MAKES & PARTNERS
LAW FIRM

KNOW YOUR BENEFICIAL OWNER: A NEW OBLIGATION UNDER INDONESIAN LAW

"*Corporations could be used as a means, either directly or indirectly, by a beneficial owner who conducts money laundering and terrorism financing, as long as there is no regulation on it. So it is necessary to regulate the principle of recognizing the beneficial owner of a corporation*;"
Presidential Regulation 13/2018, Consideration (c)

A. INTRODUCTION

In early March 2018, President Joko Widodo issued Presidential Regulation No.13 of 2018 on the Implementation of the Know Your Beneficial Owner Principle for the Prevention and Eradication of Criminal Acts of Money Laundering and Terrorism Financing ("**Regulation 13/2018**"). Regulation 13/2018 sets out the rule that requires Indonesian corporations to state and disclose their beneficial owner(s) ("**BO**") to the relevant authority ("**Authorized Authority**") and to update this disclosure at least once every year. The information on the disclosed BO is open to the public upon request.

The rule on BO is not exactly novel under the Indonesian financial regulatory framework. Financial service companies are subject to the anti-money laundering requirements that require them to do customer due diligence (CDD) on their customers, and to a certain extent, the beneficial owners of the customers. Also in practice, the Financial Services Authority (*Otoritas Jasa Keuangan* or "**OJK**") requires any publicly listed company to disclose its BO in the disclosure documents (e.g. prospectus) each time such company undertakes a corporate action.

However, Regulation 13/2018 is considered a breakthrough for imposing rules to all types of corporations, be it a limited liability company or any other form of corporations (including non-profit associations and limited liability partnerships), regardless of whether the corporation is publicly listed or privately held. The regulation is expected to have far-reaching coverage and effect on the business operations of corporations. From the Government's perspective, in addition to its original objective of ensuring anti-money laundering compliance, this regulation can also serve as an instrument to ensure tax compliance.

B. UNDERSTANDING REGULATION 13/2018

There are three main components of Regulation of 13/2018: a) an assessment and stipulation of BO; b) the implementation of the principle of BO and; c) applicable sanctions.

a. Assessment and Stipulation of BO

Regulation 13/2018 defines BO as "an **individual** who (i) may appoint or dismiss a member of the board of directors, board of commissioners, management, supervisor or supervisor of the corporation, (ii) has the ability to control the corporation, is entitled to and/or receives benefits from the corporation whether directly or indirectly, (iii) the owner of the fund or shares of the Corporation and/or (iv) fulfil the criteria as referred to in Regulation 13/2018." Therefore, a BO must be an individual (natural person), and cannot be a corporate legal entity.

The term "corporation" encompasses a range of legal entities, both incorporated and un-incorporated, and both commercial and non-profit. Corporations may take the form of a group of organized people and/or assets, whether as a legal entity or non-legal entity, and includes:

a. Limited liability companies (Perseroan Terbatas or **PT**);
b. Foundations;
c. Associations;
d. Cooperatives;
e. Limited partnerships;
f. Firm associations; and
g. Other forms of corporations.

The method of determining a BO differs from corporation to corporation. For example, the criterion to determine a BO for a PT is an individual who meets any of the following criteria:

(1) owns more than 25% of shares in the company;
(2) has more than 25% of voting rights in the company;
(3) receives more than 25% of the profits or profits derived from the company per year; or
(4) has the authority to appoint, replace, or dismiss the members of the board of directors and members of the board of commissioners.

or an individual who meets the following criteria:

(1) has the authority or power to influence or control a limited liability company without having to obtain authorization from any party;
(2) receives benefits from a limited liability company; and/or
(3) the true owner of the fund for the ownership of shares of a PT.

In order to assess the BO, a corporation may obtain the information through several sources including:

1. information from the articles of association, document of the corporation establishment, the resolutions of the General Meeting of Shareholders;
2. information from the authorized agent or private agents receiving placements or transferring funds in order to purchase the shares of the PT;
3. information from private institutions which provide benefits to the corporation for BO; and/or
4. Other information provided by credible sources and so on.

After making an assessment, each corporation will declare the status of its BO, which can fall into the following three categories: (1) BO identified and verified; (2) BO unidentified, or (3) BO identified, but not yet verified.

Each corporation is required to report its BO to the relevant Authorised Authority that is responsible for the registration, approval, and licensing of the relevant type of corporation. For example, the Authorized Authority for a PT is the Ministry of Law and Human Rights ("**MOLHR**"), whereas the Authorized Authority for a cooperative is the Ministry of Cooperative and Small and Medium Enterprises.

Each respective Authorized Authority may also designate the BO of a corporation. Such determination maybe made by the relevant Authorized Authority based on information obtained from an audit, from a government agency or a private institution that manages the data/funds or information of the BO, and/or receives reports from certain professions containing the information of the BO and other relevant information.

b. Implementing "Know Your BO"

All corporations must apply the principle of "Know Your BO" by appointing an officer or employee to: (a) implement the principle of "Know Your BO", and (b) provide information on the corporation and its BO at the request of the Authorized Authority and relevant law enforcement agencies.

The implementation of the principle of BO consists of two components, namely: (1) the identification of BO and (2) the verification of BO. The corporation must submit BO information if it has determined its BO; or submit a statement of willingness of the corporation to submit BO information to the Authorized Authority in the event that the corporation has not determined the BO.

Newly established corporations must submit the information of their BO to the relevant Authorized Authority no later than 7 (seven) working days after it obtains a registered business license/approval from the relevant Authorized Authority. For corporations that have already been registered or incorporated, they must submit the information no later than 1 year following the date of enactment of Regulation 13/2018(March 5, 2018).

Once the BO information is filed, the corporation is required to update the information annually. In addition, the corporation, as well as its notary or proxy, is required to administer any documents which relate to its BO for at least five years from its date of establishment or ratification of the corporation.

Regulation 13/2018 further provides the authority for the respective Authorized Authorities to supervise the implementation of "Know Your BO" based on their risk assessments of potential money laundering or terrorism financing activities through the issuance of technical regulations or guidelines for the respective sector, an audit of a specific corporation, or any supervisory activity.

c. Sanctions

Article 24 of Regulation 13/2018 states that a corporation that does not implement the provision as regulated in Regulation 13/2018 shall be liable to be sanction in accordance with the provision of laws and regulations. The sanctions may be further regulated under specific sectoral regulations, such as BKPM regulation (for foreign direct investment), OJK regulation (for financial services), MOLHR regulation (for corporate registration) and any other relevant regime.

C. BENEFICIAL OWNERSHIP UNDER FINANCIAL REGULATIONS

As discussed earlier, financial regulatory stakeholders are already familiar with the concept of beneficial ownership. Back in 2012, the then BAPEPAM-LK introduced the concept under BAPEPAM-LK Regulation X.K.6 on Annual Reporting, which required all issuers to disclose "information about main shareholders or controllers of the public companies, directly or indirectly, to the extent of individual ownership, which shall be presented in charts". While this regulation has been fully replaced by OJK Regulation No. 29/POJK.04/2016 and such specific required information is no longer stipulated under the new regulation, there are still several regulations that specifically cover the issue of BO under OJK Regulations, namely:

POJK 11/2017

Pursuant to OJK Regulation No.11/POJK.04/2017 on Reporting of Substantial Shareholdings in Public Companies, there is an obligation for public companies to report a substantial shareholding of any change of 0.5% or more of the shareholding by anyone who directly or indirectly holds 5% or more of the total issued shares in a public company. However in practice, only the change of a direct shareholder is reported to the OJK

Further, there are sanctions for non-compliance such as (i) warning, (ii) fines, (iii) restriction on business activities, (iv)suspension of business activities, (v) revocation of business license, (vi) cancellation of approval, or (vii) cancellation of application.

POJK 12/2017

OJK Regulation No.12/POJK.01/2017 on the Implementation of Anti-Money-Laundering and Prevention-of-Terrorism-Financing Programs Within the Financial Sector regulates provisions concerning the BO as follows:

The BO is any person who is:

a. entitled to and / or receives benefits in connection with accounts of parties using the services of the Provider of Financial Services (the "**Customer**");
b. the owner of the Financial Services Provider fund (*Penyedia Jasa Keuangan* or "**PJK**") (ultimately having its own account);
c. in control of the transaction of costumer;
d. authorized to conduct transactions;
e. in control of the corporation or other agreements (legal arrangement); and / or
f. the controller of transactions through a legal entity or under an agreement.

PJK is required to have policies and procedures for managing and mitigating the risks of money laundering and / or financing of terrorism, one of which is by identifying and verifying the beneficial owner of the prospective customer prior to opening a business relationship with the customer or before making a transaction with a walk in customer.

In the event that the PJK is unable to verify the identity of the BO, the PJK is required to refuse to enter into a business relationship or transaction.

D. WHAT'S NEXT

The biggest impact that Regulation 13/2018 brings is the application of BO to all types of corporate legal entities and the creation of a public administration system that maintains BO information. This is similar to the existing corporate administration system maintained by the MOLHR which allows anyone to obtain information about any company upon request. This will now also include beneficial ownership information, and will significantly change the way companies navigate around investing in Indonesia and compliance on anti-money laundering and tax laws.

In reality, the Government still has a lot of work to do to create a reliable system, as it also depends on the willingness of corporations to identify and verify their BOs. In the meantime, business stakeholders must be ready for the full implementation of Regulation 13/2018.