in payment traffic as referred to in the Law concerning Banking, which are established in the form of legal entities in accordance with the Articles of Association regulated in Law Number 40 of 2007 and Financial Services Authority Regulation Number 20/POJK.03/2014 concerning Rural Banks. A debtor is someone who obtains financing from a financial institution, in this case a bank and/or RB, and uses the funds to pay interest.

RB and the debtor are expected to have a mutually beneficial relationship and no loss is experienced by either. RB, in this case, is represented by a President Director and/or Director with the approval of the Board of Commissioners. RB also has a Compliance Director who can be held by a member of the Board of Directors called the Director in charge of the compliance function.

Based on Circular Letter of the Financial Services Authority Number 6/SEOJK03/2016 about the Compliance Function for Rural Banks, the Director in charge of the Compliance Function cannot handle activities directly related to lending and fundraising. Some parties believe that not being able to handle credit and fundraising activities means not being able to represent the President Director in carrying out legal actions, one of which is signing credit-related deeds. This violates the Articles of Association in the Deed of Establishment of the Company, which state, "If the President Director is absent or unable to attend for any reason, which need not be proven to a third party, then another member of the Board of Directors has the right and authority to act for and on behalf of the Board of Directors and represent the Company."

If each RB has the above-mentioned agreement, then the Director in charge of the compliance function will not be able to use his authority as a director as outlined in

the Articles of Association. In this instance, the Circular Letter of the Financial Services Authority No. 6/SEOJK03/2016 and Law No. 40 of 2007 do not align with one another.

Suggestions

A mismatch of authority may produce losses that affect both the debtor and the RB, including both significant and immaterial losses. This discrepancy can be resolved if the RB applies the principle of Lex Superior Derogat Legi Inferiori, wherein the Law trumps the Circular in this instance. In this case, the internal parties of the RB, both the Board of Directors and the Executive Officers, should know about the rules and regulations in accordance with Law Number 12 of 2011, namely in the order of the 1945 Constitution of the Republic of Indonesia, MPR Decrees, Laws/PPs in Lieu of Law, Government Regulations, Presidential Regulations, Provincial Regulations, and the last Regional Regulations. In addition, the disagreement may be materially examined by utilizing the Lex Superior Derogat Legi Inferiori premise as one of the foundations.

Conflict of Interest: None

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