

## PPSK Law and The Changing Landscape of Indonesia's Capital Market Sector



In early January of this year, the Indonesian government enacted the 'Omnibus Law for the financial sector', or Law No. 4 of 2023 on Financial Sector Development and Reinforcement ("**PPSK Law**"). The PPSK Law, which became effective immediately upon issuance, amends 16 laws and revokes 1 law, i.e., Law No. 11 of 1992 on Pension Funds.

Broadly, the PPSK Law aims to revamp the country's financial sector. It addresses not only the emergence of complex and high-risk financial instruments, such as crypto assets, but also the laxity, gaps, or overlap in the assessment, governance, and enforcement in the financial sector. The PPSK Law also amends the capital market regulatory regime as governed under Law No. 8 of 1995 on Capital Markets ("**Capital Markets Law**") and Law No. 21 of 2011 on the Financial Services Authority.

This alert will focus on the notable changes to the capital markets regulatory regime.

### Introduction of SPV and Trustee

One of the most significant developments under the PPSK Law is the introduction of the financial instrument manager in the form of a special purpose vehicle ("**SPV**") or a trust fund manager ("**Trustee**").

As many knows, Indonesian law does not recognise the concept of trust and the separation of beneficial and legal ownerships, except for the role of a trustee (*wali amanat*) in the specific context of representing the holders of debt securities. Despite the lack of formal recognition under the Capital Markets Law, in practice, parties often use an SPV in the securitisation process, where the SPV is established as a limited liability company that does not require any licence from the Financial Services Authority (*Otoritas Jasa Keuangan* or "**OJK**").

Under the PPSK Law, an SPV or a Trustee is defined as a special business entity established to carry out securitisation activities and/or manage a trust fund. Their scope of activities are as follows:

- (i) accept the safekeeping and management (trust) of the assets of a settlor based on an agreement between the recipient and the trustee with the settlor for the interest of the beneficiary; and/or
- (ii) carry out securitisation, which includes:
  - (a) accepting the transfer of assets or a group of assets including financial assets from a creditor/original owner of the assets (“**originator**”);
  - (b) carrying out securitisation of assets including financial assets; and
  - (c) issuing securities as a result of the securitisation activities to the investors (beneficiaries).

The table below details the notable similarities and differences between an SPV and a Trustee under the PPSK Law.

Remarks	SPV	Trustee
<b>Licensing</b>	OJK is the authority responsible to issue the business licence. The SPV or the Trustee may also require other licences from other relevant authorities.	
<b>Form of Entity</b>	Limited liability company	An individual or a legal entity
<b>Assets</b>	Every asset transferred for securitisation from the originator to the SPV will be stated and reported as the SPV’s assets for the interest of the beneficiary.	Adhering to the principle of separation of assets where every asset of the settlor is stated and reported separately from the trustee’s assets.
<b>Key Characteristics</b>	<ul style="list-style-type: none"> <li>a. An SPV is established by one shareholder or more.</li> <li>b. An SPV is managed by a financial institution supervised by OJK or any other appointed party.</li> <li>c. An SPV must fulfil the minimum amount of authorised capital as prescribed by OJK.</li> <li>d. An SPV must have at least one director and one commissioner.</li> <li>e. An SPV must obtain OJK’s approval to perform corporate actions (i.e. merger,</li> </ul>	<ul style="list-style-type: none"> <li>a. The beneficiary is entitled to any benefit of the asset managed by the Trustee in accordance with the terms agreed between them.</li> <li>b. The Trustee is authorised and obliged to manage, use, and/or release the asset in accordance with the law.</li> <li>c. The asset can be managed by one or more Trustees and the settlor may appoint one or more beneficiaries for the asset in accordance with the</li> </ul>

Remarks	SPV	Trustee
	consolidation, acquisition, or spinoff) and transfer any shares.  f. The shareholders of the SPV are responsible for any business activity performed by the SPV.	trust management agreement.;  d. The Trustee must cease managing the trust fund if the trustee no longer has a valid licence from OJK and/or is sentenced to bankruptcy by an <i>in kracht</i> verdict.  e. The Trustee must cease managing the trust fund on expiration of the trust management agreement and/or its termination by the asset settlor.  For cases described in points (d) and (e), the Trustee must return the asset to the beneficiary or the settlor.

Lastly, the PPSK Law regulates that provisions on SPV and Trustee as well as their tax treatment will be further regulated under a government regulation that must be issued within two years from the enactment date of the PPSK Law.

## Changes to Capital Market Instruments and OJK's Authority

### ***New definition of securities***

The PPSK Law expands the definition of securities to adapt and keep abreast with technological innovation in the market.

Previously, securities only include marketable instruments, such as debt acknowledgement instruments, commercial papers, shares, bonds, debentures, collective investment contract participation units, securities futures contracts, and every derivative of securities. Now, the definition of securities also includes conventional, digital, or any other form (depending on technological development) of investment contracts.

### ***OJK's new authority***

In line with the above-expanded definition, OJK now also regulates and supervises securities-related derivatives and digital financial assets, i.e., crypto assets, which previously fall under the authority of the Commodity Futures Trading Regulatory Agency (*Badan Pengawas Perdagangan Berjangka Komoditas* or "**Bappepti**").

The PPSK Law grants two years for the Bappepti to transfer its authority to OJK and mandates that the implementation of the transfer will be regulated under a government regulation, which will be enacted within six months from the enactment of PPSK Law.

## Changes to the Capital Markets Law

Some notable changes to the Capital Markets Law are the extended responsibility for parties that have obtained a licence, approval, or effective statement from OJK, the introduction of the single presence policy for securities company, and shortened timelines.

### ***Extended responsibility***

Previously, a party that has obtained a licence, approval, or effective statement from OJK (in this case, the “**party**”) was only responsible for the actions of its employees. The PPSK Law expands this responsibility to also cover the party’s directors, commissioners, principal shareholder, controller, employees, and other parties working for them.

In addition, any director, commissioner, shareholder and/or affiliate of the party is personally liable, whether jointly or severally, for losses suffered by the party, its customers, and/or its investors due to:

- (i) the act of the party in bad faith and/or in violation of the law for the personal interest of any directors, commissioners, shareholders, and/or any of their affiliates;
- (ii) any director, commissioner, shareholder, and/or any of their affiliate’s involvement in an unlawful act by the party;
- (iii) any director, commissioner, shareholder, and/or any of their affiliate using the party or any of its customer’s asset/funds in bad faith or unlawfully and such utilisation causes the party or the customer’s asset/fund to be insufficient to perform their respective obligations; or
- (iv) any directors and/or commissioners being found guilty or negligent in performing their respective duties as stipulated under the law and/or the articles of association.

### ***Single presence policy for securities company***

The PPSK Law added Article 42B to the Capital Markets Law, which introduces the single presence policy for securities company. This means that one party can only directly or indirectly control and/or own one securities company.

As a result, a party that owns or controls two or more securities companies would need to divest its share ownership or merge the securities companies within three years of the enactment date of the PPSK Law to comply with this new requirement.

### ***Shortened timelines***

Another notable change under the PPSK Law to the Capital Markets Law is the shortening of several timelines, namely the timeline to report any change of ownership in a public company and the timeline for the issuance of the effective statement by the OJK.

With respect to the former, the Capital Markets Law and OJK Regulation No. 11/POJK.04/2017 of 2017 on Reports of Ownership or Changes to the Share Ownership in Public Companies (“**OJK Regulation**

## Client Update: Indonesia 21 March 2023

11”) used to require directors or commissioners of a public company or any party who owns 5% of the issued shares in a public company to report its share ownership, including any change in its ownership, within 10 calendar days of the occurrence of such change. This period has now been cut in half to 5 business days from the occurrence of the change.

In line with this change, we can expect an amendment to OJK Regulation 11 with respect to this reporting obligation.

Meanwhile, on the latter, OJK was required to issue an effective statement within 45 days (or shorter) from the submission of a complete registration statement or any additional information or change. Now, the PPSK Law mandates that OJK must issue an effective statement within 20 business days from the submission of a complete registration statement or any additional information or change.

In our view, although this is a significant cut-down, OJK would typically give their comments and response to the registration statement documents within 10-15 business days anyways. Hence, in our view, this cut down is unlikely to affect the process drastically.

## Changes to PKPU and Bankruptcy Procedure

### ***New authority of OJK***

Along with OJK’s extended authority, as discussed earlier, the PPSK Law also grants exclusive authority to OJK as the only party that can file for a debt suspension payment (“**PKPU**”) application and/or bankruptcy lawsuit against the following debtors:

- |   |  |
|---|--|
| i) Banks                                    | (xi) Sharia insurance companies  |
| ii) Securities companies                    | (xii) Reinsurance companies  |
| iii) Stock exchange                         | (xiii) Sharia reinsurance companies  |
| iv) Alternative market organisers           | (xiv) Pension funds  |
| v) Clearing and securities institutions     | (xv) Guaranty institutions   |
| vi) Savings and settlement institutions     | (xvi) Financing institutions   |
| vii) Providers of investor protection funds | (xvii) Microfinance institutions   |
| viii) Securities funding institutions       | (xviii) Electronic system providers that facilitate the collection of public funds through securities offering |
| ix) Securities pricing institutions         | (xix) Technology-based providers for joint funding/financing services  |
| x) Insurance companies                      | (xx) Other financial service authority registered in and supervised by OJK                                     |

### ***Rights of public shareholders in liquidation***

In a liquidation scenario, the PPSK Law makes it clear that public shareholders will be prioritised over non-public shareholders in the distribution of liquidation proceeds. The threshold of public shareholders with such priority will be further regulated under OJK regulation.

## Criminal Penalties

Lastly, the PPSK Law amends the criminal penalties under the Capital Markets Law to create a more deterrent effect and to be in line with current developments. These new criminal penalties are as follows:



No.	Violation or Misconduct	Criminal Penalty
1.	Conducting activities in the capital market sector without business licence	Imprisonment of between 1 to 12 years and a fine of between IDR1.5 billion to IDR400 billion.
2.	Fraud, market manipulation, and insider trading	Imprisonment of between 5 to 15 years and a fine of between IDR5 billion to IDR150 billion.
3.	Violation of Articles 70 and 73 in respect of registration statement and submission to OJK	Imprisonment of between 1 to 15 years and a fine of between IDR1.5 billion to IDR150 billion.
4.	Disclosing the client's securities account to parties other than the permitted parties under the law	Imprisonment of between 1 to 5 years and a fine of between IDR1.5 billion to IDR50 billion.
5.	Violation in respect of securities custody activity by a custodian	Imprisonment of between 3 to 10 years and a fine of between IDR3 billion to IDR100 billion.
6.	Hindering the law enforcement process in the capital market sector as regulated under the PPSK Law	Imprisonment of between 1 to 5 years and a fine of between IDR1.5 billion to IDR50 billion.
7.	Deceiving or causing loss to another party or misleading the OJK, as well as losing, destroying, erasing, obscuring, hiding, or falsifying records of a party, including an issuer or a public company	Imprisonment of between 1 to 5 years and a fine of between IDR1.5 billion to IDR50 billion.
8.	Violate or hindering OJK's inspection process	Imprisonment of between 2 to 15 years and a fine of between IDR5 billion Rupiah to IDR200 billion.

## Conclusion

As detailed above, the PPSK Law mandates the enactment of several implementing regulations, including on SPV and Trustee. We expect that once issued, these regulations will further facilitate securitisation transaction and fund management activity in Indonesia.

Meanwhile, the other changes introduced under the PPSK Law as discussed above relate to good corporate governance. Going forward, every business actor, issuer, and public company must ensure that they have established and will implement good corporate governance measures. These, in our view, may include implementing an internal compliance checklist or guidelines to accommodate the new parameter of the single presence policy and the shortened timeline to report changes in the public company's share ownership.

Moreover, parties falling under the OJK's supervision must be extra vigilant in performing their business activities and taking corporate actions due to the extended responsibility to actions performed by directors, commissioners, principal shareholders, controllers, employees, and any parties working for them.

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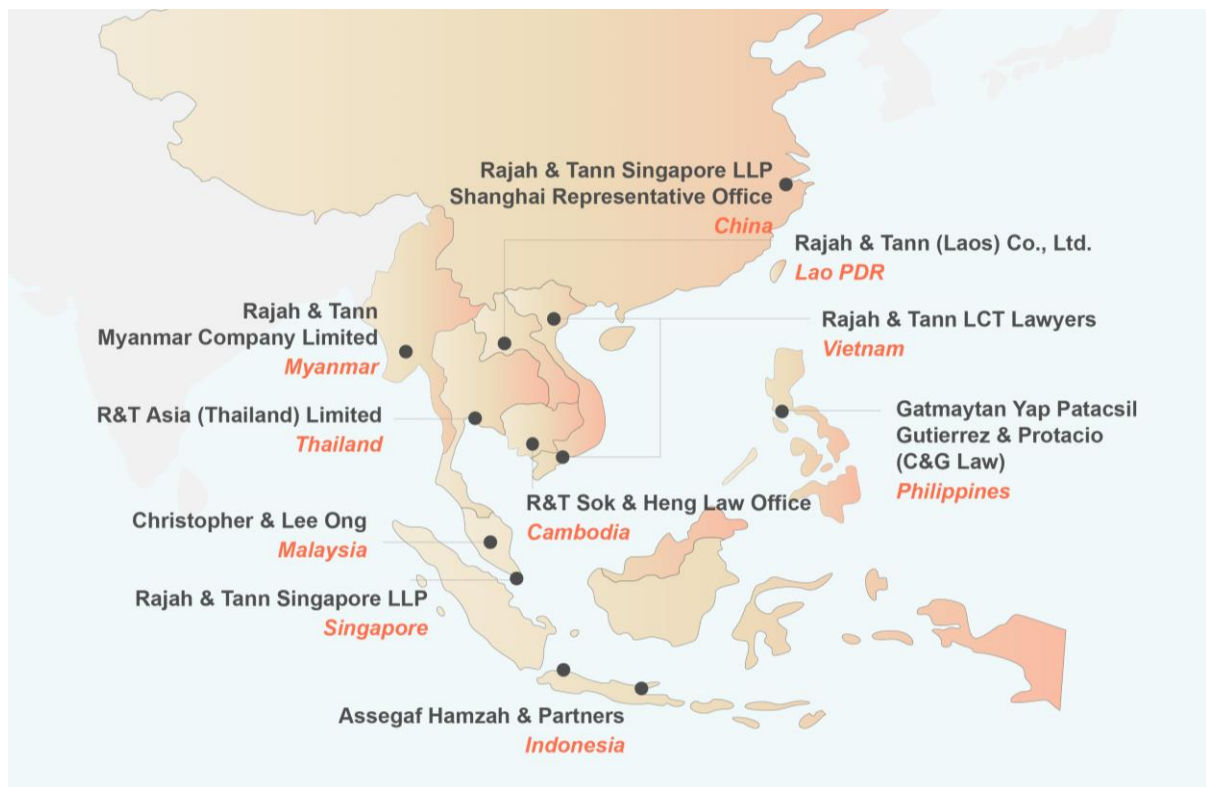
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