

The Development and Strengthening of the Financial Sector: An Improved Concept of Trust

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In an evolving financial landscape, the concept of Trust has gained significant importance, especially for managing and protecting your wealth. Let us take a look the fundamental concept of Trust and how it is adopted and regulated Indonesia. By exploring the concept and its related matters, we aim to shed light on how it can benefit you and your appointed beneficiaries.

The Concept of Trust

The concept of Trust ("Trust") was initially applied under the common law system, where a Trust is recognized as a concept that serves as a framework for asset management or legal arrangement whereby one person (the settlor) transfers property or assets to another person (the trustee). The trustee then holds the assets for the benefit of specified trust beneficiaries. The settlor can determine which assets are included in the trust and how they should be distributed to the beneficiaries. Generally, this type of legal arrangement involves three (3) parties: (i) the Trustee (as the party who manages the assets), (ii) Beneficiary (as the party who receives the benefit from entrusting the asset to the Trustee), and (iii) the Settlor (original owner of the asset). Trusts are widely known as a legal framework around the globe, expanding benefits for many parties.

The Concept of Trust Adopted in Indonesia

In Indonesia, part of the concept of Trust was adopted by Bank Indonesia in 2012 as a response to the increasing need for the use of Trustee services provided by foreign banks in the oil and gas sector. It was hoped that this policy would provide a legal infrastructure for Indonesian banks to carry out activities similar to Trust services. The concept was adopted through Bank Indonesia Regulation Number 14/17/PBI/2012 using the term "custody and management activities" for banks to run Trusts as a business activity, which was later replaced by the Financial Service Authority (*Otoritas Jasa Keuangan /OJK*) through OJK Regulation Number 27/POJK.03/2015 Year 2015 regarding Bank Business Activities in the Form of Custody with Management (Trusts) as amended by OJK Regulation Number 25/POJK.03/2016 Year 2016 (hereinafter referred as "**OJK Reg No. 27/2015**").

Similar to the Trust activity generally applied under the common law system, the parties in the concept of Trust under OJK Reg No. 27/2015 consist of a Trustee, Settlor, and Beneficiary. Further, assets entrusted by the Settlor to be managed by the Trustee are recorded and reported separately from the assets of the bank. However, one difference between the Trust activity known in the common law system and the Trust that is regulated through the OJK Reg No. 27/2015 is that the assets entrusted by the Settlor to be managed by the Trustee are limited to financial assets only.

Until now, there is no obligation for a private trust to publish the ultimate beneficial owner of the company they manage. The current legal umbrella for open beneficial ownership (BO) is Presidential Regulation Number 13 Year 2018 concerning the Application of the Principle of Recognizing the Beneficial Owners of Corporations in the Context of Preventing and Eradicating Corruption, Money Laundering and Terrorist Financing Crimes, is still limited to corporate legal entities, and has not yet reached forms of this type of legal arrangement.

Meanwhile, the regulations regarding beneficial owners in Law Number 8 Year 2010 concerning the Prevention and Eradication of Money Laundering Crime and OJK Regulation Number 8 Year 2023 concerning the Application of Anti-Money Laundering and Prevention of Terrorism and Proliferation of Weapons of Mass Destruction Funding Programs Within the Financial Services Sector are also inadequate. This can provide an opening for the misuse of Trust services to carry out money laundering, hide assets resulting from corruption, and to fund terrorism.

The Government also faces difficulty in determining the BO of this type of Trust. In fact, Indonesian tax authorities also admit that it is difficult to obtain information about who actually controls private Trusts and who is the ultimate beneficiary, especially when there are many layers in the private Trust.

Besides, considering that no tax regulation regarding Trusts has been specifically promulgated, the government, in this case, the Indonesian tax authorities, need to regulate the imposition of taxes on Trust, to prevent potential losses of state revenue through Trusts and to boost investors' confidence.

Current Development: P2SK Law

On January 2023, the Indonesian Government rolled out Law Number 4 of 2023 regarding the Development and Strengthening of the Financial Sector (*Pengembangan dan Penguatan Sektor Keuangan*) ("**P2SK Law**"), which was widely known as the second omnibus law made by the Indonesian government specifically for the financial sector. As the second omnibus law, P2SK Law amended and repealed a number of laws including the banking, capital market, and other legislation within the scope of the financial sector.

As a higher regulation than OJK regulation, the P2SK Law also re-affirms and improves the concept of Trust previously regulated by OJK Reg No. 27/2015.

The P2SK Law added a number of characteristics to the concept of Trust, the key highlights of which are:

- a. A Trustee can be in the form of a legal entity or an individual.
- b. The transfer of assets to the Trustee in the context of asset management is recorded as the registered owner (legal owner) for the benefit of the Beneficiary (*off balance*). By the Trustee becoming the legal owner of the trust's assets, the Trustee is given the right to manage the trust's assets as agreed with the Settlor.

- c. In the event that the Trustee files for bankruptcy, the assets cannot be included in the scope of the bankrupt estate. Like the Trustee, in the event that the settlor files for bankruptcy, the trust's assets cannot be included in the scope of the bankrupt estate;
- d. Unlike OJK Reg No. 27/2015, the P2SK Law does not limit the assets the Trustee can manage.
- e. In managing trust's assets, the Trustee is required to maintain the confidentiality of data and transactions of the settlor and beneficiary.

What's Next?

As the P2SK Law is still new, there are still some aspects which need to be addressed in its implementing regulations, which includes the requirements to be a Trustee or a Settlor, the limitation of the Trust activities, types of Trust that are allowed, confidentiality, investment by the Trustee, and the taxes related to Trust activities.

For the Indonesian Government this also raise concern of evasion of restrictions on foreign ownership for certain businesses, smuggling related to restrictions on certain assets such as property, or the possibility of trusts being used for money laundering.

Related to investment by the Trustee, it is understood that the assets handed over by a Settlor are to be managed by the Trustee so that they continue to provide benefits to the Beneficiaries in accordance with the Trust agreement. Are there any restrictions on the Trustee investing or managing the Trust's assets, and is the Trustee required to collaborate with an investment manager, for example. Another question that might arises is how tax will apply to this scheme? Also, how this trust scheme will not be used in embezzlement of asset from any criminal action, or how to avoid that the settlor will use this trust scheme to avoid claw back action in bankruptcy.

Considering that the applicable legal framework can differ from region to region, it is essential to consult a lawyer on the laws applicable in the region in question.

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The article above was prepared by Dentons HPRP's lawyers

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