Upcoming OJK Regulation on Fit and Proper Test Reassessment

The Financial Services Authority ("OJK") is currently preparing a new regulation on fit and proper test reassessments for "primary parties" in the financial service sector. The draft regulation is currently being disseminated by the OJK for public comment. We have not received any confirmation on when the OJK will enact this regulation.

Clients are encouraged to review the draft regulation and to provide comments to the OJK.

The term "primary parties" refers to controlling shareholders, directors, commissioners, internal auditors, and actuaries of banks, investment managers, securities houses, insurance companies, pension funds, multi-finance companies and fiduciary companies (pegaadai).

According to the latest public draft:

- The OJK will have the authority to reassess the fulfillment of the integrity, reputation, competency and financial capability criteria of a primary party after that primary party has obtained fit and proper test approval from the OJK.

- The regulation also gives the OJK the right to perform reassessments of ex-primary parties against their conduct in the financial services sector, whether or not those ex-primary parties are still assuming other roles in the financial services sector. This is an unclear point as the OJK may not have the authority to reassess these parties if they are no longer primary parties in the financial service sector at the time the reassessment is done by the OJK.

- However it would have an impact though, if a director in Company A, who previously served as a director in Company B, could be reassessed by the OJK for any actions of the director in Company B. The result of the reassessment could affect the director’s fit and proper test approval to be a director in Company A.

- The reassessment exercise will be initiated by the OJK if there is any indication of noncompliance or nonfulfillment of one of the relevant criteria.

- The regulation will specify the types of actions that would be seen as indications of noncompliance or nonfulfillment of the relevant criteria. Those indications would include:
  - a primary party knowingly providing misleading information on a transaction to the OJK
a primary party providing an unreasonable benefit to other primary parties of a financial service institution, including to a senior management officer and an employee that could bring loss to the company or lessen the company's revenues

– a primary party breaching prudential principles

– a primary party not performing commitments previously given to the OJK

- If a primary party is declared "unfit" by the OJK, the OJK may:
  - revoke that party's current fit and proper test approval
  - ban that party from being a primary party in the financial services sector in Indonesia for a certain period

- If an "unfit" primary party is a shareholder, the OJK will order it to transfer or otherwise dispose of all of its shareholding in the company to a non-affiliated party no later than one year after the OJK declares it as an "unfit" primary party.

If the shareholder fails to transfer or otherwise dispose of its shareholding before the deadline:

- The shareholder will be "blacklisted" for at least 20 years, meaning it cannot be a shareholder in the financial service sector in Indonesia (the divestment obligation would still apply).

- For as long as an "unfit" shareholder has not been able to transfer or otherwise dispose of all its shareholding, regardless of its shareholding percentage in the company:
  1. The shareholder will only be able to receive a maximum of 10% of the dividends declared and paid by the company.
  2. The shareholder will lose its voting rights in the company's shareholders' meetings.

Given the Company Law, it is unclear what authority the OJK has to impose requirements which are otherwise contrary to the rights under the Company Law.