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## CLIENT INSIGHT

# MULTIPLE VOTING SHARES, AT A GLANCE APPROACH AND INDONESIA'S RECENT REGULATION

A LEGAL AND BUSINESS INSIGHTS



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This joint publication provides focal points for readers to identify the relevance regulatory and benefit for the business which is presented below.

## BACKGROUND

Technology development has positively lifted Indonesia's economic growth, as Indonesian technology companies bring it in creating innovation with high productivity and growth (new economy). With the widespread innovative technology brought by Indonesian technology companies, unicorns, and decacorns, the new economy in Indonesia will massively improve by doing market deepening through encouraging or accommodating other potential technology companies that create a new level of the economy playing field, if at all. Many global technology companies have adopted a multi-class shares structure. As a result, the rise of dual or even multi-class shares implementation in technology companies significantly needs the founder's role and funds injection, making it an attractive topic to discuss. In addition, there are many debatable issues regarding the creation of classes with inequality voting rights in practice.

To encourage and accommodate the foregoing companies to be able to enter into Initial Public Offering ("IPO") in the Indonesian capital market sector and subsequently listed in Indonesian Stock Exchange ("IDX"), Financial Service Authority (*Otoritas Jasa Keuangan* or "OJK") has recently issued OJK Regulation No. 22/POJK.04/2021 dated December 2, 2021 on the Implementation of Stock Classification with Multiple Voting Shares by Issuer with Innovation and High Growth Rate that Entering Public Offering of Share Equity Securities ("**OJK Reg. No. 22/2021**"). In brief, OJK Reg No. 22/2021, among others, governs the implementation of dual-class shares separation with Multiple Voting Shares ("**MVS**" or *Saham Dengan Hak Suara Multipel* in *Bahasa Indonesia*).

Now, dual-class shares with MVS are commonly implemented by foreign technology companies. Several offshore stock exchanges, such as the Hong Kong Exchange (HKEX), the New York Stock Exchange (NYSE), and the National Association of Securities Dealers Automated Quotations (NASDAQ) have recognized and created their own policies to support high-tech companies in implementing MVS, enabling them to be listed in their stock exchange.

We will also focus on how the foregoing OJK Reg. No. 22/2021 meets the company business needs composing many parts that fit together to form a complete picture, like a kaleidoscope.

## DEFINING CLASS OF SHARES WITH MVS AND ITS IMPORTANCE

From a legal perspective, OJK Reg. No. 22/2021 defines Multiple Voting Shares as a classification of shares whereby one share gives the shareholders more than one voting right that meets certain requirements.

Companies often issue dual or multi-shares. Typically, even in non-technology companies, they are divided into two or more classes, for instance, consisting of shares A, B, and C, in which one of them has super-voting rights and dominant capacity to influence the management, business's operation, and the policy of the company. A founder of the company commonly owns these super-voting rights. By having super-voting rights, a founder can dominantly control the company's decision-making as controlling shareholders.

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## CRITERIA AND ELIGIBILITY FOR MVS ISSUER, AND MVS HOLDER

Commonly, companies that implement dual or multi-class shares are companies with high growth opportunities and actively pursue external equity financing, which they conceive to issue these dual or multi-class shares. According to a Harvard Business School study, the scholars of the view that there are reasons why technology companies implement dual or multi-class shares, such as the increasing importance of intangible investments, the rise of activist investors, and the increasing of other protection mechanisms to management, such as staggered board and poison pills (as a preventive system for hostile takeover with the sole purpose of the change of control). Dual or multi-class shares also offer immunity against proxy contests initiated by short-term investors, enabling the company's founder to ignore pressures from the capital markets and avoid actions such as cutting research and development and delaying company restructuring.

Under OJK Reg. No. 22/2021, the controlling shareholders in a technology company are now protected from hostile takeover after entering into IPO by implementing MVS. OJK Reg. No. 22/2021 brings more stringent requirements, as the Issuer must clearly set out a detailed minimum rule of thumb of the MVS under its Articles of Association ("**AOA**"), among others, shares classifications made by the Issuer and the attached rights, eligible parties to become shareholders with multiple voting rights (collectively, the "**MVS Holders**"), voting rights ratio of MVS against ordinary shares in accordance with the owned shares, MVS Holder ownership limitation with the maximum ownership (whether MVS or ordinary shares) amounting 90% of all voting rights, MVS votes that equal to ordinary shares on certain GMS' agenda, MVS validity period and its extension, certain condition that causes MVS to convert to ordinary shares before expiration, and different treatment of MVS Holder in GMS.

More importantly, OJK Reg. No. 22/2021 requires a company to meet the following criteria to be qualified as an Issuer that may implement MVS (the "**MVS Issuer**"):

- a. Utilizing technology to create product innovation that increases productivity and economic growth as well as a broad social benefit;
- b. Has shareholder that significantly contributes to technology utilization;
- c. an entity that has met the followings:
  - (i) Has a total asset of at least Rp2,000,000,000,000 (based on the current audited financial statement);
  - (ii) Conducted operational activities for at least 3 years before applying the Registration Statement (*Pernyataan Pendaftaran*);
  - (iii) Compound annual growth rate of total assets of at least 20% within three years (based on the audited financial statement); and
  - (iv) Compound annual growth rate of revenue at least 30% within three years (based on the audited financial statement);
- d. Has never done IPO of equity securities before; and
- e. Meet any other criteria set by OJK.

In terms of assets value, another interesting point is the requirement of having a total asset of a minimum of Rp2,000,000,000,000, which might be a hassle for an early-stage technology company to implement dual-class shares with MVS, therefore the requirement is more relevant for the later stage. Typically, the company's assets shall refer to the assets stated in its financial reports. It is important to anticipate that there is a possibility for OJK to require specific audited assets value for 3 consecutive years rather than general

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information of the asset value. But, we suggest the company consult with appropriate business and legal consultants to liaise with OJK regarding the foregoing matter. As a regulatory body, bear in mind that OJK has full discretion to require additional requirements other than the foregoing criteria by considering additional regulatory compliance.

From a legal perspective, it comes to our attention that product innovation should be considered to have a broad social benefit. In addition to that, the foregoing criteria are only applicable to technology companies.

But, by legal concept, utilizing technology is perceived through the lens of how a successful company creates product innovation and/or business model distinguished from other existing ones by bringing new technology as part of its core business, unique features, or intellectual property rights.

From a business perspective, there are factors and considerations to make technology companies eligible as MVS Issuer, especially technology start-ups, since they require a large amount of funds to maintain their growth, among others, expanding research and development for their technology, developing markets, developing business unit, and hiring talents. Because of budget limitations, the founder of the early-stage technology company pursues the investor to bring capital to them, which the investors usually receive a certain interest.

The technology companies' focus often broadens in the later stage of a business (growth stage). The business often starts to diversify by introducing new tech products. Each tech product becomes easier to establish and is often more profitable after the first production. To be more focused on the company's vision and market deepening, we believe OJK is very much aware of the intentions and ideas of technology company founders in raising capital by providing an opportunity to the founder to conduct an IPO with dual-class shares with MVS with the ultimate purpose of creating innovation as part of its the technology company's strategies. In addition, the founder typically holds a pivotal role in determining the company's direction and strategy, such as performing significant transformations and reshaping the business model.

Therefore, it appears that OJK Reg. No. 22/2021 also requires that eligible initial MVS Holder must be determined in a GMS and included in the prospectus. OJK Reg. No. 22/2021 amplifies that parties that are eligible to be an MVS Holder are those of shareholders who have been disclosed in the IPO prospectus, Board of Directors ("**BOD**") members that have significantly contributed to the company's business growth as approved by the independent shareholders in the GMS. Suppose MVS Holder is a legal entity, eligibility requirements will come with specific ownership limitations. Such entity must be directly owned for at least 99% by MVS Holder and/or a party appointed as MVS Holder in a GMS (but no longer becomes as MVS Holder), represent a BOD having expertise in line with the Issuer's main business activity, and must be a company that engages in management consultancy business (for Indonesian company).

Further, different MVS Holder might have different interests. But, under OJK Reg. No. 22/2021, if MVS Holders consist of more than 1 party, they are required to have the same vision and mission and provide the same voting rights in every GMS decision-making. Furthermore, OJK Reg. No. 22/2021 requires MVS Holders to enter into a shareholder agreement that governs their mutual commitment to undertake the vision and mission. In a broad sense, the existence of the foregoing agreement may be used to avoid problematic issues on the company's future direction and strategy and *de minimis* exit plan caused by unnecessary reasons.

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## PROTECTION FOR PUBLIC SHAREHOLDERS

As noted above, OJK intends to encourage more technology companies to conduct IPO to be listed in IDX by implementing MVS. To harmonize the interest of public shareholders, we note that there are several limitations on OJK Reg. No. 22/2021 that intended to protect public shareholders.

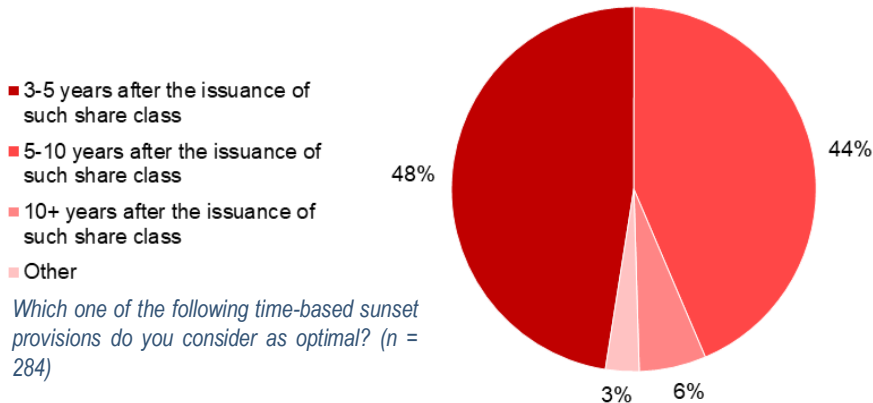
In brief, public shareholders' interest protection is conducted by disclosing certain material facts or information that affects the interests of public shareholders by a publicly listed company under OJK Regulation No. 31/POJK.04/2015 on Disclosure of Material Information or Fact by Issuer or Public Company ("**OJK Reg. No. 31/2015**"). They are essential to the public in investing in the publicly listed company. OJK Reg. No. 31/2015 requires a publicly listed company to report material fact or information to OJK and announce it to the public. The foregoing report or announcement must at least consist of the date of the event, types of material information or fact, description of material information or fact, and impact of the event of the material information or fact. The material information or facts consist of a certain event, such as merger, separation, consolidation, or joint venture of a company, bid submission to purchase other company's shares, sale and purchase of company material shares, share distribution or share merger, delisting and re-listing of shares on IDX, and/or change in control of the Issuer or publicly listed company.

In line with OJK Reg. No. 31/2015, OJK Reg. No. 22/2021 also governs the protection of public shareholders by limiting the validity period of MVS for 10 years and can be extended for another 10 years by obtaining Independent Shareholders' approval in the General Meeting of Shareholder ("**GMS**"). In our view, the validity period is necessary since technology companies need to implement MVS when they are still immature operating (such as early stage and growth stage). The company's founder will take higher innovation and business development risks in this condition. In the condition of maturity, shares with multiple voting rights must be stopped because if the implementation of shares with multiple voting rights continues, it will reduce the value of the company. However, we cannot predict how long it will take for the company to reach a mature condition since, as time goes by, certain situations make the company liquidated or have to rebuild to prevent falling into a state of decline. Therefore, we are not able to estimate how long shares with multiple voting rights are able to implement.

According to the Chartered Financial Analyst ("**CFA**") Institute survey in the Asia Pacific ("**APAC**") Region, a total of 97% of respondents supported the validity period for safeguards when shares with multiple voting rights were introduced.

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### Results of CFA APAC Survey Regarding Optimal Time for Time-Based Sunset Provisions



Source: CFA Institute APAC Survey Report

Based on the picture above, we can see more than 90% of the total respondents agreed that ideally, MVS should be implemented in less than 10 years. Meanwhile, 6% of total respondents agree that the validity period is more than 10 years. Furthermore, the extension of the validity period is crucial to facilitate the founders in transforming or reshaping the business model if competition and innovation are required to do so. However, the key extension here is to obtain Independent Shareholders' approval, making them fairly straightforward to assure the foregoing transformation and reshape do not constitute conflict of economic interest of the founders.

In line with the foregoing survey, we believe that OJK has addressed the same view under OJK Reg. No. 22/2021 in stipulating the provision of MVS's validity period.

As another attempt to protect public shareholders, an MVS Holder is prohibited from transferring a part or whole of its MVS for 2 years following the Registration Statement's effective date ("**Lock-Up Period**"). This prohibition also applied to ordinary shareholders (*pemegang saham biasa*), restricting them from transferring a part or whole of their ordinary shares before commencing the IPO. If the book value per share (*nilai buku per saham*) lower than the IPO price, all existing ordinary shareholders shall not transfer their shares for up to 8 months since the Registration Statement's effective date. Once the Lock-Up Period has ended, MVS Holders that wish to transfer their shares must first offer to one or more other MVS Holders and inform OJK and the Issuer of its intention to transfer the MVS no later than 2 business days before commencing the transfer. Such transfer must be carried out through a negotiation market.

There is also a limitation in exercising super-voting rights in the GMS in which each MVS Holders may only have 1 voting right for each MVS owned in the GMS for; (i) the amendments to the Issuer's AOA, save for an amendment to the authorized capital, (ii) the appointment or dismissal of an independent commissioner, (iii) the appointment or dismissal of a public accountant or accounting firm that will provide auditing services on historical financial information, and (iv) bankruptcy or petition for dissolution of the Issuer. OJK Reg. No. 22/2021 also requires that the MVS Issuers' GMS be attended by ordinary shareholders representing at least 1/20 of ordinary shares' total voting rights owned by other than MVS Holders.

MVS will convert into ordinary shares if; (i) the MVS Holder passed away or under *curatele* (*pengampuan*) and the MVS has not been transferred to another MVS Holder or other parties that have been appointed as an eligible MVS Holder within 6 months, (ii) the MVS Holder transferred its MVS to a party that is ineligible as an MVS Holder as stipulated in IPO prospectus, (iii) the MVS Holder does not hold more than 50% of the total voting rights in the Issuer, and such condition has been going for at least 6 months, (iv) the MVS period has ended, (v) the MVS Holder does not longer fulfill the eligibility criteria (as noted above) if the MVS holder is a legal entity, and/or (vi) the MVS Holder no longer serve as a BOD member of the Issuer or becomes unable to carry out his duties as a director pursuant to the decision of the relevant institutions.

## VOTING RIGHTS RATIO

To implement the multiple voting rights, MVS Issuer must implement MVS voting ratio compared to ordinary shares by calculating the MVS Holders' shares ownership percentage based on the total nominal value of the issued and paid-up capital. The ratio of shares with multiple voting rights act as the rule of thumbs for superior voting rights.

Please see below the ratio of multiple voting rights that technology companies can use under OJK Reg. No. 22/2021 and our brief analysis:

MVS		Voting Right Ratio of MVS to Ordinary Voting Right	Effective Voting Rights	
Minimum (%)	Maximum (%)		Minimum (%)	Maximum (%)
10.00	47.36	10:1	52.63	90.00
5.00	10.00	20:1	51.28	68.97
3.50	5.00	30:1	52.11	61.22
2.44	3.50	40:1	50.01	59.20

Source: OJK Reg. No. 22/2021 and KAP Jimy Abadi Analysis

The company is able to issue a certain ratio of multiple voting rights ranging from 2.44% to 47.36%. The foregoing ratios demonstrate fulfillment of the basic concept needed for simple majority requirements for decision purposes. For instance, suppose the founder has shares ownership 2.44% of shares with multiple voting rights, the foregoing ownership reflects 50.01% of the voting rights, which is possible to reach dominant voting rights upon the ordinary shareholder (1 vote per share).

Please note that MVS Issuer must ensure that the owned ordinary shares other than MVS Holder are at least 10% of the total voting rights. In addition, MVS Holders (either individually or jointly) are prohibited from owning MVS or ordinary share, resulting in more than 90% of the total voting rights. If an MVS Holder owns more than 90% of the total voting rights, ordinary shares' voting rights are calculated to 10% of the total voting rights.

## KEY TAKEAWAYS

Based on the above explanation, we can conclude that OJK Reg. No. 22/2021 can minimize the negative impact of implementing shares with multiple voting rights, and this regulation is sufficient to answer the needs of the founder of technology companies, which is the concern of losing control of the company due to erosion ownership. Therefore, the founder is allowed to ignore the short-term shareholder pressures and focus more on implementing

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their long-term vision, such as performing significant transformations and reshaping the business model.

Determining the ratio of shares with multiple voting rights can also make it easier for companies to issue them since they are relatively new in Indonesia. Therefore, this determination assists the company's consideration. In addition, this regulation also agrees that implementation of shares with multiple voting rights will not last forever since when the company has been reached its mature condition, the benefit of implementation shares with multiple voting rights will be decreased gradually, and the cost of management entrenchment and executive compensation will be increased at the same time. Therefore, the validity period is essential. Any extension is subject to GMS's approval.

Specifically for the future transformation of a technology company, the regulator must take feasible impediments that a single-class publicly technology company should be given an option to convert their shares to dual-class shares through GMS rather than completely delist from the relevant stock exchange.

But, as noted above, OJK Reg. No. 22/2021 restricts a technology company that has never done IPO to implement MVS, which we believe such requirements are intended to protect the public shareholders' interest. Hence, the evaluation of an existing publicly listed company has gone through a rigorous and complex process to preserve existing public shareholders' interest, among others, by disclosing certain material facts or information that affects the interests of public shareholders. They are essential to the public in making investment decisions in the publicly listed company in the beginning. In addition, OJK Reg. No. 31/2015 requires a publicly listed company to report material facts or information to OJK and announce it to the public, including delisting and re-listing of shares on IDX, and/or change in control of the Issuer or publicly listed company.

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March 7, 2022  
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