

LEGAL PROTECTION EFFORTS BY NOTARIES IN *BACKDOOR LISTING PRACTICES* AS CORPORATE ACTIONS IN THE CAPITAL MARKET

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Abstract

Backdoor listing is a method used by companies to enter the capital market without going through the lengthy and costly initial public offering (IPO) process. This practice typically involves the acquisition of a public company by a private company, allowing the private company to be listed on the stock exchange through the acquired public company. One of the main requirements for listing shares on the stock exchange is that the business must be a limited liability company. In this context, notaries play a crucial role in ensuring legality and compliance with applicable regulations. Legal protection for notaries in *backdoor listing practices* is crucial given the complexity and potential legal risks involved. Notaries must ensure that all documents and processes related to *backdoor listing* comply with the Limited Liability Company Law (UUPT), the Capital Market Law (UUPM), and other relevant regulations. However, due to the lack of detailed legal regulations regarding *backdoor listing* in Indonesia, notaries must exercise caution and ensure that every step taken complies with applicable legal principles.

Keywords: *Notary Protection, Backdoor Listing, Capital Market*

Introduction

In Indonesia, the rapid economic growth due to globalization has had a significant impact on society. Many business actors are implementing various business strategies, including investments, to improve business performance. Investment activities are now facilitated by the existence of capital markets, which provide a means for fund holders to invest in issuers requiring funds for their business capital. ¹The definition of a capital market itself is a place to trade various long-term financial instruments, such as stocks, mutual funds, bonds, and other derivative instruments issued by private companies. ²Article 1, number 13 of Law Number 8 of 1995 concerning Capital Markets defines a capital market as activities related to public offerings, securities trading, and public companies related to the securities they issue, as well as institutions and professions related to securities. For companies that want to enter the capital market, the company is required to conduct an *Initial Public Offering* or IPO which is strictly regulated in Article 1 number 15 of Law Number 8 of 1995 that *going public* or *Initial Public Offering* (IPO) is an activity of offering securities carried out by issuers (companies that offer their shares) to sell securities to the public which is regulated in capital market provisions and their implementing regulations. The status of the company that has carried out the public offering (*go public*) after that becomes a public company and as an effort to gain access to wider investors, the public company will list its shares on the stock exchange so that its status can become a listed *company*. The process for a company to conduct an *Initial Public Offering* (IPO) requires high costs and a considerable amount of time, with various processes including proof of good financial records, significant company profits, increased business volume with increasing profit potential, and the company's condition in the community ³. This difficult process is what makes entrepreneurs seek an easier way in business practices, namely by using the practice of *backdoor listing*. The *backdoor listing* method is familiar to business practitioners because this way the company can

¹The Indonesia Capital Market Institute. Securities Trading Mechanism of the Indonesian Capital Market Structure. Academia.edu, 2016.

https://www.academia.edu/31382620/Modul_WPPE_MPE_MEKANISME_PERDAGANGAN_EFEK_STRUKTUR_PASAR_MODAL_INDONESIA.

²Nasarudin, M. Irsan, and Indara Surya. Legal Aspects of the Indonesian Capital Market. Jakarta: Prenada Media Group, 2014, 13.

³Nasarudin, M. Irsan, et al. Legal Aspects of the Indonesian Capital Market. Jakarta: Kencana Publishers, 2010, 214.

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enter the stock exchange without going through the *initial public offering* (IPO) process. Companies that practice this use acquisition efforts with companies already listed on the stock exchange or BEI and effective statements from the OJK⁴. This practice, however, to this day does not have a forum related to legal provisions that further regulate the *backdoor listing process*. Meanwhile, to support the success of the *backdoor listing practice*, notaries as Authentic deed makers are directly involved in the preparation of articles of association for parties such as issuers, public companies, securities companies, and mutual funds.⁵ Article 64, paragraph 1 of Law Number 8 of 1995 concerning Capital Markets, mandates that notaries assist in the preparation of legal documents necessary to meet issuers' requirements for public offerings or capital market transactions. Notaries' obligations regarding capital market practices must be carried out with great care, as violations can result in administrative and criminal sanctions, both as stipulated in the Financial Services Authority (OJK) and the UUJN.

Research purposes

To identify the legal protection that notaries can obtain in carrying out their duties related to *backdoor listing practices* in Indonesia, including an analysis of legal provisions and regulations governing protection for notaries and assessing the extent to which notaries need legal protection in handling this practice.

Research Authenticity

This research was previously discussed in the *Dinasti Research journal*, "*Legal Protection for Notaries in the Backdoor Listing Process Based on Capital Market Law in Indonesia (Study of PT Pantai Indah Kapuk Dua Tbk)*" by Viani Chrisanta Ranti1 and Richard Adam. The authors offer a new perspective on notary legal protection in relation to the presumption of legality, particularly regarding *backdoor listing practices*, which have rarely been discussed before. With empirical data, a comparative approach, and concrete policy recommendations, this research provides significant added value to the literature on corporate law and the notary profession.

Research methods

The type of research conducted is normative legal research. Legal research itself is a study that aims to find the truth of coherence, which in this case looks at the coherence of actions, legal rules, legal norms, and legal principles, as well as legal principles. The approach *in* conducting this legal research uses a statute approach *to* resolve and answer existing legal problems or issues. The statute approach *is* a type of approach in legal research that focuses on norms in a statutory provision. The author also uses a conceptual approach, which is carried out by examining a concept through studies of doctrines that develop in legal science. In this case, the author examines the concept of *Back Door Listing*. The analysis is carried out using the Interpretation method. Interpretation itself is a method of legal discovery that provides a clearer explanation of a legal norm contained in a statutory regulation so that it is easier to understand and can be applied in a concrete legal event.

Discussion

According to Article 1 number 11 of Law Number 40 of 2007, acquisition is defined as: "A legal action carried out by a legal entity or individual to take over shares in a company, which results in the transfer of control over the company.

The backdoor listing process can be carried out through the method of acquisition of a Public Company by a Private Company, where a private entity buys all or most of the shares of a public company listed on the stock exchange.

backdoor listing procedure through company acquisition generally involves the following steps:

1. Identifying and targeting public companies.
2. Conduct *due diligence* to assess the financial and operational condition of the target company.
3. Holding a General Meeting of Shareholders (GMS) to approve the acquisition in accordance with legal regulations.
4. Drafting agreements and completing the acquisition process.

⁴ Riyanto, Agus. "Questioning the Legality of *Backdoor Listing*." Binus University, May 17, 2020. <https://business-law.binus.ac.id/2020/05/17/mempertanyakan-legalitas-back-door-listing/>.

⁵Ranti, Viani Chrisanta, and Richard Adam. "*Legal Protection for Notaries in the Backdoor Listing Process Based on Capital Market Law in Indonesia (Study of PT Pantai Indah Kapuk Dua Tbk)*." *Journal of Law, Politics and Humanities* 4, no. 4 (2024): 649–654.

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5. Undertake corporate reorganization, including changes to the board of directors and the primary operational focus of the public entity.

In a *backdoor listing*, a company carries out a *reverse takeover strategy*, often followed by other corporate steps, such as issuing Pre-emptive Rights (HMETD) or a *rights issue*. In a *reverse takeover*, shareholders of a private company (in this example, entity B) typically undergo the following process:

1. Acquisition of a Majority of Shares in a Public Company

A private company shareholder, B, acquires a majority stake in a public company (PT Tbk). In this scheme, B acquires the shares of C, the majority shareholder in the public company. Upon completion of the acquisition, B gains full control of the public company, which will be used as a vehicle for a *reverse takeover*.

2. *Rights Issue* Implementation

After taking control, the public company carries out a *rights issue*. In this *rights issue*, B, as the new controlling shareholder, participates in the issuance of new shares. However, payment for these rights is not made in cash, but rather by depositing shares from the private company owned by B into the public company.⁶

Through a change of control in a public company and the exchange of shares from a private company, the *reverse takeover process* is considered complete. This allows a private company to become a public company without going through the conventional IPO process. This transaction carries a high level of risk due to the numerous procedures and mechanisms required for a private company seeking to become a public company. However, to date, there are no capital market regulations specifically governing the implementation of a *backdoor listing* through a *reverse takeover*. In the world of capital markets, notaries play a crucial role, particularly in drafting articles of association for various parties, such as issuers, public companies, securities companies, and mutual funds, as well as in drafting a number of other important agreements.⁷ In accordance with the provisions of Article 64 paragraph (1) of the Capital Markets Law (UUPM), notaries are recognized as a supporting profession in the capital markets sector. Further explanation of this article also emphasizes that notaries are public officials authorized to draft authentic deeds, provided they are registered with the Financial Services Authority (OJK). In general, the primary duties of notaries in the capital markets sector are no different from their duties prior to registration with the OJK, namely providing explanations, advice, and drafting authentic deeds. Therefore, it is important for a notary to understand the ins and outs of the capital markets in order to provide relevant advice.

When drafting a company deed for *public listing*, such as a General Meeting of Shareholders (GMS) for an issuer or public company, a notary public needs to know the meeting agenda in detail. This must be done while taking into account provisions related to conflict of interest transactions, material transactions, business mergers, and various other legal aspects.⁸ In the *backdoor listing process*, a notary plays a crucial role. They are tasked with ensuring that the procedures for amending a company's articles of association comply with applicable regulations, both Stock Exchange regulations and general provisions governing limited liability companies. The General Meeting of Shareholders (GMS), as the highest decision-making forum within a company, requires special attention. Quorum for summoning and decision-making at the GMS must be met in accordance with applicable regulations.

To protect the rights and interests of shareholders, both majority and minority, notaries are responsible for ensuring that the GMS is conducted in accordance with the rules. Furthermore, for any changes in share ownership or the company's articles of association, notaries are required to prepare a deed of GMS minutes containing the meeting's decisions, also known as a *deed of minutes*. Notaries play a crucial role in drafting the GMS minutes because they are responsible for the accuracy of the deed's contents. Notaries will witness, see, and hear everything discussed and decided at the meeting. However, not all notaries can become notaries supporting capital market activities. Only notaries officially registered with the Financial Services Authority (OJK) are qualified to perform this role. In carrying out their role, capital market notaries can also be dismissed by the OJK if their work permit is revoked by the relevant authorities. Furthermore, capital market notaries can also resign voluntarily by submitting a letter of resignation to the OJK. The Notary Law (UUJN) itself has provided legal protection to notaries through the right of recusal, which requires notaries to carry out their duties with several obligations, such as maintaining the confidentiality of all matters related to the deeds made and information obtained in the context of making the deed,

⁶ Hukumonline. "Regulation of Reverse Mergers and Backdoor Listings in Indonesia."

<https://www.hukumonline.com/klinik/a/pengaturan-reverse-merger-dan-backdoor-listing-di-indonesia-lt4e8ae2b4a4215/>.

⁷Nasrudin, M. Irsan, and Indara Surya. Legal Aspects of the Indonesian Capital Market. Jakarta: Prenada Media Group, 2014, 94.

⁸Tumanggor, MS Professional Institutions in the Capital Market. Jakarta: LPPH, 2007, 55–56.

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in accordance with the oath or promise of office, unless the law regulates otherwise. This obligation is absolute, where notaries are required to maintain the confidentiality of the deeds they prepare and related information, which is also reinforced by the Civil Code (KUHPerdata). The Civil Code regulates that every person in his position, job, or office is required to maintain confidentiality, only for matters entrusted to him.⁹ In the criminal law system, the right to recusal is regulated in several provisions, such as Article 148 of the Criminal Code, Article 146 of the Criminal Code, Article 277 of the Criminal Code, and Article 170 of the Criminal Procedure Code, which states that a witness can choose to withdraw by using the right to recusal. This right is an exception to the general rule that requires every party summoned as a witness to provide testimony. If a notary reveals the secrets of his/her office, the notary can be subject to criminal threats in accordance with Article 85 of the UUJN, sued in civil court based on Article 1365 of the Civil Code, and threatened with punishment in Article 322 paragraph (1) of the Criminal Code.

Notaries, as a profession, have an organizational structure called the Indonesian Notaries Association (INI). This organization fosters trust and support for the notarial profession. Furthermore, the Memorandum of Understanding is a mandatory procedure when a notary is summoned or questioned by the police. Protection for notaries is also provided through the Notary Honorary Council, which has the authority to grant approval for summoning notaries and collecting minutes of deeds and related documents. Parties involved in this process are law enforcement, ranging from investigators, prosecutors, to judges who handle cases in court, in accordance with the provisions of Article 66 Paragraph 1 of the UUJN and Regulation of the Minister of Law and Human Rights No. 7 of 2016 concerning the Notary Honorary Council. For further legal protection, INI also collaborates with the police through a Memorandum of Understanding between INI and POLRI, which regulates the development and strengthening of professionalism in the legal field. This serves as part of the legal protection for notaries in carrying out their duties, particularly in maintaining official confidentiality, which is a crucial part of a job based on trust.¹⁰ If in the process of making the deed the notary has fulfilled all the provisions and obligations based on all applicable legal regulations, the responsibility imposed on the notary is limited to the deed he made, namely guaranteeing that the content and intent and purpose of the deed are true and do not violate the code of ethics, laws and applicable provisions and regulations. If at a later date in the *backdoor listing process* it is suspected that there is a violation of the law, then the principle of presumption of validity or *presumption iustae causa applies*.¹¹ This principle assumes that the notarial deed is valid, unless there is a party that proves otherwise. To prove that the deed is invalid, a lawsuit is required in a general court. During the lawsuit process until there is an inkraht court decision (having permanent legal force), the notarial deed remains binding on all parties related to the deed. So in the *backdoor listing action*, although there are no clear specifications that regulate it in the legislation, however, if it is connected with a notary, as long as the authentic deed made does not violate the provisions of the law, the deed drawn up will be valid and binding on the parties involved, unless there is a lawsuit that can prove the invalidity of the deed through clear legal channels.

Conclusion

Backdoor listing is a method where a private company becomes a public company without going through an initial public offering (IPO) process, which currently has no clear legal regulations regarding its practice. Regarding legal protection, a notary must ensure that all deeds made comply with applicable laws and regulations. If in the process of making the deed the notary has fulfilled all provisions and obligations based on all applicable laws and regulations, the responsibility imposed on the notary is limited to the deed he made, namely guaranteeing that the content and intent and purpose of the deed are true and do not violate the code of ethics, laws and applicable provisions and regulations. If at a later date in the *backdoor listing process* there is suspected legal violation, the principle of presumption of legality or *presumption iustae causa applies*.

⁹Civil Code, Article 1909 paragraph (3).

¹⁰Memorandum of Understanding No. Pol. B/1056/V/2006 and 01/MOU/PP-INI/V/2006.

¹¹Adjie, Habib. *Civil and Administrative Sanctions against Notaries as Public Officials*. Bandung: Reflika Aditama, 2008, 79.

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