



Legal Problems of the Financial Planner Profession in Indonesia

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Abstract

This study aims to examine the legal problems of the Financial Planner to clients in investing in the capital market. The type of research used is doctrinal or normative legal research. This research is normative/doctrinal legal research using a statutory approach. The technique of collecting legal materials is by studying literature. The results of the study indicate that there are two legal problems regarding the Financial Planner profession, namely regarding the legality of the Financial Planner business and the client asset management agreement to the broker or stockbroker. First, the legality of a Financial Planner's business should only be obtained by a Financial Planner who holds a license as an investment advisor and deputy investment manager. Second, asset management agreements with third parties should not be justified, especially if the stock brokerage company has a conflict of interest with the Financial Planner who should be independent unless there is a statement of interest disclosure in accordance with applicable regulations.

Keywords: *Legality; Financial Planner; Asset management*

Introduction

The recent covid-19 pandemic has made people, especially the younger generation, tend to manage their finances more carefully. Recently, they have a tendency to invest their assets into capital market investment instruments, especially in stock instruments due to the price that tends to fall. This decline in stock prices makes the number of stock investors increase. This is evidenced by the fact that during 2020 yesterday, OJK stated that the number of capital market investors was increasing, especially the number of millennials, namely 58.4% of the total investors under 30 years old. During the year 2020, the number of capital market investors reached 3.88 million people. The number of investors increased 56.45 percent from 2019 which only amounted to 2.48 million people (OJK., 2021). The main subject of the capital market is an investor. Therefore, investor protection is one of the most important things in shaping capital market regulations and the financial industry in general (Malcolm K. Sparrow., 2000). Investor protection is certainly a very important thing considering the principle of the capital market itself which has the principle of high risk high return with market conditions where it is very easy for investors who have many assets to manipulate market conditions.

Increasingly rapid development of social media has encouraged many accounts which is trending among millennials whose contents are financial and investment education. These social media accounts are sometimes not just financial education accounts for free. Some of the accounts that provide free

education to provide paid financial planning services. For this reason, recently, the financial planner service has begun to attract the attention of the millennial generation who have high income. Their hope is that the assets they have are not silent and can be managed optimally so as to generate profits in the future or generate profits known as passive income. Currently, there is a company that offers financial planning services which has gone viral because of its attractive social media branding. The more developed the economy, the greater the potential for law violations to occur. Unfortunately, in the end, the company was reported to have cost its clients billions of rupiah because of the unprofessional allocation of funds. The unprofessional allocation was due to the absence of clear arrangements regarding the Financial Planner.

Research Methods

The type of research used is doctrinal or normative legal research. Doctrinal research is research based on legal materials that focus on reading and studying primary and secondary legal materials so that legal research will be able to produce new arguments, theories, or concepts as prescriptions in solving problems at hand. (Marzuki, PM, 2014). This research is normative/doctrinal legal research using a statutory approach and a conceptual approach.

Research Result

A. Financial Planner Business License

Different types of investments have their own risks. It is certain that every investment has a risk of loss (Uni Tsulastsi Putri., 2020). Each investment instrument has a different risk profile. The job of a Financial Planner is to provide advice on what investment profile is suitable for an individual and the financial goals to be achieved. Usually, the higher the investment risk, the greater the potential profit that can be obtained. Therefore, investment requires good literacy in order to avoid the risk of loss. Meanwhile, the profession of financial planner (Financial Planner) is a profession that helps individuals or families to prepare financial plans to meet short, medium, and long-term financial goals.

This is a broad term for a professional who helps manage Client's money. Clients pay for advisors, and in return, they assist with a number of money-related tasks. Financial advisors can help manage investments, broker the sale and purchase of stocks and funds, or create comprehensive real estate and tax plans. In America, if advisors work with the public, they must hold a Series 65 license (Mallcom: 17-18). In addition to that license, there are many other financial advisory credentials an advisor may have, depending on the services provided.

The Financial Planner professional business license is very important because it relates to the legality of an established business entity. Talking about legality, the language has a legal basis. According to the Black Law dictionary, legal means in accordance with the law; according to law; required or permitted by law; is not prohibited or omitted by law; good and effective in law (Engga Prayogi., 2016) Eligible, or sufficient to be recognized by law; recognized in court; competent or adequate to meet statutory requirements. That is, the new Financial Planner profession is considered legal when it meets these requirements. When translated in full, the word legality in Black Law dictionary, the first point means as an implied guarantee that the laws of a particular jurisdiction are the basis for any action, agreement, or contract in that jurisdiction. As a legal principle (in criminal law), there is no crime if an act does not constitute a crime in that particular jurisdiction.

The legality of a company or business entity is the most important element, because legality is the identity that legalizing or certifies a business entity so that it is recognized by the community. The legality of the company must be legal according to laws and regulations, where the company is protected or

covered by various documents until it is legal in the eyes of the government in power at that time. Legally, companies in Indonesia are divided into two, namely companies with legal entities and non-legal entities. A company that is not a legal entity is a collection of people (except individual businesses) based on an agreement to carry out business activities with the intention of sharing the profits earned (Tri Budiyo., 2010). An example of a company that is not a legal entity is a partnership business, namely a general civil partnership, a firm, and a CV. Meanwhile, legal entities include limited liability companies and cooperatives. The main difference between a business with a legal entity and a non-legal entity lies in the separation of assets and responsibilities.

Financial Planner in Indonesia is different from the arrangement in America. America expressly stipulates that Financial Planner is subject to the Investment Advisers Act of 1940 (“Advisers Act” or “Act”) regulations, and other regulations. In Indonesia, the regulation regarding Financial Planner has not been regulated at all. Basically, the permit or legality of a company engaged in providing financial planning services has not been specifically regulated. However, based on the scope of work, the Financial Planner is similar to the Investment Advisor profession. However, sometimes the Financial Planner has access to the client's investment portfolio. Thus, the rules are based on the rules regarding the investment advisory profession in Law Number 8 of 1995 concerning the Capital Market (hereinafter referred to as the Capital Market Law). Article 34 UUPM paragraph 1 stipulates that Those who can carry out activities as Investment Advisors are parties who have obtained a business license from BAPEPPAM. The permit is then stipulated in a government regulation which will regulate in more detail. The article states that the activity of an investment advisor is to provide advice on the sale or purchase of Securities in exchange for services. Therefore, Investment Advisors must meet certain requirements such as expertise in the field of Securities analysis

Unfortunately, until the authority of BAPEPPAM moved to OJK (Financial Services Authority), the rules regarding the capital market have not been changed. Even though there are so many new professions in today's development, for example, are Financial Planners and financial advisors. This should be a concern because according to M.Isnaeni, this includes external legal protection. External legal protection made by the authorities through regulations for the benefit of weak parties, in accordance with the nature of the laws and regulations that should not be one-sided and partial in nature, proportionally must also be given balanced legal protection as early as possible to other parties.

Even if there is a contract, it does not guarantee that the client's rights are protected. Legal protection is required both internally and externally to protect Clients from capital-market crimes by Financial Planners. In addition to external protection through regulation, there is also an internal protection. (Moch Isnaeni., 2016) The essence of internal legal protection is that the intended legal protection is packaged by the parties themselves when making the agreement, where when packing the contract clauses, both parties want their interests to be accommodated on the basis of an agreement. Likewise, all types of risks are endeavouring to be prevented through filing through clauses that are packaged on the basis of agreement, so that with this clause the parties will receive a balanced legal protection based on their mutual consent.

One of these external protections is regulated in the rules issued by the Financial Services Authority. According to POJK Number 5 /POJK.04/2019 Regarding Prohibited Behaviour for Investment Advisors is prohibited from:

- a. Ask for a very high fee compared to the fee requested by other Investment Advisors who provides the same service without notifying the customer that there is another choice of service provider;
- b. disclose the identity of customers to third parties unless required by applicable laws and regulations;
- c. misrepresents the customer regarding the qualifications of the Investment Advisor, misrepresents the nature of the services provided, or neglects to convey material facts necessary so that the statements

- made in relation to the Investment Advisor's qualifications, nature of services, and material facts are not misleading;
- d. provide reports or suggestions to each customer that was not prepared by him without mentioning the party who prepared the report or advice;
 - e. promise a certain result that will be achieved if the customer follows the advice given;
 - f. give advice to customers regarding the purchase, sale, or exchange of Securities without any rational rationale;
 - g. neglecting to disclose in writing to the customer before the advice is given regarding the conflict of interest of the Investment Advisor, which may reduce the objectivity of the advice;
 - h. enter into, amend, extend, shorten, or renew an investment advice contract without the written consent of the customer;
 - i. manage customer funds; and/or
 - j. perform Securities rating for Investment Advisors who is not Securities rating companies.

Article 34 paragraph 1 of the Capital Market Law states that those who can carry out activities as Investment Advisors are parties who have obtained a business license from Bapepam. A person who conducts investment advisory activities without a permit may be convicted of a crime. There are several kinds of capital-market crimes. When looking at crime, there are 3 articles. First, Article 103-paragraph (1) states that: *“Any Party conducting activities in the Capital Market without the permit, approval, or registration as referred to in Article 6, Article 13, Article 18, Article 30, Article 34, Article 43, Article 48, Article 50, and Article 64 is threatened with imprisonment for a maximum of 5 (five) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah).”*

Parties carrying out capital market activities without a permit in accordance with Article 6 concerning the operation of a stock exchange, Article 13 concerning Clearing Guarantee Institutions, or Depository Institutions, and Companies, Article 18 concerning Mutual Funds, Article 30 Securities Companies, Article 34-Investment Advisors, Article 43 Custodians, Article 48-Securities Administration Bureau, Article 50 Trustee, Article 64 Other Supporting Professions. In addition to criminal sanctions, OJK will also use administrative sanctions for investment advisers who do not comply, namely in the form of written warnings, fines, restrictions on business activities, freezing of business activities, revocation of business licenses, cancellation of approvals; and/or cancellation of registration.

B. Duties and Obligations of Financial Planner

The scope of the Financial Planner's duties and obligations lies in the work agreement signed with the client. The main task of the Financial Planner is to provide educational advice on the allocation of client funds. These financial products include life insurance, gold, property, or investment in the capital market such as stocks or bonds and derivatives of capital market products such as mutual funds. This suggestion adapts to the character of the client. Each client must have a different character. The Financial Planner itself has the task of helping clients achieve certain financial goals with optimal allocations in various investment instruments. Financial Planners in other countries can double as investment planners or investment planning. The main task of the Financial Planner is to adjust which investment product best fits the client's profile. Each investment choice has different risks and different returns. Therefore, to invest in the capital market, it is necessary to have sufficient knowledge, experience, and business sense to analyze which securities should be purchased and which must be resold (Sentosa Sembiring., 2019)

When we talk about duties and obligations, we will not be separated from the law of the agreement. Article 1313 of the Civil Code means that an agreement is an act by which one person or I bind himself to another person or more. Subekti argues that an agreement is an event where a person

promises to another person or where two people promise each other to carry out something (Subekti., 2001). Financial Planner makes arrangements with clients in terms of advice and portfolio management with clients according to the client's goals, sometimes including planning for children's education funds, emergency funds, pilgrimage funds, investment advice, and even insurance.

Financial Planners has broader powers than investment advisors. According to the SEC, states that Section 202(a) (11) of the Act defines an investment adviser as any person or firm that: for compensation; is engaged in the business of; providing advice to others or issuing reports or analyzes regarding securities. A person must satisfy all three elements to fall within the definition of "investment adviser," which the SEC staff has addressed in an extensive interpretive release explaining how the Act applies to Financial Planners, pension consultants and other persons who, as a part of some other financially related services, provide investment advice.

According to the SEC described above, the Act defines an investment advisor as any person or company that: for compensation; engaged in business; provide advice to others or issue reports or analyzes regarding securities. One must meet all three of these elements to fall within the definition of an "investment advisor". This applies to financial planners, retirement consultants, and others who, as part of some other financial-related services, provide investment advice.

Advice on securities may not only include advice on specific securities (such as stocks, bonds, mutual funds, limited partnerships, and commodity pools), but may also include advice on market trends, the selection or retention of other advisers, the advantages of investing in securities over other types of investments. (such as coins or real estate), granting selective securities listings, and asset allocation. Investment advisors in the United States generally must register with the Securities and Exchange Commission (SEC) or state securities authorities.

According to Indonesian law, Article 1 number 14 of the Capital Market Law states that an Investment Advisor is a Party that provides advice to other Parties regarding the sale or purchase of Securities in exchange for services. Investment Advisors are required to first obtain a business license from BAPEPPAM. The second paragraph of this Article is an order to delegate implementing arrangements that regulate in more detail the permit. More detailed arrangements are regulated in Government Regulation of the Republic of Indonesia Number 45 of 1995 concerning the Implementation of Activities in the Capital Market Sector. The contents of this PP are more or less the same and are detailed in the POJK below, namely POJK Number 3 /POJK.04/2021 concerning the Implementation of Activities in the Capital Market Sector.

Parties who can carry out business activities as Investment Advisor is an individual or company that has obtained a business license from Financial Services Authority. An individual who becomes an Investment Advisor or an individual who is a member of the board of directors, member of the board of commissioners, or controlling either directly or indirectly Investment Advisor in the form of a company must meet minimum requirements:

- a. Never committed a disgraceful act and/or convicted of committing a crime
- b. In finance;
- c. Have good character and morals; and
- d. Have expertise in the Capital Market sector.

Advisor as intended must have at least one expert who has a license as an Investment Manager representative. In the event that the Investment Advisor is an individual and the person concerned has obtained a license as an Investment Manager representative, the individual is not required to appoint another Investment Manager representative. An application to obtain a business license as an Investment Advisor is submitted to the Financial Services Authority accompanied by documents and information on

the license as an Investment Manager representative, the taxpayer identification number, and other supporting documents and information related to the application for an Investment advisor business license regulated by the OJK.

Investment Manager Representatives are required to meet the integrity requirements and competency requirements. Integrity requirements are having good character and morals, being competent, never being punished in the field of financial services. Has never been sanctioned with revocation of license, the cancellation of approval, and/or cancellation of registration by OJK for the last 3 (three) years, has never been declared bankrupt or has been a manager found guilty of causing a company to be declared bankrupt within the last 5 (five) years prior to filing the Application for Investment Manager Representative License and have a high commitment to comply with the provisions of the legislation.

Competency requirements which include: having a minimum education level of Diploma Three (D3), having adequate knowledge and expertise in the Capital Market sector as evidenced by:

- a. Have a certificate of expertise as an Investment Manager Representative issued by a Professional Certification Agency registered with the Financial Services Authority; or
- b. Have work experience in Capital Market supervisory institutions and/or organizations authorized by the Capital Market Law to regulate and/or supervise the Capital Market industry with the following provisions:
 - i. A minimum of 2 (two) years in a managerial position; or
 - ii. at least 5 (five) years in the executive position, in the field of tasks and functions related to the regulation and/or supervision of the investment management sector;
- c. Working for financial service institutions in Indonesia, for foreign nationals; and
- d. Not working for more than one-Securities Company and/or other financial service institutions

Investment Manager Representatives must understand and comply with the provisions of the Indonesian Capital Market laws and regulations, act and behave professionally and have broad knowledge in the Capital Market field; and has become a member of an association that accommodates Investment Manager Representatives who have received recognition from the Financial Services Authority. Investment Manager Representatives must attend continuing education organized by associations that accommodate Investment Manager Representatives or other parties recognized by the Financial Services Authority at least 1 (one) time in 3 (three) years. Investment Manager Representatives is prohibited from working concurrently for more than one-Securities Company and/or other financial service institutions. This work prohibition does not apply to Investment Manager Representatives who are members of the board of directors of a Securities Company conducting business activities as Investment Managers to hold concurrent positions as commissioners of the stock exchange, clearing and guarantee institution, or depository and settlement institution. The Investment Manager Representative License has a validity period of 3 (three) years according to the date and month of birth of the Investment Manager Representative License holder and can be extended.

The consequence of not being specifically regulated in the Financial Planner profession is the proliferation of Financial Planners without permission. This is because there is no special arrangement that requires that the Financial Planner should have a license as an investment advisor and deputy investment manager at the same time. Ideally, there is a professional certification such as advocates and medical personnel in practice. The practice that has been mushrooming so far is that Financial Planners can run a business without professional certification, as there are several institutions that provide professional certification of financial planners in Indonesia. The three institutions are the Financial Planning Standards Board (FPSB), the International Association of Registered Financial Consultants (IARFC), and the Certified Wealth Managers Association (CWMA).

The reality is that Financial Planners can practice without using the certifications of the three institutions. This is different from the advocate profession and other professions which are regulated in clear regulations. Advocate profession, for example, it is clear that this profession is regulated in Law Number 18 of 2003 concerning Advocates. This law describes that those who become advocates must be graduates with a legal background who then take special education for the advocate profession and fulfill other requirements in this law.

The absence of clear rules has a negative impact on legal certainty in terms of protecting Client's rights. Then, what happens is that customers are directed to brokers affiliated with the Financial Planner, which makes the profession no longer independent, and prioritizes the interests of clients but only focuses on its own benefits. In 2019, there was even a Financial Planner company that was caught in a legal case as a result of improper advice and intervening in a client's fund management agreement with an unlicensed broker's club as an Investment Manager Representative. This happens because there are no special rules regarding this business license which is actually almost the same as the task of an Investment Advisor. The difference is, the Financial Planner has the main task of asset planning which is not only in the field of investment, but in order to realize the client's plans in the future with a good investment portfolio and there is continuous evaluation within a certain period of time, it can be monthly or four months.

C. Client fund management

The biggest problem as a result of the unregulated regulation regarding financial planners arises because of the emergence of questions about the legality of the business entity run by the Financial Planner and what activities the Financial Planner may undertake. Regarding the management of client funds, when referring to the OJK rules regarding investment advisors, investment advisors are not authorized to manage client funds directly in client assets unless they are licensed as Investment Manager Representatives. An application to obtain a business license as an Investment Advisor is submitted to the Financial Services Authority accompanied by the following documents and information:

- a. License as Investment Manager representative;
- b. Tax ID number; and
- c. Documents and other supporting information related to the application for an Investment Advisor business license in accordance with the provisions of the laws and regulations in the Capital Market sector regarding Investment Advisor licensing.

The application is submitted using a form in accordance with the provisions of the laws and regulations in the Capital Market sector regarding Investment Advisor licensing. The Financial Planner itself does not yet have a separate policy that is really specific about the profession. Regulations in Indonesia indirectly say that the rules for this profession are based on the rules regarding investment advisors. Whereas basically, the two professions have different scope of work. In America the rules regarding Financial Advisors have been explicitly accommodated by the SEC (*Security and Exchange Commission*) that "Money managers, investment consultants, and financial planners are regulated in the United States as "investment advisors" under the US Investment Advisors Act of 1940 ("Advisory Act" or "Act") or similar state law." (US Securities and Exchange Commission.,2013)

Sometimes, the legal problems that arise here are caused by differences in skills or professionalism because every business has what is called an opportunity cost (Robert H. Sitkoff., 2014). Referring to the context of a financial advisor with the authority to manage client funds at the discretion of the client's portfolio account, of course, it does not mean that it is free from the risk of loss in investment. The unpredictable nature of the capital market makes portfolios sometimes suffer losses when market conditions weaken due to various triggering factors.

America through the SEC regulates investment advisors primarily under the Investment Advisers Act of 1940 and the regulations adopted under that law. The investment advisor must disclose to the client all material information about his compensation, such as if the advisor's fees are higher than the fees other advisors would normally charge for similar services (in most cases, this disclosure is required if the annual fee is three percent of assets or higher). An investment advisor must disclose all potential conflicts of interest between the advisor and his client, even if the adviser believes that the conflict does not affect and will not affect the adviser's recommendations to his client. The obligation to disclose this conflict of interest includes the obligation to disclose any benefit that an advisor may receive from a third party as a result of his recommendation to a client.

Investment advisors (even if unregistered) may be subject to disclosure obligations not only under the Advisers Act but also under other federal laws, including the Stock Exchange Act of 1934 (the "Exchange Act"). For example, Section 13(f) of the Exchange Act, and Rule 13f-1 below, generally require an investment advisor to exercise investment discretion, or share investment discretion with others, on equity securities (which would include debt and convertible options). who has an aggregate fair market value of at least \$100 million to file, quarterly, Form 13F disclosing the holdings it maintains in its own name and on behalf of the client.

Section 205(a)(2) of the Advisers Act requires any investment advisory contract signed by an investment advisor (whether registered with the SEC or not, unless exempted from registration under Section 203(b)) to stipulate that the contract may not be awarded without client approval. As a fiduciary duty, investment advisors owe their clients the obligation to only provide appropriate investment advice. This task generally requires the investment advisor to determine that the investment advice provided to the client is appropriate for the client, taking into account the client's financial situation, investment experience and investment objectives. America has even provided an Investment Adviser Public Disclosure (IAPD) which allows anyone to disclose information about a person's investment professional background just by accessing the name of an investment advisor. On the web, we can also check whether they have had problems with securities regulators or not.

Management of client funds in investment advisors in Indonesia in POJK Number 5 /POJK.04/2019 concerning Prohibited Behavior for Investment Advisors basically prohibits giving advice to customers related to buying, selling, or exchanging Securities without a rational rationale. Investment advisors are also prohibited from neglecting to disclose in writing to customers before advice is given regarding conflicts of interest from Investment Advisers which can reduce the objectivity of the advice.

To be able to manage customer money in Indonesia and buying and selling transactions (trading) requires a special license, namely Investment Manager Representative (WMI) and Broker-Dealer Representative (WPPE) and the person must work in one of the securities companies (security / investment manager), according to with applicable laws and regulations. People who work in securities companies (securities & investment managers) cannot declare themselves as independent, especially those who carry out their duties with full discretion, even though they have been authorized by the customer.

Independent Financial Planners and their firms are financial planners who are not bound by or affiliated with any financial institution or product. If a financial planner and/or their firm are affiliated with any financial institution and financial product, they are required to notify the customer/prospective customer about the affiliation and the possibility of a conflict of interest.

If an independent financial planner and/or his firm receives money in the form of commissions, fees, etc. from the institution or the proceeds from the sale of financial products, it is obligatory to notify the customer/prospective customer of a possible conflict of interest. When planning activities, a Financial Planner must always do so with great prudence and put the interests of customers above other interests. An investment advisor who has a license as a deputy investment manager in accordance with POJK Number 3 /Pojk.04/2021 concerning the Implementation of Activities in the Capital Market Article 50 paragraphs 1 and 2 states that the Investment Advisor as referred to in Article 49 must at least have an

expert who is having a license as an Investment Manager representative. If the Investment Advisor is an individual and the person concerned has obtained a license as an Investment Manager representative, the individual is not required to appoint another Investment Manager representative. Indirectly, these regulations contradict each other, but basically, indirectly, these regulations require investment advisors to have permits as deputy investment managers at the same time.

Conclusion

Financial Planner/Advisor activities in Indonesia are legal if they comply with the rules regarding investment advisors. A business license Financial Planner is someone who ideally holds a license as an investment advisor and deputy investment manager. If one declares as an independent financial advisor, one must truly not be bound by any institution in managing client funds unless it is done by disclosing conflicts or interests in a client portfolio securities transaction. Companies that carry out a Financial Planner business without complying with the regulations of the OJK in Article 34 in conjunction with Article 103 paragraph 1 of the Capital Market Law are threatened with imprisonment for a maximum of 5 (five) years and a fine of a maximum of Rp. 5,000,000,000.00 (five billion rupiah). In addition to criminal sanctions, OJK will also use administrative sanctions for investment advisors who do not comply, namely in the form of written warnings, fines, restrictions on business activities, freezing of business activities, revocation of business licenses, cancellation of approvals; and/or cancellation of registration.

Suggestion

These legal problems can be prevented by the existence of a special OJK Regulation related to this profession. So far, it is not clear what the Financial Planner 's authority is and what Financial Planners is prohibited from doing as in Americans who directly categorize Financial Planners are included in investment advisors and their regulations are subject to Investment Adviser regulations. OJK Regulations need to be established but specifically regulate business licensing and prohibited activities for Financial Planners. OJK should also make a special website, which is similar to the content in the United States, which documents all cases that have been experienced by financial planners as well as any violations they have committed so that people can be more careful in choosing financial planners who have integrity.

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Indonesian Regulation

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