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INSIDER TRADING EVIDENCE UNDER INDONESIA LAW

M.M. Ezra Fadriansyah

1. Introduction

INSIDER were the “first” party always took the benefit of share sales on the capital market under normal condition. This statement were proven true about 20 years ago when Indonesia capital market still using script trading. After Indonesia capital market convert their trading system to script less trading, slowly “inside” information began to minimized. The question always “why?”, since 1990 the internet has majorly taken part in business aspect to make the system efficient and cell phone were the main part for telecommunicate between person to person. If we pay attention carefully, every new technology always have their own loopholes and sometimes regulation doesn’t quickly follow the progressively (which we may known as “slow moving”) of technology evolution. Today when this Article was written, cell phone were already mandatory for everybody, especially to business activities everyday and the old style of text message were replaced to social messaging application, such as whatsapp application, LINE Naver application and other application that had similar function. Is this kind of technology evolution has side effect to insider trading? Absolutely we have to answer “yes”, when image or photo file transfer become much easier than 15 years ago it’s absolutely one of the benefit of technology evolvment. Screen capture or screen video, voice recorder by phone call or stand alone application which has function to record the conversation were another big benefit to business activities.

The insider trading should be analyzed first using one original concept of insider trading, as follows: “Much of the regulation of insider trading is based on the premise that if an insider or corporate entity possesses special information, but has a business reason for keeping it secret, may withhold that information from the marketplace”¹. We have to realized that the adage “silence is golden” has to take the main part for insider trading secrecy, after silence applied and then “disclose or abstain” if the insider choose to disclose the “information” and the answer were the trading became legally (not classified as insider trading) but if the insider choose to “abstain” the information and then then insider prohibited to trade using that

¹ Saul Levmore, "*Securities and Secrets: Insider Trading and the Law of Contracts*," 68 Virginia Law Review 117 (1982), pg.1-2.

information. How the insider allowed to trade? First, the insider should disclose the information to the public using the legal mechanism (announcement from the newspaper or capital market website), and then the insider may allowed to trade the company shares.

2. Indonesia Securities Law of Insider Trading

Indonesia already have Law of The Republic of Indonesia Number 8 Year 1995 Concerning The Capital Market² (“Capital Market Regulation”) under article 95 it’s stated clearly that “*an insider³ with respect to an Issuer or Public Company, who is in possession of inside information, is prohibited from buying or selling Securities of: (a) the Issuer or Public Company; or (b) another Company engaged in transactions with the Issuer or Public Company.*” If the party were classified as the insider, he/she should have remained silence of the inside information from the minutes he/she known until the information has announced formally. Under Indonesia society habit, Indonesian people sometimes mistakenly doesn’t recognize that inside information were already classified as inside information and he/she already classified as insider. Is this kind of mistake accepted by the Law? Of course, no. The insider should follow the Capital Market Regulation under article 104 which the insider who violates the provision of article 95, 96, 97 item (1) and 98 shall be subject to imprisonment for maximum of ten years and a maximum fine of fifteen billion rupiah.

This insider trading was classified as criminal provisions (and felonies as mentioned on article 110) and the remedy should follow as stipulated on article 104 as mentioned above. The next question occurs

² For this Article purpose, the unofficial English translation version was used as the main version and the secondary version were the original Indonesia version.

³ “Insider” means:

- a. a commissioner, director or employee of an Issuer or Public Company;
- b. a substantial shareholder of an Issuer or Public Company;
- c. an individual, who because his position or profession, or because of a business relationship with an Issuer or Public Company, has access to inside information; and
- d. an individual who within the last six months was a Person defined in letters a, b or c, above.

The term “position” in letter c, includes a position at a government agency, institution or body. The term “business relationship” in letter c, is any working relationship or partnership in business activity, as well as the relationship as client, supplier, contractor, customer, or creditor. The term “inside information in letter c, referes to Material Information held by an insider that is not yet available to the public. An example of the case indicated in letter d, would be as follows: *Although, Mr. A quit as the director on January 1, he is still considered to be an insider until June 30 of the same year.*

“what the evidence qualification?” if we look deeply to the Capital Market Law, the inside information it self as the main aspect of the important evidence but the inside information should be possessed by a person or more than one person as the subject and then inside information as the object.

Indonesia Financial Services Authority known as “Otoritas Jasa Keuangan” were replacing BAPEPAM-LK since Indonesia announce Law of The Republic Indonesia Number 21 Year 2011 Concerning Financial Services Authority. Otoritas Jasa Keuangan has fully performed since 2013⁴ and on 2017 Otoritas Jasa Keuangan announced Peraturan Otoritas Jasa Keuangan Nomor 78/POJK.04/2017 Concerning Stocks Trading Not Prohibited To Insiders (“POJK 78/2017”). This Otoritas Jasa Keuangan regulation were used as the anti-dote to the insider trading, in this case Otoritas Jasa Keuangan tried to regulate provisions that exclude insider trading. Under Article 2 POJK 78/2017 regulate the exception of insider trading, as stipulate:

- a. the Securities transaction is carried out between Persons in the same Issuer or Public Company who have the same Insider Information and are carried out outside the exchange; or
- b. Securities transactions carried out by Persons in Issuers or Public Companies that have Insider Information with Non-Insiders on the Securities of Issuers or Public Companies or other companies that conduct transactions with the Issuer or Public Company referred to and carried out outside the exchange with the following conditions:
 1. The Insider has previously provided all Insider Information to the Non-Insider Party;
 2. The Person who is not an Insider referred to does not use the Insider Information other than to conduct the Securities transaction with the Insider concerned;
 3. The party who is not an Insider is intended to make a written statement to the Insider who provided the information stating that the information to be received will be kept confidential and will not be used for other purposes other than to conduct the Securities transaction with the Insider concerned; and
 4. The party that is not an Insider referred to does not conduct Securities transactions of the Issuer or Public Company or other company that conducts transactions with the said Issuer or Public Company within a period of 6 (six) months after the

⁴ On 2012, BAPEPAM-LK began to switch slowly to Otoritas Jasa Keuangan and on 2013 Bank Indonesia has given some of their authority to Otoritas Jasa Keuangan. Otoritas Jasa Keuangan were the ultimate form of Self Regulatory Organization if compared to BAPEPAM-LK.

information is obtained, in addition to conducting the Securities transaction with said Insider.

Under Article 3 POJK 78/2017⁵ explain insiders could give inside information to other party in relation to give consideration to other party to do the securities transaction or passed the transaction. On Article 4 POJK 78/2017⁶ in simply conclusion explain insiders who possessed inside information could do the trading limited to the Indonesia capital market or the highest bidder under court verdict or the insiders does not have power or influence to do the securities trading. For the Article 5 POJK 78/2017 explain that insiders and other party that do the securities transaction obliged to report the transaction to Otoritas Jasa Keuangan maximum ten days since the securities transaction and on Article 6 POJK 78/2017 regulate the report inquiry minimum and on Article 7 POJK 78/2017 explain the report as mention in Article 5 item (1) should available to public and could be copied at Otoritas Jasa Keuangan.

Between insider trading prohibition regulation and insider trading exception regulation conclude that there's under regulate (poorly regulate) on the prohibition regulation which the "regulation spirit" should regulate more on the prohibition, but on the exception regulation provision "relaxed" out the insider trading. In this matter, only two main regulation which regulate the prohibition and the other one the exception regulation.

⁵ Article 3: Insiders in an Issuer or Public Company can provide Insider Information to other Parties with the aim of providing material for consideration to other Parties to conduct Securities transactions of Issuers or Public Companies or other companies involved in transactions with Issuers or Public Companies, from Insiders referred to as fulfilling the provisions referred to in Article 2 letter b number 2, number 3, and number 4.

⁶ Article 4: Insiders in Issuers or Public Companies that have Insider Information can sell Securities of Issuers or Public Companies or other companies that conduct transactions with their Issuers or Public Companies, if done at the Stock Exchange or at the public auction place at the highest bid provided:

- a. the sale of a court decision that has obtained permanent legal force or the implementation of a mortgage; or
- b. The Insider is unable to influence or control the sale and / or the selling price of Securities, both directly and indirectly and decisions about when to sell and sell prices are made by other Parties who do not have access to Insider Information.

3. The Main Concept of Insider Trading

Principles of Disclose or Abstain⁷

People who have employment relations (insiders) with issuers are prohibited from trading securities of the issuer because of information that is not yet open to the investor community. Based on the information insider has, the insider against the problem can make his choice, namely to open the information (disclose) to other traders or investors or not open material information but also not to conduct trade transactions (abstain) or not recommend to other parties to do transactions on the stock against company securities. This situation is known as disclose or abstain theory.

The obligation to disclose or abstain has 2 (two) minimum elements, namely:

- a. The inside information is only for the benefit of the company, and not for anyone's personal interests;
- b. Is an injustice (inherent unfairness) if there is a party that takes advantage of an information where he knows that the other party does not know the information.

Principle of Fiduciary Duty

The Fiduciary Duty principle is based on the common law legal doctrine which affirms that anyone who has a fiduciary duty or other relationship based on trust (trust) with the company⁸. Based on this theory, anyone who is paid by the company to carry out the tasks assigned, then he has the duty to the company to carry out these tasks as well (due diligence) with high ethical and economic measures. In carrying out its duties, the person concerned may not take advantage of even having to sacrifice personal interests for the benefit of the company⁹.

This theory is often referred to by academics as a classic theory, whose application in modern Insider Trading cases has become ineffective, because this theory is not able to reach Insider Trading

⁷ Najib A. Gisymar, *Insider Trading dalam Transaksi Efek*, cet. 1, (Bandung: Citra Aditya Bakti, 1999), pg. 39.

⁸ Sofyan A. Djalil, "Manipulation and Insider Trading," (Course Paper and Capital Market Legal Consultant Training Batch VII, LMKA-BPLK, 21 October-8 November 1996).

⁹ Munir Fuady, *Pasar Modal Modern (Tinjauan Hukum)*, cet. 1, (Bandung: PT Citra Aditya Bakti, 1996), pg. 179.

practitioners who do not have fiduciary duty to companies such as secondary tippee¹⁰.

Law Number 40 of 2007 concerning Limited Liability Companies implies the fiduciary duty principle. This is contained in Article 79 paragraph (1) and Article 82 of Law Number 1 Year 1995 jo. Article 92 paragraph (1) and Article 98 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies. Based on the two articles, it can be said that the directors have dual authority, namely the management and running of company representatives.¹¹

Company Information (Material Information)

Company information or material information is all data, facts or events that have, will or can occur in or relating to the company, whether the information is related to securities issued by the company or not related to company securities¹².

Form of company information:

- a. Public Information. Public information is information provided by companies for the public, in the sense that anyone can know it. This public information can be obtained in various forms, including: prospectuses, press releases issued by companies, financial reports, annual reports, periodic reports and incidental reports, either in written form or in the form of press conferences or public exposes others.
- b. Non-Public Information. Information that includes non-public information is closely linked to the rules regarding Insider Trading as mentioned above. This information is information that is not provided to the public, in the sense that not everyone has the right or can know it. Included in this category include: company business or financial projections, management plans, corporate action plans, and other company plans or plans that have not yet been implemented or will not be implemented.
- c. Clear information. To be categorized as company information, the information must be clear, not just a rumor. This is also related to the responsibility of the person in the company if there is a suspicion of Insider Trading.

¹⁰ Donald Moody Pangemanan, *Peraturan Insider Trading Dalam Pasar Modal: Studi Mengenai Penerapan Teori Penyalahgunaan Dalam Praktik Insider Trading*,” Law Journal and Capital Market 2 (July 2005) : 52.

¹¹ Fred B. G. Tumbuan, “*Fiduciary Duties Direksi Dalam Perseroan Terbatas Menurut Undang-Undang No. 1 Tahun 1995*,” *Newsletter*, No. 23/Year VI (December 1995) : 2

¹² Asril Sitompul, *Insider Trading (Kejahatan Di Pasar Modal)*, (Bandung: Books Terrace & Library, 2007), pg. 10

- d. Information on price sensitive. Material information that is sensitive to the price of company securities is information that if known by a party, then the party, under normal circumstances, will be affected to conduct trading in the company's securities, and the existence of such information will affect the decline or increase in the company's securities price.

General Provisions Regarding Information Disclosure¹³

Disclosure obligations for public companies. Every company that has made a public offering and shares has been traded in the Capital Market, means that it has become a public company. Public companies are companies whose shareholders are no longer limited to some of the founders, but also the general public, the company is also called a public company. For every open company there is an obligation to provide information to its shareholders.

Information that must be disclosed is information or material facts that can influence investor decisions in the trading of company shares. Material Information or Facts are important and relevant information or data regarding events, events or facts that can affect the price of Securities on the Stock Exchange and / or decisions of investors, prospective investors, or other parties with an interest in such information or facts.

In deciding whether an information will be disclosed or not, the company must pay attention to the provisions of the Capital Market law and stock regulations where the company's shares are registered and recorded. The company must hold the principle of prudence in the sense that it must be absolutely sure about the truth and accuracy of the information. This precautionary principle is to avoid claims from investors based on disclosure of information that is a misleading statement ("misleading statement") or ignoring information ("omission") or making false statements ("misrepresentation").

This misleading statement occurs when companies disclose an information. It turns out that the information is misleading, for example a company issues information about a plan that will be implemented, investors can accuse the company of issuing misleading information that causes them to make certain decisions in trading company shares.

Likewise if the company denies information provided by a party, and it turns out that the information is correct, for example if the government states that the government will sell the shares of the company it owns and that information is denied by the company, if it

¹³ Asril Sitompul, *Ibid.* pg.11-12.

turns out that the government actually sells its shares then companies can be accused of omission, which is hiding the right information.

Whereas misrepresentation can occur if the company issues incorrect information, including about the state of business, management or about the company's financial position. If the company has issued an information and then it turns out that the information is incorrect then the company must immediately provide an explanation of why this happened. Suppose that the company does not become implemented, the company must provide an explanation of why the plan was not implemented so that it was not sued based on giving misleading statements or misrepresentations.

Likewise, if the other party issues information that is later denied by the company and it turns out that the information is correct, the company must provide an explanation so that it is not sued on the basis of omission of information.

Provisions concerning Disclosure¹⁴

This regulation (Law Number 8 Year 1995) contains the equal treatment principle, which is the same treatment for all parties related to the shares of the issuer company, where if the company discloses to one party, the company is also required to disclose to the other party.

The time period required for disclosure depends on whether the disclosure was done intentionally or accidentally. For disclosure that is done intentionally, the publication of the information must be done simultaneously, and for accidental disclosure, the publication must be done as soon as possible.

In principle, companies are required to provide full disclosure of material facts contained in the company, so that nothing is hidden (omission).

Material facts that must be disclosed are not only material facts about the company, but also about subsidiaries and affiliates. This openness is carried out by giving reports, both in the form of periodic reports (annual, semi-annual and quarterly) or in an official report. These reports can be in the form of annual reports, quarterly memo info, and can also be in the form of press releases delivered to all investors and institutions of the Capital Market authority and the stock exchange. For material transactions that have the potential to have an impact on the sustainability of the company's business, company management must submit it to shareholders by making a circular to the shareholders (shareholder circular) which contains a description of the transaction.

¹⁴ Asril Sitompul, *Ibid.*, pg 13-14.

For certain things the company is not required to provide complete information (partial disclosure) and is allowed to give only part of the material facts that exist or occur in the company. For certain transactions that are confidential and highly sensitive to the company's business activities, the Capital Market authority gives the company an opportunity not to submit the entire transaction, but simply provides a summary and requests that the Capital Market authorities treat it as a confidential document and not be treated as a public document.

If the company or company official provides information that turns out to be incorrect or false, then the company is required to immediately provide corrections or corrections to the news, within the period determined by the applicable regulations, usually the period is two working days. Companies are required to submit information about material facts to three parties, namely: shareholders, Capital Market authorities, and stock exchanges.

With the development of the internet, companies can use these tools to deliver information quickly at low cost. However, behind the convenience there are several risks for the company, including: first, the possibility of exceeding the limits justified based on regulations regarding forward looking statements; second, the possibility of providing overlapping information between one official and another in the company; and third, the possibility of violations of direct selling effort restrictions.

Forward-looking statements are statements that contain projection or forecasts that are not facts that are the object of the obligation to provide information. But the provision of information in the form of forward-looking statements cannot be avoided by the company, because a good company certainly has calculations, forecasts and projections that are part of the business design or financial projections in the future. If the company provides information in the form of a forward-looking statement that the company cannot yet be certain and new is a forecast or projection

This notification is needed so that the company is not trapped in giving misrepresentation or misleading. That is why it is said that this forward-looking statement is a "safe harbor" for companies in providing information that is still in the form of design, projections or forecasts.

Sanctions and Background on Insider Trading Prohibition

Trading with Insider Trading is a dangerous and detrimental action for the Capital Market, Insider Trading itself can also be interpreted as "collusion" which must be eradicated because it is very detrimental and causes injustice for capital market players.

In Article 104 of the Capital Market Law, Insider Trading is indeed classified as a criminal offense with a fairly severe criminal sanction, namely a maximum of 10 (ten) years in prison and a maximum fine of Rp. 15,000,000,000 (fifteen billion Rupiah). Whereas the background is the prohibition itself because these actions can pose a danger for, among others:¹⁵

a. Fair and Efficient Market Mechanism

It can be likened that if an Insider Trading is not prohibited, then the market runs is like the running of a car without lubricating oil. This is caused by:

1) Price Formation that is not Fair (Informed Market Theory)

If there is an Insider Trading, a fair price will not be formed due to lack of information about the actual condition of the goods. Even though the fair price is an accurate signal about the amount of resources that need to be allocated.

2) Unfair Treatment among Market Players (Market Egalitarianism or Fair Play Theory)

A good market is a market where all market members are treated equally and fairly. And, in the Capital Market, all actors have the right to the same information. Whereas with Insider Trading, only a small number or even one person has certain information.

3) Dangerous for the Survival of the Capital Market

If the market situation is unfair, many people will leave the capital market concerned to switch to capital markets in other countries or to other types of investments.

b. Negative Impact on Issuers

With Insider Trading, investors will lose their trust in the Issuer itself. And, once the good name of the Issuer falls, it will be difficult for him to develop or add further capital. In fact, it is possible for Insider Trading to do things that harm the Issuer to take advantage of the incident. Unjust Enrichment (enriching yourself illegally by having what is not his right).

c. Material Losses for Investors

¹⁵ Hamud M Balfas, Hamud M. Balfas, *Hukum Pasar Modal Indonesia* (Edisi Revisi), (Jakarta: PT Tatanusa, 2012). h. 486-489

Indeed, with the occurrence of actions that can be classified into this Insider Trading, the investor will suffer losses directly. Maybe he has bought securities at prices that are too expensive, or sold them at prices that are too cheap.

d. Confidentiality Is Owned by the Company (Business Property Theory)

The confidential information belongs to the company in accordance with the principle of recognition of intellectual property rights. Because of this, the company does not belong to the place used by other parties other than the company itself.

Occurrence of Insider Trading

Law Number 8 of 1995 concerning the Capital Market itself does not provide strict Insider Trading limits. The Capital Market Law only provides restrictions on prohibited transactions, among others, insiders from issuers who have inside information are prohibited from carrying out sales or purchase transactions on securities of issuers or other companies that conduct transactions with the issuer or public company concerned.

Based on the above restrictions, it can be determined that securities trading can be classified as an Insider Trading practice if it meets 3 (three) minimum elements, namely:

- 1) The presence of insiders;
- 2) Material information that is not yet available to the public or not yet disclosed; and
- 3) Doing the transactions because of material information.

a. Parties Included as Insider Trading

Explanation of Article 95 of the Capital Market Law gives meaning to insiders as parties classified into:

- 1) Commissioners, Directors or employees of a public company.
- 2) The main shareholders of the company are open.
- 3) People who because of their position, profession or because of their business relationship with a public company allow them to obtain inside information. With the position here it is intended as an institution, institution or government agency. Meanwhile, which is a "business relationship" is a work relationship or partnership in its business activities, such as customers, suppliers, contractors, customers, creditors, and others.
- 4) Parties that are no longer parties as mentioned in numbers 1, 2 and 3 before the period of 6 (six) months passes.

The word "position" in the Explanation of Article 95 letter c of the Capital Market Law is a position in a government institution,

institution, or body. "Business relationship" referred to in the Explanation of Article 95 letter c is a work relationship or partnership in business activities, including relationships between customers, suppliers, contractors, customers and creditors. "Professional" referred to in the Explanation of Article 95 letter c, for example is a Legal Consultant or Lawyer.

Some also state that what is meant by "insiders" are shareholders of a public company who also hold an executive position. Also against the merchants according to his position, as distinguished from a member of the community who invests, known as an "insider" or "lamb".

In other words, those included as "insiders" in the Explanation of Article 95 of the Capital Market Law are Corporate Insiders. Technically, Corporate Insiders can be divided into 2 (two) types, namely:

a) Traditional Insiders

Traditional Insiders are parties that are in a fiduciary position (parties that must carry out fiduciary obligations within the company) within the Issuer or Public Company. Included in traditional insiders are Commissioners, Directors, Employees, Major Shareholders of Issuers or Public Companies.

b) Temporary Insiders

Temporary Insiders or Quasi Insiders are parties outside the company that have a relationship of trust and confidence with the company or have a short-term relationship that results in their fiduciary obligations to the company. Because the relationship allows the outside party to obtain inside information. Included in temporary insiders are legal consultants, notaries, accountants or financial and investment advisors, as well as suppliers or contractors that work with the Issuer or Public Company.

While the contents of Article 96 of UUPM are:

Insiders as referred to in Article 95 are prohibited:

- a. influence other parties to make a purchase or sale of said Securities; or
- b. providing inside information to any Party that is reasonably expected to be able to use the information intended to make a purchase or sale of Securities.

One thing to note from Article 96 of the Capital Market Law is that the formulation of the Capital Market Law does not prohibit tippees from continuing to disseminate the information they know to other parties.

In the context of Article 97 of the Capital Market Law, printers that obtain information in the form of non-public information materials are not included in the criteria of insiders who have fiduciary duty and tippee relationships.

Inside Information

According to the Capital Market Law, what is meant by "inside information" is information (in any form including regarding a "fact") that is material in nature, which is owned by an insider that is not yet publicly available. While according to Article 1 point 7, material information or facts are important and relevant information or facts regarding events, events or facts that can affect the price of securities on the Stock Exchange and / or decisions of investors, prospective investors, or other parties with an interest in information or facts that is.

There is also an understanding of the inside information as everything that is an event in the company (corporate affairs) that has not been open to the public, where the "officers" of the company in question have first known the information, for example if the company will make an acquisition, or The last earnings report differs greatly from the information that was previously released. This information is not justified as a basis for consideration in terms of trading.

Regarding the types of information or material facts that must be announced at the latest at the end of the second working day to the public and notified to BAPEPAM-LK, examples of information intended in Regulation No. X.K.1 concerning Information Disclosure that Must Be Immediately Announced to the Public, mentioning events, information, or material facts that are expected to affect the price of securities or investment decisions, including:

- 1) Business combination (merger), acquisition or acquisition (acquisition), business consolidation (consolidation), or the formation of a joint venture;
- 2) Solution to shares or distribution of share dividends;
- 3) Income from extraordinary dividends;
- 4) Acquisition or loss of important contracts;
- 5) Product or new invention that is meaningful;
- 6) Changes in controls or important changes in management;
- 7) Announcement of repurchase or payment of debt securities;
- 8) Sales of additional securities to the public or in limited material quantities;
- 9) Purchase or loss of sale of material assets;
- 10) Relatively important labor disputes;

- 11) Important legal demands on the company and / or company directors and commissioners;
- 12) Submission of bids for securities purchases of other companies;
- 13) Replacement of accountants auditing companies;
- 14) Replacement of trustee;
- 15) Changes in the company's fiscal year.

The fifteen things mentioned above are only examples of material information or facts, which are certainly still open to information or other facts. So actually, seeing an obligation to disclose in a fairly fast time from an important event or decision from a public company, there is little room for insiders to trade.

The Trading Occurs

One of the conditions that must be fulfilled so that an Insider Trading occurs is the occurrence of a trade (trading), so that if someone has inside information but no transaction has occurred, it cannot be said to have done Insider Trading, but may have violated disclosure obligations.

According to the Capital Market Law, which includes prohibited trading is:

- "1) Insiders who make purchases or sales of the securities of the company where the information originates, as well as the effects of other companies that make transactions with such open companies;
- 2) Insiders who influence other parties to make purchases or sales of these securities;
- 3) An insider who provides inside information to any other party that is reasonably suspected of being able to use the information to make a sale or purchase of said securities;
- 4) Other people who illegally obtain inside information from the insider then use it to conduct transactions such as numbers 1, 2, and 3 above;
- 5) Other people who attempt to obtain inside information unlawfully, but provide such information with restrictions (such as the obligation to keep it confidential), then use that information in the ways referred to in numbers 1, 2 and 3;
- 6) Securities companies that have people's information in the sense of a public company that carries out transactions as referred to in number 1, 2 and 3, with the exception if the transaction is carried out not on the customer's orders, and the securities company does not provide recommendations to its customers regarding the securities concerned. "

Delicacy Insider Trading can only be said to be perfect if there are parties that are classified as insiders, have material information that is still confidential, then the insider conducts transactions on these securities, then Insider Trading can be said so that based on these facts an investigation action can be carried out with a criminal offense set in Article 95 of the Capital Market Law.¹⁶

Insider Trading Occurrence Indicators

a. Return or Negative Return

The purpose of doing Insider Trading based on economic principles is to get a higher profit (abnormal return) more than usual. Acquiring strong indicated abnormal returns is due to Insider Trading. To search for higher profitability, the return can be used as an indicator of the alleged Insider Trading.

b. Return Volatility

In trading activities, the occurrence of Insider Trading based on economic principles is indicated by the presence of volatility, which is a price tendency to change unexpectedly. There are 2 (two) types of volatility, namely Fundamental Volatility and Transitory Volatility. Fundamental volatility is caused by unanticipated changes in instrument value, and transitory volatility is caused by trading activities by unknown traders.

c. Value of Transaction

The value of stock trading transactions from the economic side will look very different, if the transaction is suspected of experiencing Insider Trading, there will be a very drastic transaction value in a certain period of time due to the existence of material information that has not been revealed to the public, but used by insiders. Thus, the transaction value is very important to be used as an indicator of the alleged Insider Trading.

d. Domination of Exchange Members

The dominance of the exchange members from the economic side can be used as an indication of the occurrence of Insider Trading, because there will be seen patterns or habits of exchange members in making transactions. Is a member of the exchange very dominant in conducting transactions in a stock when compared to other exchange member transactions. Even though insiders are likely to split or distribute transaction orders to several members of

¹⁶ Rusdin M, *Hukum Pasar Modal*, (Bandung: Penerbit Alfabeta, 2011) pg.64.

the exchange, it can be seen from the habit of trading members trading on normal trading¹⁷.

Financial Services Authority sanctions for Insider Trading

Otoritas Jasa Keuangan attitude in discovering the crime of Insider Trading is to conduct an examination and investigation as written in Article 100 of the Capital Market Law. Otoritas Jasa Keuangan investigators have the right to do:

- a. request information and or confirmation from the Party suspected of committing or engaging in a violation of this Law and / or its implementing regulations or other Parties if deemed necessary;
- b. requires parties suspected of committing or engaging in violations of this law and / or implementing regulations to carry out or not carry out certain activities;
- c. examine and or make copies of records, bookkeeping and or other documents, both those of the Party suspected of committing or engaging in violations of this Law and / or its implementing regulations and those of other Parties if deemed necessary; and or
- d. stipulate conditions and or allow Parties suspected of committing or engaging in violations of this Law and / or implementing regulations to carry out certain actions needed in order to settle losses arising.

In the case of imposition of sanctions, in general there are 2 types of sanctions that are often used in the Capital Market, namely administrative sanctions (Article 102 of Act Number 8 of 1995) and criminal sanctions (Article 104 of Law Number 8 of 1995). Furthermore, the author will explain what sanctions are imposed on insiders who are proven to have committed Insider Trading.

4. Example Case of PT Bank Pikko, Tbk¹⁸

PT Bank Pikko Tbk (hereinafter referred to as Bank Pikko) conducts an Initial Public Offering of a total of 28 million shares on the 17th until December 19, 1996 at an initial price of Rp. 800.00 per share. After the Public Offering has been conducted, all 128 Pik shares of Bank Pikko are listed in the Jakarta Stock Exchange (hereinafter

¹⁷ Irsan Nasarudin, *Aspek Hukum Pasar Modal Indonesia*, (Jakarta: Kencana Prenada Media Group, 2011), pg. 150.

¹⁸ PT Bank Pikko Tbk cases quoted from BAPEPAM Elucidation dated May 14, 1997 <Asril Sitompul, Op.Cit. pg. 96-101>

referred to as the JSX) and the Surabaya Stock Exchange (hereinafter referred to as BES) on January 8, 1997.

Although all Bank Pikko shares are listed on the Exchange, the 100 million shares of Bank Pikko owned by the founding shareholders cannot be traded within 8 months from December 10, 1996 to August 10, 1997. On that basis, Bank Pikko's shares traded on the JSE is a total of 28 million shares. The 11 million shares of Bank Pikko that can be traded are owned by institutional investors and employees do not sell their shares, meaning that the shares traded on the JSE are around 17 million shares.

In the period January to February 1997, the daily trading volume of these shares averaged 100,000 shares and the prices varied between Rp. 875 to Rp. 1,425.00. In mid-March 1997 someone made a stock transaction so that the total ownership of the concerned party reached 4,500,000 shares. The transaction was carried out through PT Multi Prakarsa Investama Securities using 13 other parties.

On April 7, 1997 Bank Pikko's stock trading became very active and the share price increased by 20 percent. Based on that, the JSX requested confirmation from Bank Pikko regarding the presence or absence of material matters regarding Bank Pikko that need to be disclosed to the public. Bank Pikko provided information to the JSX on April 8, 1997 before the first session of trading that there were no material matters that needed to be disclosed to the public. The information is then announced on the JSX at 10:30 WIB on the same day.

Even though it was informed about this, but the share price of Bank Pikko experienced a sharp increase in the first session and then continued in the second session until the JSX stock trading was stopped by the JSX at 14.24 WIB.

Director of PT. Multi Prakarsa Investama Securities, which is controlled by someone together with its affiliates, actively conducts Bank Pikko share transactions through PT Putra Saridaya Persada Securities (PSP Securities). On the basis of the request of the Director of PT. Multi Prakarsa Investama Securities, PT PSP Securities split the buy and sell order of Bank Pikko shares through another securities company.

The solution to the stock buy and sell order was carried out by the Director of PT. Multi Prakarsa Investama Securities with the intention that trading activities become active. On April 8, 1997, the total amount of purchases after deducting Bank Pikko's share sales was carried out by PT PSP Securities, PT. Multi Prakarsa Investama Securities and PT Danasakti Securities for the interests of their respective customers, including for the benefit of a shareholder and Director of PT. Multi Prakarsa Investama Securities reaches the

estimated number of shares available for trading, it appears that there is a problem of settlement of Bank Pikko transactions conducted on April 8, 1997.

Because Bank Pikko provides information that there are no material matters, speculators estimate Bank Pikko's share price to go down. Therefore, these speculators conduct Bank Pikko's share sale transactions even though they do not have such shares (short position) in the hope that the share price will drop. Although regulation V.D.3 prohibits Securities companies from receiving selling orders from customers who do not have shares, the reality is that they occur widely in the market. This is evident from the presence of 52 of 127 Securities Companies that have failed to surrender Bank Pikko's shares on the date of the settlement of the shares. Finally, on April 8, 1997, the JSX decided to temporarily suspend the trading of Bank Pikko shares at 2:24 p.m. WIB.

In connection with the above matters, BAPEPAM-LK takes the following actions:

Based on article 100 paragraph (2) letter d of Law Number 8 of 1995 concerning Capital Market, to the relevant shareholders and Director of PT. Multi Prakarsa Investama Securities is required to submit profits obtained from Bank Pikko share transactions during the period March to April 1997 amounting to Rp.1,000,000,000.00 (one billion rupiahs) and Rp.500,000,000.00 (five hundred million respectively) rupiah) to the state, no later than 14 (fourteen) days. Besides that, the Director of PT. Multi Prakarsa Investama Securities was asked to resign as director.

The stipulation is based on evidence indicating that the person concerned has carried out and / or actively involved, either directly or indirectly, in a large number of Bank Pikko shares sale and purchase transactions in which the execution is carried out by breaking orders through 9 Securities Companies for Directors PT Multi Prakarsa Investama Securities and to use names of at least 13 (thirteen) other Parties for the benefit of a shareholder. The transaction can create an image as if the activities of Bank Pikko's shares are active. This can affect other parties, directly or indirectly, to actively engage in Bank Pikko shares.

Based on Article 102 paragraph (2) letters a and b of Act Number 8 of 1995 concerning Capital Market juncto Article 61 and Article 64 Government Regulation Number 45, 1995 concerning the Implementation of Capital Market Activities, to PT PSP Securities and PT. Multi Prakarsa Investama Securities is given administrative sanctions.

These administrative sanctions are provided on the basis of evidence that the two Securities Companies have carried out and /

or actively involved, both directly and indirectly, in Bank Pikko's share sale and purchase transactions in substantial amounts for the benefit of customers that can create a pseudo image trading activity. The transaction was carried out by PT PSP Securities by breaking down buy and sell orders through 8 (eight) other Securities Companies on the orders of its customers, besides that PT PSP Securities itself also implemented as a sell or buy order for Bank Pikko's shares for the interest of the relevant customers.

Meanwhile, the transaction of Bank Pikko shares by PT. Multi Prakarsa Investama Securities is carried out by using the names of at least 13 (thirteen) other parties at the customer's request, which is also the controller of PT. Multi Prakarsa Investama Securities.

The two Securities Companies should not fulfill the customer's request, considering this can create an image as if there has been an active stock trading activity, besides being able to cause a sale and purchase that does not result in a change in ownership of shares.

On that basis, the two companies are subject to sanctions in the form of a fine of Rp 150,000,000.00 (one hundred fifty million rupiahs) which must be immediately deposited to the state treasury no later than 14 days. In addition, the two securities companies were warned to immediately carry out repairs or internal control systems and bookkeeping in accordance with the intended regulation V.D.3. Improvement of the internal control system and the organization of the bookkeeping of the securities company must be examined by an accountant registered at BAPEPAM-LK and the results must be submitted to BAPEPAM-LK within a period of no later than 90 days.

Based on Article 102 paragraph (2) letters a and b of Act Number 8 of 1995 concerning Capital Market juncto Article 61 Government Regulation Number 45 of 1995 concerning the Implementation of Capital Market Activities, to 54 (fifty four) Securities Companies that violate for the provisions of Regulation VD3 concerning Internal Control and Implementation of Bookkeeping of Securities Companies and or Regulation VE1 concerning Behavior of Securities Companies Conducting Broker-Dealer Activities. Securities Companies that violate the provisions Rule V.D.3 is given a warning and is required to improve the internal control system and the administration of books and to be examined by an accountant registered at BAPEPAM-LK. Furthermore, the results must be submitted to BAPEPAM-LK within no later than 90 (ninety) days.

Based on Article 102 paragraph (2) letters a and b of Act Number 8 of 1995 concerning Capital Market juncto Article 61

and Article 64 Government Regulation Number 45, 1995 concerning Implementation of Capital Market Activities, BEJ Directors are subject to administrative sanctions in the form of warnings in relation to the supervision of markets and Exchange Members. In this case, BAPEPAM-LK concluded that there were problems as follows:

- a. The JSX Board of Directors has not understood the concept and function as an institution that has the authority to regulate the implementation of its "self-regulatory organization" as mandated by Article 9 of Act Number 8 of 1995 concerning Capital Markets;
- b. There are weaknesses in the decision-making process in situations that require quick decision making;
- c. There are still weaknesses in the market surveillance system;
- d. There are weaknesses in the implementation of inspections and inspections of Exchange Members; and
- e. There is no adequate regulation in order to settle stock exchange transactions.

To avoid the occurrence of undesirable things as mentioned above in the future, the BEJ Directors have also been instructed to do the following:

- a. Conducting a thorough review of the market surveillance system so that there is a guarantee that the JSX Directors carry out activities as mandated by Law Number 8 of 1995 concerning the Capital Market;
- b. Make improvements to the inspection and inspection methods of the Exchange Members and take decisive steps and actions in the event of a violation of the laws and regulations in the Capital Market sector;
- c. Prepare regulations regarding clearing and settlement of transactions to obtain a guarantee that the transaction settlement is carried out in a timely manner; and
- d. Take necessary steps in order to resolve problems between customers and Exchange Members relating to Exchange Transactions including transactions in Bank Pikko shares.

5. Insider Trading Evidence

As mentioned above, there isn't any classification for insider trading evidence as stipulated on the Capital Market Law, in this matter were caused by every case took different evidence. For this Article purposes, evidence classification as the minimum could be "squared" into:

- a. Information from the public
- b. Information from the insiders
- c. Party who took the inside information
- d. Transaction were occurred by the insider's information
- e. Record of the transaction (with price record)
- f. Other record (any form)
- g. Witness (in every aspect)

Evidence in insider trading transaction should be regulated in Otoritas Jasa Keuangan regulation, such as Whatsapp conversation which already recorded, voice recording (should be legal under Indonesia Law), video recording and tapping phone call (likewise corruption cases in Indonesia using phone tapping by the Authority).

On the Bank Pikko case, Director PT Multi Prakarsa Investama Securities taken the execution part to do the sale and purchase of the shares and PT Putra Saridaya Persada Securities taken part too. Both of them was charged with administrative sanction from BAPEPAM (former name of Otoritas Jasa Keuangan) which ideally it should be using criminal code of Indonesia. Under this circumstance, insider trading provision couldn't fully function with the provision on Law Number 8 Year 1995, the question is why? It could be assumed that on business ethic would minimize criminal charges from the court (could be the business "good name" were the main reason).

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