

Analysis of the Liability of Capital Market Supporting Notaries for the Contents of the Deed of Corporate Action Backdoor Listing by Limited Liability Companies

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Abstract: Backdoor listing refers to a situation where an unlisted company obtains listed status indirectly through a listed company. Law Number 8 of 1995 concerning Capital Markets (UUPM) and its implementing regulations that have been enacted in Indonesia to accommodate activities in the capital market do not include detailed arrangements related to backdoor listing corporate actions, resulting in confusion about the practice of backdoor listing itself. This research aims to analyze the responsibility of the Capital Market Supporting Notary for the contents of the deed of backdoor listing corporate action by Limited Liability Companies. the research used in this research is normative legal research, with a research approach to the legislative approach and concept approach used to examine problems related to legal issues. Briefly, the result of the research is that the Notary plays an important role in backdoor listing by making the GMS deed. The main responsibility of the notary is to ensure the deed complies with the regulations. If there is a violation of the law, the notary can be summoned but must be with the permission of the Notary Honor Council.

Keywords: *Backdoor listing; Capital Market; Corporation; Limited liability company; Notary*



INTRODUCTION

Notary is a public official authorized to make authentic deeds that serve as evidence for certain legal acts.¹ Notaries as public officials are authorized to make authentic deeds regarding all actions and agreements that are the will of the parties. The function of an authentic deed is as strong and perfect evidence in a legal action for the parties, because it can guarantee the truth of the contents conveyed by the parties. The definition of Notary is regulated in Article 1 paragraph (1) of Law Number 30 of 2004 which has been amended by Law Number 2 of 2014 concerning the Notary Position (UUJN) which outlines that a Notary is a "public official authorized to make authentic deeds and has other authorities as referred to in the Notary Position Law or based on other laws".² Other authorities of Notary are regulated in the Law of the Republic of Indonesia Number 8 of 1995 on Capital Market (UUPM) which has been amended by the Law of the Republic of Indonesia Number 4 of 2023 on Financial Sector Development and Strengthening (PPSK Law) stating that "Notary is one of the supporting professions in the capital market in addition to Public Accountant, Legal Consultant, Appraiser and other professions stipulated by the Regulation of the Financial Services Authority".³ Before playing a role in the capital market, notaries must be officially registered with the Financial Services Authority (OJK) by fulfilling all the requirements and registration procedures that have been set.

The capital market is an alternative source of funding for both the state and the private sector. Governments that need funds can issue bonds or debt securities and sell them to the public through the capital market. The private sector, in this case companies that need funds, can issue securities, both in the form of stocks and bonds and sell them to the public through the capital market. Furthermore, the capital market is a market for buying and selling various long-term instruments, including debt securities (bonds), equities (stocks), mutual funds, derivative instruments and other instruments. The

¹ Faisal Santiago, "Peranan Notaris Dalam Transaksi Saham Pada Pasar Modal Di Bursa Efek Jakarta," *CONSTITUTUM* 12, no. 2 (2013): 507.

² Republik Indonesia, *Pasal 1 Angka (1) UUJN Undang-Undang Nomor 2 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 Tentang Jabatan Notaris*, 2004.

³ Republik Indonesia, *Pasal 64 Undang-Undang Nomor 8 Tahun 1995 Tentang Pasar Modal (UUPM)*, 1995.



Capital Market Law as amended by the PPSK Law regulates Capital Market activities in Indonesia by defining "Capital market as activities related to public offerings and securities transactions, investment management, issuers and public companies related to the securities issued, institutions and professions related to securities".

Notary in its capacity as part of the profession that supports the capital market is a party that participates in supporting the operation of the capital market and is tasked with providing services related to the capital market. The duties of a notary in the realm of the capital market are very important, especially in making authentic deeds which are documents required in the context of the capital market regarding all actions, agreements desired by the parties.⁴ The authentic deed is the perfect evidence for the parties in a legal event. The need for written evidence that has perfect evidentiary power will continue to be one of the important things and will increase along with the development of demands for legal certainty in relation to economic, social and other fields. A company must first obtain an effective statement from OJK to be able to sell its shares on the stock exchange. In addition, the company is required to go through the IPO (Initial Public Offering) process⁵ in accordance with the Regulation of the Capital Market Supervisory Agency and Financial Institutions Number IX.A.2 concerning Registration Procedures in the Context of Public Offerings, namely in the form of Appointment of Underwriters, Supporting Institutions and Professionals and Preparation of Documents, Submission of Securities Listing Application to the Indonesia Stock Exchange and Submission of Registration Statement to the Financial Services Authority, Public Offering to the Public, and Listing and Trading of Company Securities on the Indonesia Stock Exchange.⁶

⁴ Kusumastuti, "Perlindungan Hukum Notaris Pasar Modal Terhadap Backdoor Listing (Studi Kasus Backdoor Listing PT Indonesia Airasia Terhadap PT Rimau Multi Putra Pratama Tbk)" (Master Thesis, Yogyakarta, Universitas Islam Indonesia, 2019), 41, <https://dspace.uui.ac.id/handle/123456789/13962>.

⁵ Kusumastuti, "Perlindungan Hukum Notaris Pasar Modal Terhadap Backdoor Listing (Studi Kasus Backdoor Listing PT Indonesia Airasia Terhadap PT Rimau Multi Putra Pratama Tbk)" 43.

⁶ IDX Go Public, "Pencatatan dan Perdagangan Efek Perusahaan di Bursa Efek Indonesia," IDX Go Public, 2023, <https://gopublic.idx.co.id/how-to-ipo/?slide=2>.



A company must incur substantial costs in carrying out an Initial Public Offering. These costs include the cost of public accountant services, consultants, notaries, underwriters, listing of shares, share administration, collective custody of shares, advertising, printing prospectuses and so on.⁷ Based on the Decree of the Board of Directors of PT BURSA EFEK INDONESIA Number Kep-00101/BEI/12-2021 dated December 21, 2021 concerning Amendments to Regulation Number I-A concerning the Listing of Shares and Equity Securities Other Than Shares Issued by Listed Companies states that each "Listed Company is obliged to pay initial listing fees, annual listing fees, and additional listing fees if it records additional shares."⁸

The many stages that must be passed by a company and the high costs required in the IPO process, and there is no certainty that if a company has passed all these processes it can pass to get an effective statement from the OJK, this is the reason for the emergence of a phenomenon in the world of capital markets known as backdoor listing. Backdoor listing refers to a situation where an unlisted company obtains listed status indirectly through a listed company. Based on this definition, backdoor listing can be understood as a corporate action strategy used by a company to achieve the status of a public company without having to go through an IPO mechanism, so that it can be listed and conduct trading activities in the capital market. There are several stages in the backdoor listing process that a company must go through before conducting transactions in the capital market, which include the Extraordinary General Meeting of Shareholders (EGMS) and Pre-emptive Rights (HMETD) as a form of offering shares to the public with a limited public

⁷ Dewi Rachmat Kusuma, "Berapa Biaya yang Diperlukan Perusahaan untuk Melantai di Pasar Modal?," *detikfinance*, 2015, <https://finance.detik.com/bursa-dan-valas/d-3077891/berapa-biaya-yang-diperlukan-perusahaan-untuk-melantai-di-pasar-modal>.

⁸ IndonesiaStockExchange, "VIII Surat Keputusan Direksi PT Bursa Efek Indonesia Nomor Kep-00101/BEI/12-2021 Tanggal 21 Desember 2021 Tentang Perubahan Peraturan Nomor I-A Tentang Pencatatan Saham Dan Efek Bersifat Ekuitas Selain Saham Yang Diterbitkan Oleh Perusahaan Tercatat," 2021, https://gopublic.idx.co.id/media/1446/peraturan_i_a_pencatatan_saham_dan_efek_bersifat_ekuitas-1.pdf.



offering.⁹ The backdoor listing process requires the involvement of important elements in the capital market, namely institutions that have the authority to oversee capital market activities such as the OJK and related institutions, individuals or companies in the capital market sector and professions that support capital market technical activities called capital market support professions.¹⁰

Notary as a capital market supporter is an official authorized to prepare deeds of amendment to the articles of association of issuers. In addition, notaries supporting the capital market can also attend the General Meeting of Shareholders (GMS) and Extraordinary General Meeting of Shareholders (EGMS) held by the issuer. The role of the notary in this case is to make a deed of Minutes of the General Meeting of Shareholders which includes the agenda of the backdoor listing implementation plan.¹¹ Capital market notaries in preparing the deed are guided by the provisions stipulated in the Notary Position Law, Capital Market Law and Limited Liability Company Law because until now there has been no detailed regulation governing the practice of backdoor listing. Law Number 8 Year 1995 on Capital Market (UUPM) and its implementing regulations that have been enacted in Indonesia to accommodate activities in the capital market do not include detailed arrangements related to backdoor listing corporate actions, resulting in confusion about the practice of backdoor listing itself. The absence of regulations related to backdoor listing can pose a risk for notaries as a capital market support profession in making deeds related to the backdoor listing process. In addition, the effect that occurs in the practice of backdoor listing is the potential dilution due to the issuance of new shares for the company that will acquire the issuer.

⁹ Kusumastuti, "Perlindungan Hukum Notaris Pasar Modal Terhadap Backdoor Listing (Studi Kasus Backdoor Listing PT Indonesia Airasia Terhadap PT Rimau Multi Putra Pratama Tbk)," 51.

¹⁰ Astrid Paramitha, "Analisis Hukum Terkait Pelaksanaan Backdoor Listing Dalam Prespektif Good Corporate Governance" (Yogyakarta, Universitas Gadjah Mada, 2016), 11, <https://etd.repository.ugm.ac.id/penelitian/detail/103367>.

¹¹ Andhika Pradana, "Analisis Peranan Dan Tugas Notaris Dalam Pasar Modal Menurut Peraturan Perundang-Undangan Yang Berlaku Di Pasar Modal," *Indonesian Notary* 3, no. 4 (December 31, 2021): 773.



Dilution according to The Law Dictionary is "*the act of reducing the proportion of ownership held by current investors through the issuance of new shares of common stock (or through the exercise of outstanding stock options or the conversion of convertible bonds)*"¹², based on this description, dilution can be defined as the act of reducing the proportion of ownership held by current investors, through the issuance of new shares of common stock (or through the exercise of outstanding stock options or convertible bonds). In general, stock dilution is a decrease in the percentage of an existing shareholding largely as a result of a company issuing new shares. The new shares issued by the company increase the number of available shares, causing the value of existing shares to decrease or become diluted. This will also pose a risk to investors who do not understand the backdoor listing itself. Backdoor listing as a new phenomenon in the capital market certainly does not yet have legal protection for investors so that it can create a gap for violations of investor rights.

THEORETICAL BASIS

In general, a theory is a system of abstract concepts that indicates the relationship between these concepts that help us understand a phenomenon. In essence, a theory explains a phenomenon or is a process or product of activity or is a system.¹³ Specifically, a theory is a set of concepts, constructs, definitions and propositions that attempt to explain the systematic relationship of a phenomenon, by detailing the cause-and-effect relationships that occur. The theoretical framework in legal research is needed to make legal values up to its philosophical foundation.

Progressive Legal Theory

Progressive law proposed by Satjipto Rahardjo has basic assumptions about the relationship between humans and law. The basic assumption of progressive law starts from the basic nature of law is for humans. Such a position can lead to the tendency that the law is in the status of "law in the making" or the law is always in the process of becoming.¹⁴ Progressive legal

¹² thelawdictionary.org, "Black's Law Dictionary - Free Online Legal Dictionary," The Law Dictionary, accessed October 10, 2024, <https://thelawdictionary.org/>.

¹³ Salim H.S., *Perkembangan Teori Dalam Ilmu Hukum* (Jakarta: Raja Grafindo Persada, 2010), 1.

¹⁴ Satjipto Rahardjo, "Hukum Progresif: Hukum Yang Membebaskan," *Jurnal Hukum Progresif* 1, no. 1 (July 16, 2011): 6, <https://doi.org/10.14710/hp.1.1.1-24>.



thinking is part of an intellectual dialectic-synthesis process in the search for the truth that never stops. The purpose of progressive legal thinking is to place humans as the main centrality of all conversations about law by paying attention to human behavior factors, therefore progressive legal thinking places a combination of regulatory factors and law enforcement behavior in society.

The development of progressive law can be identified through several characteristics that are expected to be the type of law that can provide a way for legal development in Indonesia which adheres to the paradigm: 1) Law is created with the aim of human welfare, 2) Legal pluralism, 3) Synergy between central and regional interests, 4) Coordination, and 5) Legal harmonization.¹⁵ In simpler terms, progressive law can be interpreted as a liberatory legal system, which refers to a way of thinking and acting in the legal domain. This allows the flow of law to fulfill its role which is oriented towards service to humans and the interests of humanity, thus law enforcement is considered not to involve engineering or certain alignments, because the main purpose of law is to create justice and welfare for all people.¹⁶

Progressive law can be interpreted as a law that pays attention to human aspects, not only dogmatic. In particular, progressive law can be explained as a form of law that supports the interests of the people and aims to create justice. The concept of progressive law states that the law exists not solely for its own sake, but to achieve a broader goal.¹⁷ Therefore, progressive law leaves the tradition of analytical jurisprudence or *rechtsdogmatiek*. These schools only pay attention to the internal aspects of the law and analyze the legal structure as a system that is considered systematic and logical. Progressive law is responsive, in which case the law will always be linked to goals beyond the textual narrative of the law itself.¹⁸ The progressive legal theory is deemed appropriate to answer the problems in this research related

¹⁵ Shinta Dewi Rismawati, "Menebarkan Keadilan Sosial Dengan Hukum Progresif di Era Komodifikasi Hukum," *Jurnal Hukum Islam* 13, no. 1 (June 15, 2015): 2, <https://doi.org/10.28918/jhi.v13i1.485>.

¹⁶ Satjipto Rahardjo, *Ilmu hukum: pencarian, pembebasan dan pencerahan* (Surakarta: Muhammadiyah University Press, 2004), 17.

¹⁷ Satjipto Rahardjo, *Membedah Hukum Progresif* (Jakarta: Kompas, 2007), 19.

¹⁸ Satjipto Rahardjo, *Hukum progresif: sebuah sintesa hukum Indonesia* (Yogyakarta: Genta publishing, 2009), 67.



to the notary's responsibility in making the deed of backdoor listing corporate action by a limited liability company.

Legal Certainty Theory

The theory of legal certainty was put forward by Gustav Radbruch who outlined 4 (four) fundamental things related to the meaning of legal certainty, namely:

- a) *The law is positive, meaning that positive law is legislation.*
- b) *The law is based on facts, meaning it is based on reality.*
- c) *That the facts must be formulated in a clear way to avoid confusion in interpretation and be easy to implement.*
- d) *Positive law should not be easily changed.*

Gustav Radbruch's theory stems from the view that legal certainty refers to certainty about the law itself. Legal certainty is a product of law, more specifically of legislation. According to this view, Gustav Radbruch argued that "positive laws that regulate human interests in society must always be obeyed even if the positive law is unfair."¹⁹

Legal certainty is an issue that can only be explained with a normative approach, not from a sociological point of view.²⁰ Legal certainty is important to uphold the principle of equality before the law without discrimination.²¹ Legal certainty also has a role in directing society to order.²² Legal certainty can ensure that a person behaves in accordance with the applicable provisions, otherwise without legal certainty, a person has no guidelines in behavior.²³ Therefore, it is appropriate when Gustav Radbruch suggests certainty as one of the objectives of the law. The order of community life is closely related to legal certainty. Legal certainty is something that is normative, both provisions and judges' decisions.²⁴ Legal certainty refers to the implementation of a

¹⁹ Rahardjo, *Hukum progresif: sebuah sintesa hukum Indonesia*, 71.

²⁰ Muhamad Erwin, *Filsafat Hukum: Refleksi Kritis Terhadap Hukum* (Jakarta: Rajawali Pers, 2012), 123.

²¹ Sidharta Arief, *Meuwissen Tentang Pengembangan Hukum, Ilmu Hukum, Teori Hukum, Dan Filsafat Hukum* (Bandung: Refika Aditama, 2008), 8.

²² Arief, *Meuwissen Tentang Pengembangan Hukum, Ilmu Hukum, Teori Hukum, Dan Filsafat Hukum*, 9.

²³ Erwin, *Filsafat Hukum: Refleksi Kritis Terhadap Hukum*, 125.

²⁴ Nur Agus Susanto, "Dimensi Aksiologis Dari Putusan Kasus 'ST' Kajian Putusan Peninjauan Kembali Nomor 97 PK/Pid.Sus/2012," *Jurnal Yudisial* 7, no. 3 (2014): 214.



system of life whose implementation is clear, regular, consistent, consequent and cannot be influenced by subjective circumstances in people's lives.²⁵ Normatively, legal certainty is when a regulation is formulated and promulgated with certainty because it regulates clearly and logically. The theory of legal certainty is considered appropriate to answer the problems in this study regarding legal protection for investors who have purchased securities in backdoor listing in the Capital Market Law and related laws and regulations, has or has not provided legal certainty.

RESEARCH METHODS

The research method used is normative juridical research, which is research that can be interpreted as a scientific procedure to find the truth based on the logic of legal science from its normative side.²⁶ The system of norms built is about principles, norms, rules from laws and regulations, court decisions, agreements, and doctrines (teachings).²⁷ Furthermore, normative legal research is research that has an object of study on legal rules or rules. This research is conducted with the intention of providing legal arguments as a basis for determining whether an event has been right or wrong and how it should be according to the law.²⁸ The writing of this thesis is normative juridical, because to examine the liability of notaries supporting the capital market for backdoor listing corporate actions by limited liability companies regarding deeds made by notaries and will be analyzed based on laws and regulations and library research.

RESULT AND DISCUSSION

Liability of Capital Market Supporting Notary for Deed of Corporate Action Backdoor Listing by Limited Liability Company

Economic development is accelerating in line with the increasing activities of the capital market in Indonesia, this condition also causes an increasing need for professional services of Notary supporting the Capital Market. Law Number 8 of 1995 concerning Capital Market (UUPM) article 1

²⁵ Susanto, 215.

²⁶ Johnny Ibrahim, *Teori Dan Metode Penelitian Hukum Normatif* (Malang: Bayumedia Publishing, 2012), 57.

²⁷ Mukti Fajar, *Dualisme Penelitian Hukum Normatif Dan Empiris* (Yogyakarta: Pustaka Pelajar, 2009), 33.

²⁸ Fajar, *Dualisme Penelitian Hukum Normatif Dan Empiris*, 36.



paragraph (1) number 13 contains the definition of capital market as follows: "*Capital Market is an activity related to the Public Offering and Trading of Securities, Public Companies related to the Securities they issue, as well as institutions and professions related to Securities*".²⁹

Based on this definition, it is not explicitly explained about the capital market, but the above provisions emphasize more about the aspects of the capital market that are interrelated to create a capital market activity. In addition, we can see that the capital market is a series of activities involving several important elements, namely corporate actions (public offerings), securities (financial instruments) and also related institutions, including supporting professions such as notaries, investment managers and others. In simple terms, the definition of the capital market can be summarized as a market that trades various long-term financial instruments, either in the form of debt or equity issued by the private sector.³⁰

Notary by Law Number 8 Year 1995 on Capital Market (UUPM) is appointed as one of the capital market supporting professions in accordance with Article 64 paragraph (1) which reads that: "*Capital Market Supporting Professions consist of: accountants, legal consultants, appraisers, notaries and other professions stipulated in government regulations*".³¹ The existence of Notary in the capital market industry is regulated in Article 64 of Law No. 8 Year 1995 on Capital Market, the capital market supporting profession has a role as well as responsibility in the development of the capital market industry. As one of the supporting professions in the capital market, the code of ethics and standards of the Notary profession must be in line with the Capital Market Law and other implementing regulations, so in carrying out their duties in the field of capital markets, Notaries must carry out their positions independently because Notaries are faced with the interests of parties conducting public offerings and parties investing in the form of capital investment when deed-making transactions occur. This difference of interest is an important aspect

²⁹ Republik Indonesia, *Pasal 1 Ayat (1) Angka 13 Undang-Undang Nomor 8 Tahun 1995 Tentang Pasar Modal*, 1995.

³⁰ Ana Rokhmatussadyah, *Hukum Investasi Dan Pasar Modal* (Jakarta: Sinar Grafika, 2011), 35.

³¹ Republik Indonesia, *Pasal 1 Ayat (1) Angka 13 Undang-Undang Nomor 8 Tahun 1995 Tentang Pasar Modal*.



for Notary as a capital market supporting profession, related to the protection of investors and the public.

The independent role of Notary requires strong moral integrity. This is related to the obligation of the Notary to provide neutral and impartial opinions and assessments, in order to avoid legal irregularities in the future. The independence of the role of Notary as a capital market supporting profession also aims to meet the needs of service users and maintain public trust, especially in the capital market and financial services sector. Given the importance of the role of Notary and the complexity of regulations in the capital market, Notary must follow and understand the development of regulations regarding the capital market sector, in accordance with Article 16 paragraph (1) of Law No. 30 of 2004 and Article 4 of the Notary Code of Ethics, Notary is obliged to carry out their duties honestly, carefully, independently, impartially, responsibly and safeguard the interests of the parties involved in legal acts. That based on the Capital Market Law, Notary has been appointed as one of the capital market supporting professions. The main responsibility of the capital market supporting profession is to assist issuers in the process of going public and fulfill the requirements of continuous disclosure. In essence, going public is a process in which the company opens itself to the public, meaning that the company provides a means for the public to be involved in its company, namely by accepting public participation in its business, both in ownership and in determining company management policies.³²

Based on the provisions of UUPM, there are several stages that must be passed by a company that will conduct an Initial Public Offering (IPO) of shares or an initial public offering of shares, namely the Pre-Emissions Stage, the Emissions Stage and the Post-Emissions Stage. Since the company plans to increase capital through IPO Shares, according to the Company Law, this must be authorized by the GMS and involves changes to the Company's Articles of Association. The authorization is then set out in the form of a Deed. The ratification is the authority of a Notary as stipulated in the Law on Notaries. Regarding companies that will conduct an IPO of Shares, this stage is called Pre-Emissions. At the Issuance Stage, the authority of the Notary is carried out in accordance with Article 64 of the Capital Market Law, which outlines that

³² Sumantoro Sumantoro, *Pengantar Tentang Pasar Modal Indonesia* (Jakarta: PT. Ghalia Indonesia, 1990), 65.



only Notaries registered with Bapepam-LK (now OJK) can carry out activities in the capital market sector. The authority of a Notary registered with OJK includes:³³

- (1) Checking the validity of the Deed of Ratification of the GMS and the Deed of Amendment to the Articles of Association/Bylaws of the Company, then authorizing and compiling it in the form of a Deed for capital market players such as issuers, securities companies, public companies, and others;
- (2) Preparing the minutes of the GMS and preparing the GMS resolution statement, both for the preparation of the public offering (IPO) and the GMS after the public offering (IPO);
- (3) Examine the validity of the GMS, including compliance with the company's articles of association, the procedure for inviting the GMS, and the validity of the shareholders or their proxies present;
- (4) Create important contracts such as mutual fund contracts, Collective Investment Contracts, Underwriting Contracts, and Trustee Contracts;
- (5) Responsible and authorized to make other Deeds related to activities at the Emission stage and post-Emission stage.

Notary as a public official is authorized to act as a capital market supporting profession based on the following provisions:

- (1) Law Number 30 of 2004 concerning Notary Position which was amended into Law Number 2 of 2014;
- (2) Article 64 paragraph (1) letter d of Law Number 8 of 1995 concerning Capital Market;
- (3) Financial Services Authority Regulation No.67/POJK.04/2017

Whereas in its development, the implementation of all activities previously regulated by Bapepam has been transferred to the Financial Services Authority (OJK), where with the existence of integrated legal services, OJK is expected to be able to protect consumer interests efficiently, including in Capital Market transactions, the enactment of Bapepam legislation is no longer valid. However, decisions regarding the granting of business licenses, individual licenses, effectiveness of registration statements, registered letters, approval of business activities, ratification, and approval or determination of

³³ Mas Rahmah, *Hukum Pasar Modal* (Jakarta: Kencana, 2019), 114.
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dissolution and any decisions previously issued by Bank Indonesia, the Ministry of Finance, and the Capital Market and Financial Institutions Supervisory Agency (Bapepam-LK) based on laws and regulations in the financial services sector before the transfer of functions, duties, and authority to OJK as stipulated in Article 55 of the OJK Law are declared to remain in effect. The settlement of applications related to this matter, based on Article 67 paragraph (2), will be continued by OJK.

Article 2 of Financial Services Authority Regulation No. 67/POJK.04/2017 on Notaries Conducting Activities in the Capital Market stipulates that notaries conducting activities in the capital market must first be registered with the Financial Services Authority (OJK). This shows that not all notaries are authorized to conduct activities in the capital market. This is related to the role of notaries as public officials who are authorized to make legal evidence and legal instruments in capital market activities. The role of Notary in the capital market is indispensable, especially in drafting Articles of Association or Bylaws (AD/ ART) for capital market parties or actors such as issuers, public companies, securities companies, as well as in making important contracts such as Collective Investment Contracts (KIK), underwriting contracts, or important deeds such as the Deed of Dissolution and Liquidation of Mutual Funds.³⁴ In addition, Notary services in capital market activities are also needed in various ways, including:

- (1) Preparing minutes of the General Meeting of Shareholders (GMS) and preparing the GMS decision statement, both in preparation for going public and the GMS after going public;
- (2) Examine the validity of matters relating to the organization of the GMS, such as compliance with the company's articles of association, the procedure for summoning the GMS and the validity of the shareholders or their proxies to attend the GMS;
- (3) Examining amendments to the articles of association, especially material articles of the articles of association that conflict with applicable laws and regulations and making adjustments to articles in the articles of association so that they are in line with and fulfill the provisions

³⁴ Tan Thong Kie, *Serba Serbi Praktek Notaris*, Buku I Cet. 2 (Jakarta: PT. Ichtiar Baru Van Hoeve, 2011), 94.



according to regulations in the field of capital markets in order to protect investors / the public;

- (4) Examining Capital and shares, namely the amount of authorized capital, issued capital and paid-up capital of the Issuer at the last time before the issuance, the type of shares issued by the Issuer, the composition of the last shareholder, the history of capital and share ownership and its transfer and proof of capital deposit;
- (5) Examining approvals, especially approvals to go public, such as GMS approval, approval from the Issuer's Commissioner, approval from authorized agencies required for the Issuer to conduct its business activities, or to own, control, occupy, use something or obtain certain rights.³⁵

In addition to the duties and functions mentioned above, a capital market Notary also has the responsibility to maintain the confidentiality of the contents of the deed he/she makes. This is regulated in Article 33 paragraph (3) of Law Number 21 Year 2011 on OJK which stipulates: *"Every person who knows confidential information, either because of his position, profession, as a supervised party, or a person who knows confidential information, either because of his position, profession, as a supervised party, or any relationship with the OJK, is prohibited from using or disclosing such information to other parties, except in the context of carrying out his functions, duties and authorities based on OJK decisions or required by law"*.³⁶

That in addition to making and being responsible for making deeds required by the prevailing laws and regulations in the field of Capital Markets, Notaries also play a role in reviewing and examining documents in the context of going public as mentioned above. Capital Market Notary is a public official who is authorized to make authentic deeds and has other authorities as referred to in the Law on the office of notary, Notaries registered with the Financial Services Authority as a capital market supporting profession play a

³⁵ Kie, *Serba Serbi Praktek Notaris*, 95.

³⁶ Republik Indonesia, *Pasal 33 Ayat (3) Undang-Undang Nomor 21 Tahun 2011 Tentang Otoritas Jasa Keuangan.*, 2011.



role in making authentic deeds required by the laws and regulations in the Capital Market sector.³⁷

In 2016, PT Indonesia AirAsia (IAA), a subsidiary of AirAsia Berhad, conducted a backdoor listing through PT Rimau Multi Putra Pratama Tbk (RMPP), a company already listed on the Indonesia Stock Exchange (IDX). This strategy was employed to bypass the time-consuming and costly initial public offering (IPO) process. However, this approach posed significant legal and economic implications, particularly for minority investors. During the backdoor listing process, the issuance of new shares resulted in a dilution effect, wherein existing shareholders lost a portion of their control over the company. This created uncertainty, especially due to inadequate disclosure of the company's strategic plans post-listing. An analysis of this case reveals that existing regulations, including the Indonesian Capital Market Law and the Financial Services Authority (OJK) regulations, have not provided detailed guidelines to address risks such as share dilution and potential conflicts of interest. The lack of transparency in information disclosure during the process further exacerbates investor vulnerability. Therefore, the case of PT IAA and PT RMPP serves as a concrete example highlighting the urgent need for stronger legal oversight of backdoor listing practices.³⁸ According to a report by the Indonesia Stock Exchange (IDX), there has been a significant rise in backdoor listing transactions over the past decade. Between 2010 and 2020, more than 25 backdoor listing transactions were recorded, with the highest spikes occurring in 2016 and 2018, each seeing five transactions in a single year. This data indicates that backdoor listing has become an increasingly popular alternative to traditional IPOs, particularly for small and medium-sized enterprises seeking swift access to the capital market.

However, an analysis of the outcomes reveals that over 60% of companies engaging in backdoor listing experienced a decline in their stock prices within one year post-listing. This is attributed to a lack of investor confidence, stemming from insufficient disclosure of clear financial conditions and strategic plans by the companies involved. This data underscores the

³⁷ Republik Indonesia, *Pasal 1 Peraturan Otoritas Jasa Keuangan Nomor 67 /POJK.04/2017 Tanggal 21 Desember 2017 Tentang Notaris Yang Melakukan Kegiatan Di Pasar Modal*, 2017.

³⁸ "IDX Realizes New Mechanism for Switching Listing Boards," suit-baze, accessed December 5, 2024, <https://www.idx.co.id/>.



critical need for additional regulations to ensure that backdoor listing processes are conducted transparently and accountably, thereby safeguarding investor interests.³⁹

Analysis of the validity and binding force of the backdoor listing deed

That in order to determine whether the Backdoor Listing Deed is in accordance with the provisions as stipulated in the laws and regulations, it is necessary to describe its conformity with the prevailing laws and regulations:

- (1) The GMS may be (a) conducted in the presence of a Notary, after which the minutes of the meeting shall be set forth in the Minutes of the GMS which is a deed of relaas or an official deed, namely a deed made by a Notary as a public official; or (b) made underhand which is conducted without the presence of a Notary, after which the minutes of the meeting shall be set forth in the minutes of the meeting made by a party appointed or authorized to make the minutes of the GMS of the Company, for example the Board of Directors or legal staff of the Company.⁴⁰ Furthermore, based on Article 90 paragraph (1) of the Company Law, the minutes of the GMS must be signed by the chairman of the meeting and 1 (one) shareholder appointed from and by the meeting participants, which signature is excluded if the minutes of the meeting are made in the form of a notarial deed;
- (2) Akta partij is an authentic deed containing the information of the confronters as the power of attorney given in accordance with the deed of minutes of meeting made under the hand, who come to the Notary and ask the Notary to pour out their information regarding the decisions of the meeting as stated in the deed of minutes of the meeting under the hand to be stated in a Notary deed;
- (3) According to Article 1868 of the Civil Code, a notarial deed must fulfill certain formality requirements, as stipulated in Article 38 of the UUJN which outlines the parts of the Backdoor Listing Deed, namely:
 - 1) The beginning of the deed or head of the deed, contains the title of the deed, deed number, hour, day, date, month and year of the deed as well as the full name and domicile of the Notary;

³⁹ Hong Leung Lam, "Backdoor Listing in Australia: An Exploratory Analysis," 2010.

⁴⁰ Sudaryat Sudaryat, *Legal Officer* (Bandung: Oase Media, 2008), 18.



- 2) The body of the deed, contains: (i) full names, place and date of birth, citizenship, occupation, position, position and residence of the plaintiffs and/or those they represent; (ii) information regarding the acting position of the plaintiffs; (iii) the content of the deed which is the will and desire of the interested party; and
 - 3) The end of the deed or the closing of the deed, which contains (i) a description of the reading of the deed; (ii) a description of the signing and the place of signing or translation of the deed (if any); (iii) the full name, place and date of birth, occupation, position, position and residence of each witness to the deed; and (iv) a description of the absence of changes that occurred in the making of the deed or a description of the changes that can be in the form of additions, deletions or substitutions. Based on the provisions as mentioned above, if the confronter is a proxy, then the confronter's statement as a proxy needs to be included in the body of the deed.
- (4) A notarial deed is an agreement between the parties that binds them as the parties who make it, therefore the conditions for the validity of an agreement must be met in making a notarial deed. Article 1320 of the Civil Code regulates the conditions for the validity of an agreement, namely:
- 1) Subjective conditions, namely conditions relating to the subject who entered into or made an agreement, consisting of :
 - Agreement of the Parties, which is an agreement made without coercion or pressure, but of their own free will. This is emphasized in Article 1321 of the Civil Code: An agreement has no force if it is given by mistake, duress, or fraud.
 - Capacity of the Parties, the capacity to make an agreement refers to anyone who is legally considered incapable, as mentioned in Article 1330 of the Civil Code, namely: minors; persons under guardianship; married women under certain conditions as regulated by law; and all persons who are prohibited by law from making certain agreements. However, legal developments allow wives to perform legal acts in accordance with SEMA No. 3 of 1963 jo. Article 31 of the Marriage Law.



- 2) Objective conditions, namely conditions relating to the agreement itself or relating to the object that is made a legal act by the parties, which consists of:
- A Certain Thing, what is meant by a certain thing as a condition for the validity of an agreement is the object of the agreement, namely an achievement that can be in the form of giving something, doing something, or not doing something as mentioned in Article 1234 of the Civil Code. Achievement is the obligation of the debtor and the right of the creditor in the agreement.
 - Halal Cause, the Civil Code does not explain in detail about halal cause, but regulates that a cause is considered prohibited if it is prohibited by law, contrary to decency, or public order as stated in Article 1337 of the Civil Code.

The legal consequences if an agreement does not meet the subjective requirements (agreement and / or capacity), then the agreement can be canceled. Meanwhile, if an agreement does not meet the objective requirements (a certain thing and / or a halal cause), the agreement is null and void.

- 1) A voidable agreement means that either party can request cancellation. The agreement remains binding on both parties, unless canceled by a judge at the request of the party entitled to request cancellation (for example, an incapable party or a party who does not give his agreement freely of his own free will). So, the agreement is not immediately null and void, but must be requested for cancellation to the court. Cancellation due to a request from an interested party, such as a parent, guardian or guardian is called relative or non-absolute cancellation.⁴¹
- 2) The agreement can be canceled, is the legal result of not fulfilling the subjective conditions (agreement and / or capacity) as a valid condition of the agreement. Agreement Canceled by Law Agreement canceled by law means that the agreement is canceled, from the beginning an agreement was never born and

⁴¹ Wirjono Prodjodikoro, *Azas-Azas Hukum Perjanjian* (Bandung: Sumur Bandung, 1989), 121.



there was never an obligation. It is also known as null and void. A null and void agreement is the legal result of not fulfilling the objective requirements (a certain thing and/or a lawful cause) as a valid condition of the agreement.

(5) Minutes of the resolutions of the GMS conducted without the presence of a Notary only have evidentiary power as an underhand deed, whose evidentiary power is not as perfect as an authentic deed. The minutes of the resolutions of the GMS conducted without the presence of a Notary can be notarially stated in the form of a Deed of Statement of Meeting Resolutions. The difference between an underhand deed and a notarial deed in terms of form and evidentiary power or value, namely:⁴²

- (a) An underhand deed is made in a form not prescribed by law without an intermediary or not before an authorized public official. Whereas notarial deeds are made in a form that has been determined by law, made before a public official who is authorized and at the place where the deed is made; and
- (b) An underhand deed has evidentiary power as long as the parties acknowledge it or there is no denial from either party. If one of the parties does not admit it, the burden of proof is placed on the party denying the deed and the assessment of the denial of the evidence is left to the judge. Meanwhile, a notarial deed has perfect proof. The perfection of a notarial deed as evidence must be seen for what it is, it does not need to be assessed or interpreted other than what is written in the deed."

In addition, there are differences between authentic deeds and underhand deeds in their evidentiary power. Authentic deeds have three evidentiary powers that underhand deeds do not have, namely:⁴³

- (a) outward evidentiary power (*uitwendige bewijskracht*), which is the ability of the deed itself to prove that the deed is an authentic deed, where the words in the deed come from a public official (Notary);

⁴² Habib Adjie, *Sanksi Perdata Dan Administratif Terhadap Notaris Sebagai Pejabat Publik* (Bandung: Refika Aditama, 2008), 49.

⁴³ Mohd Afnizar, Devinsyah Nasution, and Muksin Putra Haspy, "Kedudukan Akta Autentik Notaris Sebagai Alat Bukti Menurut Pasal 1886 KUHPerdata," *Jurnal Justia* 9, no. 7 (2022): 1.



- (b) formal evidentiary power (*formele bewijskracht*), namely where the notary states in his deed regarding the truth of the contents of the deed as something that was done and witnessed by the Notary himself in carrying out his position; and
- (c) material evidentiary power (*materiele bewijskracht*), i.e. not only the fact that there is a statement of something that is proven by the deed, but also regarding the content of the deed is considered to be proven as truth against everyone.

Authentic deeds have external evidentiary power because they have a certain form that has been determined by law and are made by public officials. This external evidentiary power applies not only to the parties named in the deed, but also to everyone. The party denying the deed must prove the existence of falsity. Deed falsity can be divided into material falsity, which occurs if the signature or writing in the deed is forged after the deed is made by a public official, and intellectual falsity, which occurs if the official includes incorrect information in the deed. The legal consequences of a notarial deed made by a Notary who violates the provisions in the UUJN if there is a violation in making a deed, namely:⁴⁴ (a) waiver of the deed as evidence, namely that the deed is not binding on the judge and is only valid as an underhand deed; (b) Cancellation of deeds based on a judge's decision that has permanent legal force.

- (6) Whereas in a deed containing a resolution regarding the acquisition of shares by the Company which constitutes an amendment to the articles of association of the Company, namely a change in the amount of paid-up capital and issued capital in the Company, in accordance with Article 19 and Article 21 paragraph (4) of the Company Law, amendments to the articles of association must be approved through a GMS and must be set out or stated in a notarial deed. The provision in the Company Law

⁴⁴ Rizqky Putra, "Implikasi Hukum Terhadap Ketidaksesuaian Antara Akta Notariil Dengan Akta Risalah Rapat Bawah Tangan Yang Merugikan Pemegang Saham (Studi Kasus Putusan Majelis Pengawas Wilayah Notaris Provinsi DKI Jakarta Nomor 10/PTS/MJ.PWN.PROV. DKI JAKARTA/X/ 2019)," *Indonesian Notary* 2, no. 2 (June 30, 2020): 19, <https://scholarhub.ui.ac.id/notary/vol2/iss2/33>.



regulating the requirement to be stated in a notarial deed is to guarantee the authenticity of the deed.

Form of Notary's responsibility in making a backdoor listing deed

The Notary Position Law has regulated all actions of notaries related to their positions, where these statutory provisions are a form of preventive legal protection aimed at preventing violations and providing limits for notaries regarding what actions may and may not be carried out in exercising their authority and obligations. The rule of law is an effort to prevent the possibility of violations committed by notaries. Notary as a public official in carrying out his profession in the field of legal services to the public is covered by law, in the Notary Position Law, Notary is a certain position that carries out the profession in legal services to the public who need to get protection and guarantees for the achievement of legal certainty. The importance of legal protection for Notary is:⁴⁵

- a. To maintain the dignity of his/her position, including when giving testimony or in the process of examination and trial;
- b. Keep the contents of the deed and information obtained in the making of the deed confidential in order to safeguard the interests of the parties;
- c. Maintain the minutes or letters attached to the minutes of the deed or Notary protocol in the Notary's storage;

The Notary Position Law (UUJN) has provided legal protection to notaries in the form of the right of denial, where in carrying out their positions notaries are required to carry out several things, namely keeping confidential all matters relating to the deeds they make and all information they get for the purpose of making deeds in accordance with their oaths / promises of office unless the law determines otherwise. The absolute obligation of a notary to maintain confidentiality in the deed he makes with the information that accompanies it, this is also reinforced by the Civil Code which describes who because of his position, work, or position according to the rules is required to

⁴⁵ Sulhan Sulhan, Lubis Irwansyah, and Anhar Syahnel, *Profesi Notaris Dan Pejabat Pembuat Akta Tanah* (Bogor: Mitra Wacana Media, 2018), 45.



keep something secret, but only solely related to matters whose knowledge is entrusted to him in such a way.⁴⁶

That in the criminal law, the right of recusal is mandated in the provisions of Article 148 of the Criminal Code, Article 146, Article 277 and Article 170 of the Criminal Procedure Code which states that those who become witnesses can resign if they exercise their right of recusal, where that right is an exception to the general provisions mentioned above, namely that every party summoned as a witness is obliged to provide testimony. If the Notary discloses the secrets of the office ordered by him, he can be criminally threatened and subject to sanctions in Article 85 of the UUJN, civilly sued under Article 1365 of the Civil Code, and Article 322 paragraph (1) of the Criminal Code. Notary as a profession also has an organization that oversees it, namely the Indonesian Notary Association (INI). The existence of this organization is also able to provide legal protection to its members related to their work and position as public officials. As part of the legal protection of notaries, INI cooperates with the police through a memorandum of understanding between INI and POLRI, which regulates the development and optimization of professionalism in the field of law, which in this case relates to the secret of office as a job based on trust. This memorandum of understanding is a procedure that must be implemented if a Notary is summoned or examined by a police institution.

Protection of Notaries can also be implemented through the Notary Honor Council, which is a party given the authority to give approval to the summoning of notaries as well as the collection of deed minutes and files whose complement is the law enforcers themselves, ranging from investigators, prosecutors, to judges in court proceedings, as stipulated in the UUJN and Minister of Law and Human Rights Regulation No. 17 of 2021 concerning Duties and Functions, Requirements and Procedures for Appointment and Dismissal, Organizational Structure, Work Procedures, and Budget of the Notary Honor Council (Permenkumham No. 17 of 2021). In making the deed in the backdoor listing mechanism, the capital market notary must comply with all obligations and provisions stipulated in the notary office regulations, limited liability company regulations, and capital market regulations. If in the process of making the deed the notary has complied with

⁴⁶ Republik Indonesia, *Pasal 1909 Ayat (3) Kitab Undang-Undang Hukum Perdata*, 1945. 1156



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all provisions and obligations based on all applicable legal rules, then the responsibility imposed on the Notary is only limited to the deed he made, namely ensuring that the contents and intent and purpose of the deed are correct and do not violate the code of ethics, laws and applicable provisions and regulations. However, if in the future it is revealed that in the backdoor listing process there is a violation of the law, then the authorized party will summon the notary in relation to the backdoor listing deed, then the summoning of the notary must be approved by the Notary Honor Council.⁴⁷ This is a manifestation of one of the legal protections of notaries in the capital market world in connection with the backdoor listing scheme carried out by the Company.

Responsibility is a risk that must be faced by a Notary in carrying out his obligations. Notaries must be able to be held responsible for their actions in carrying out the functions and duties of their position as public officials authorized to make authentic deeds and also as capital market supporting professionals in accordance with Article 64 paragraph (1) of the Capital Market Law. The forms of legal liability that can be requested against a Notary can be categorized into several forms, namely:

- a) civil law responsibility for the formal correctness of the deed he made;
- b) criminal law responsibility for the material truth of the deed he made;
- c) legal responsibility based on the Notary Position Regulations for the correctness of the procedures in the deed made; and
- d) responsibility based on the Notary Code of Ethics for the behavior and implementation of the office of Notary.

If a Notary violates or does not comply with the applicable rules in carrying out his/her position as a Notary, the Notary may be subject to sanctions. That in accordance with Article 6 of the Notary Code of Ethics sanctions imposed on members who violate the Code of Ethics can be:

- a. Reprimand;
- b. Warning;
- c. Suspension (temporary dismissal) from membership of the Association;
- d. Onzetting (dismissal) from membership of the Association;

⁴⁷ Republik Indonesia, *Pasal 66 Ayat (1) Undang-Undang Nomor 2 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 30 tahun 2004 Tentang Jabatan Notaris*, 2014.



e. Dismissal with dishonor from membership of the Association.

In the capital market, the role of a capital market notary is required in matters related to the preparation of articles of association for parties such as issuers, public companies, securities companies, mutual funds, and the making of various other important agreements.⁴⁸ This is the mandate of Article 64 paragraph (1) of the Capital Market Law which explains that a notary is one of the supporting professions of the capital market who is authorized to make authentic deeds and must be registered with the OJK.

In the backdoor listing mechanism, the notary has an obligation to ensure that changes to the company's articles of association are carried out in accordance with applicable regulations, considering that the GMS is a decision-making process in a company, so its implementation must always be carefully considered. Notary has a fundamental role in a backdoor listing process. The notary is responsible for ensuring the rules that apply on the stock exchange as well as the general rules that apply in limited liability companies. It is important to pay attention to the number of summoning and decision-making quorums when conducting GMS to protect the interests of majority and minority shareholders. In addition, the notary is responsible for ensuring the implementation of the GMS and then pouring the results into the deed of GMS Minutes for changes in the composition of share ownership and the company's articles of association.

The Capital Market Law has provided for the supervision of notaries who carry out activities within the scope of the capital market, namely by requiring registration for notaries who wish to carry out business in the capital market and conducting examinations and investigations of notaries in the event of suspected violations.⁴⁹ That in the implementation of backdoor listing, supervision of capital market notaries is carried out in relation to their registration status at OJK. If the Notary is not registered, then the notary is not considered as a capital market notary and therefore is not allowed to make a deed of amendment to the Company's articles of association.

⁴⁸ Irsan Nasarudin and Surya Indra, *Aspek Hukum Pasar Modal Indonesia* (Jakarta: Prenada Media, 2007), 94.

⁴⁹ Republik Indonesia, *Pasal 5 Undang-Undang Nomor 8 Tahun 1995 Tentang Pasar Modal*, 1995.



A notary has an inherent responsibility along with the deed he makes, where the responsibility can be requested either civilly, criminally, or administratively. If a deed made by a notary causes harm to another party because the evidentiary power of a deed that was originally perfect has decreased to a deed under the hand, then the notary can be held civilly liable. However, if the notary's actions are proven to have committed a criminal offense, then the notary will be held criminally liable. In addition, if there are errors related to substance, the notary can be subject to administrative sanctions such as oral or written warnings, temporary dismissal, with honor or dishonor.

CONCLUSION

The findings of this study highlight the pivotal role of notaries in ensuring the legality and compliance of backdoor listing transactions while also underscoring critical gaps in investor protection. To mitigate risks associated with backdoor listings, such as share dilution and insufficient transparency, it is essential to develop a more robust regulatory framework. This includes mandatory disclosure of comprehensive financial and strategic information by companies engaging in backdoor listings and stricter oversight by regulatory authorities like the Financial Services Authority (OJK). Furthermore, regulatory improvements should include specific guidelines to govern backdoor listing practices, ensuring they adhere to principles of fairness and transparency. OJK's active role in monitoring and evaluating such transactions is paramount to building trust in the capital market and protecting minority shareholders. Recommendations include introducing penalties for non-compliance with disclosure requirements and providing incentives for companies to adopt best practices in corporate governance. These steps will not only enhance investor confidence but also contribute to a more equitable and sustainable capital market ecosystem in Indonesia.



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