



Legal Reform and Strengthening of The Financial Services Authority (OJK): Protecting Investors From Insider Trading in Indonesia

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Abstract

This study aims to analyze and critique the legal protections for investors against insider trading practices in Indonesia's capital market, while highlighting the importance of strengthening the Financial Services Authority (OJK) in ensuring legal justice for investors. Utilizing a normative juridical method, this study employs various approaches, including the statute approach and the conceptual approach. The findings of this study reveal that the regulation of protection against insider trading in Indonesia's capital market remains inadequate due to legal gaps in the Capital Market Law, which has not comprehensively addressed issues, particularly regarding secondary tippees. Thus, a revision of the Capital Market Law is necessary to address these legal gaps by adopting the theory of abuse and regulating secondary tippees. Consistent and strict law enforcement must be enhanced. Furthermore, strengthening the capacity of the OJK is essential, including the use of technologies such as big data analysis and artificial intelligence to detect transaction anomalies more effectively. In addition to strengthening the internal capabilities of the institution, cooperation with other parties, such as law enforcement agencies and international bodies, is also crucial.

Keywords: Financial Services Authority, Legal Protection, Investor, Insider Trading, Capital Market



Introduction

Indonesia is a developing country that is currently striving to achieve progress in all sectors to boost the nation's economic growth. To implement national economic development, a substantial amount of funding is required, and the large demand for funding cannot solely be met by the government through tax revenue and other receipts. This means there is an alternative source of financing for national economic development, namely through the capital market.¹

The role of the capital market is crucial, as it serves as a platform where companies and other institutions can meet with the common goal of obtaining capital from the public to expand their businesses. In order to acquire capital, these companies and institutions may issue stocks or bonds. Investors can then participate by financing the purchase of various financial instruments, either through mutual funds or by making direct investments in the capital market. This creates an environment where public funds are allocated to support the growth and development of companies and projects in need of capital.²

The capital market is a vital source of long-term financing for companies. However, in the contemporary era, the role of the capital market is not limited to providing funds; it also serves as a means for the public to access investment opportunities and improve their welfare. The capital market has become the center of economic activity, facilitating the trade of securities, such as stocks and bonds, between investors. Through participation in the capital market, the public has access to various financial instruments, which are expected to provide profitable returns.³

With the development of technology and easier access to information regarding the capital market, there has been a positive impact with an increase in the number of investors in Indonesia. In a capital market seminar held in Surabaya

¹ Reva Amelia, "Prosedur penanganan tindak pidana insider trading yang dilakukan oleh korporasi," 2021, hal 1.

² Juniaty Ismail, "Edukasi Dan Motivasi Menjadi Investor Di Pasar Modal Syariah (Studi Kasus Galeri Investasi Syariah Iain Sultan Amai)," *Balanca : Jurnal Ekonomi Dan Bisnis Islam* 2, no. 2 (3 Mei 2021): 27–34, <https://doi.org/10.35905/balanca.v2i02.1495>.

³ Bagus Putu Wisnu Mandala, "Konsekuensi Hukum Bagi Emiten Terhadap Kegiatan Insider Trading," *Jurnal Kertha Semaya* Vol. 11, no. No.3 (2023): 523.

on May 24, 2022, with the theme "Capital Market as an Investment Option," Head of the Capital Market Supervisory Executive of OJK, Hoesen, explained that during the pandemic, the number of capital market investors continued to rise. By the end of April 2022, the number of retail investors in the capital market had reached 8.62 million, or about 15.11 percent, compared to data from December 30, 2021. This increase predominantly involved millennials under 30 years old, who accounted for 60.29 percent.⁴ This demonstrates that the millennial generation has made a significant contribution to the growth of capital market investors in Indonesia during the pandemic. The increase in the number of investors, especially among millennials, indicates a positive trend in the capital market. The presence of young investors, who are likely more accustomed to current information access, contributes significantly to market dynamics. However, to mitigate the risks associated with fraudulent investments that could harm the public, preventive measures need to be taken.

In the context of the capital market, investors play the role of legal subjects who entrust their funds to be managed in the capital market. Therefore, legal protection is a right inherent in investors as a form of recognition of their existence and contributions in the capital market. The existence of companies in the capital market greatly depends on investor trust. For this reason, the role of regulation in the capital market is crucial. Integrity-based regulations not only create a safe and fair environment but also provide protection to investors. Investors need guarantees and legal protection for the assets they place in the capital market, ensuring they feel secure and confident in participating in investment activities.⁵

In an effort to boost capital market growth, regulations that favor justice and investor protection are key. This protection includes security against unethical practices, market manipulation, and the abuse of information. Thus, investors can feel comfortable and confident in engaging in investment activities, which in turn will support the growth and development of the capital market as a whole. Through transparency of information, legal protection, and integrity-based regulations, the

⁴ "Otoritas Jasa Keuangan," dalam <https://www.ojk.go.id/id/berita-dan-kegiatan/siaran-pers/Pages/Jumlah-Investor-Ritel-Pasar-ModalTerus-Meningkat.aspx>, 2024.

⁵ Muhammad Hajoran Pulungan, "Penegakan Hukum dalam Prinsip Keterbukaan Informasi di Pasar Modal," *Jurnal Ilmu Hukum STIH Litigasi* Vol. 2, no. No. 1 (2018): hlm. 54.

capital market can become an attractive investment platform, providing benefits both for companies and investors. By creating a transparent and fair environment, the capital market can become a key pillar in advancing the economy and making a positive contribution to national economic growth.

Overall, to ensure the sustainability and integrity of the capital market in the future, it is essential to continually evaluate and improve existing regulations, enhance the professionalism of market participants, and develop a trading system that is responsive to technological developments. In this way, the capital market can become a healthy, efficient, and reliable environment for stakeholders. A legal issue arising from the gaps in the provisions of Law No. 8 of 1995 on the Capital Market is the lack of regulation concerning insider trading perpetrators, particularly secondary tippees. A secondary tippee is a party who does not receive information directly from the insider (insider trader) but through a tippee who acts as an intermediary. This gap in the regulation creates a serious challenge in addressing insider trading practices involving secondary tippees. In reality, in many cases in the capital market, especially insider trading cases, the difficulty of proof becomes a serious challenge, preventing these cases from reaching the courts. The capital market authorities, such as the Capital Market Supervisory Agency (Bapepam), face difficulties in investigating and conducting inquiries into crimes in the capital market.

Bapepam, whose authority has now been transferred to the Financial Services Authority (OJK) based on Law No. 21 of 2011, plays a role in fostering, regulating, and supervising the capital market. OJK, as the successor of Bapepam, is responsible for providing legal protection to investors, both in the form of preventive measures and imposing sanctions (repressive actions).⁶ The ambiguity of regulations regarding secondary tippees creates a legal gap that can be exploited to avoid law enforcement against those who receive information indirectly. The existence of secondary tippees becomes a complex issue because they are formally not directly involved with insiders, making it difficult to impose legal sanctions.

⁶ Nikmah Mentari, "Pertanggungjawaban Individu Atas Ganti Rugi Disgorgement Yang Melibatkan Emiten," *Arena Hukum* Vol. 13, no. No. 3 (2020): hlm 507.

Several previous studies on this topic include research conducted by Fajar Tri Pamungkas,⁷ which examines the role of OJK as an institution for overseeing fraud in the investment business from the perspective of Islamic Economic Law. Then, Dian Husna Fadila⁸ highlights the role of OJK as an independent institution in handling fictitious investment cases that harm investors in Indonesia.

Rohmatun et al⁹. discuss the role of OJK in monitoring and preventing illegal investments that are rampant in Indonesia. Lalu Ahmad Rendi Pradita¹⁰ explores OJK's responsibility in providing legal protection to investors on the Indonesia Stock Exchange. Although the above studies have discussed the role of OJK in investor protection and insider trading, your article offers novelty by focusing on strengthening the capacity and authority of OJK in the context of investor protection and highlighting the issue of the legal gap regarding protection for investors against insider trading perpetrators, specifically secondary tippees.

This is important to provide a clearer and more comprehensive legal basis related to the involvement of secondary tippees in insider trading practices. This research could include an in-depth study of the development of capital market practices, a comparative analysis with regulations in other countries, and the application of relevant legal principles.

Research Method

This study is normative legal research, which focuses solely on written regulations. Another term for normative legal research is doctrinal legal research,

⁷ Fajar Tri Pamungkas dan Ahmad Arif Zulfikar, "Peran Otoritas Jasa Keuangan (OJK) dalam Mengawasi Adanya Fraud dalam Bisnis Investasi dalam Perspektif Hukum Ekonomi Islam," *Jurnal Penegakan Hukum dan Keadilan* 2, no. no 1 (27 April 2021): 19–40, <https://doi.org/10.18196/jphk.v2i1.9507>.

⁸ "Peran Otoritas Jasa Keuangan (OJK) dalam Perlindungan Hukum Bagi Investor atas Dugaan Investasi Fiktif," *LAW REFORM* 11, no. no 2 (30 September 2015), <https://doi.org/10.14710/lr.v11i2.15768>.

⁹ Rohmatun Rohmatun et al, "Restu Argarinjani, dan Endang Kartini Panggiarti, "Peran Otoritas Jasa Keuangan (OJK) Dalam Pengawasan Dan Pencegahan Investasi Ilegal Di Indonesia," *Jurnal Maneksi (Management Ekonomi Dan Akuntansi)* 12, no. no 2 (2 Juni 2023), <https://doi.org/10.31959/jm.v12i2.1472>.

¹⁰ Lalu Ahmad Rendi Pradita, "Tanggung Jawab Otoritas Jasa Keuangan dalam Memberikan Perlindungan Hukum terhadap Investor di Bursa Efek Indonesia" (Mataram Nusa Tenggara Barat, Fakultas Hukum Universitas Mataram, 2018).

which is also referred to as library research or document study.¹¹ Therefore, this research is classified as juridical-normative research, utilizing both the statute and conceptual approaches. The data used in this research is secondary data, consisting of primary legal materials, such as Law No. 8 of 1995 on the Capital Market, Law No. 25 of 2007 on Investment, Law No. 21 of 2011 on the Financial Services Authority, Law No. 40 of 2007 on Limited Liability Companies. The secondary legal materials include research reports, journals, theses, dissertations, and other scholarly writings, while tertiary legal materials include dictionaries. The data collection technique in this study involves literature review through document collection. The gathered data will be analyzed descriptively.

Definition of Investor, Insider Trading, and Legal Protection of Investor

According to Law No. 25 of 2007 on Investment, an investor is defined as an individual or a business entity that engages in investment activities. This investment can be either domestic or foreign. In other words, an investor is a party that provides capital to develop projects or businesses, whether domestically or internationally. This definition encompasses various types of investors, ranging from individuals to large corporations, with the objective of obtaining profits or developing businesses through investment.

In principle, every business activity involves two mutually supportive instruments: the business or company manager and the capital provider for the company's needs¹². The capital provider, often referred to as the investor, is the party that places surplus funds into investment activities in a lawful and productive business sector.

Investors play a crucial role as fund providers that support a company's operations. They place their funds in the form of investments, whether in stocks, bonds, or other financial instruments, with the expectation of receiving returns commensurate with the level of risk they undertake. The investments made by

¹¹ Pm. Agus Santoso, "Kajian Tentang Manfaat Penelitian Hukum Bagi Pembangunan Daerah," *Yuriska : Jurnal Ilmiah Hukum* 3, No. 2 (19 Oktober 2017): 1–22, <https://doi.org/10.24903/Yrs.V3i2.177>.

¹² Jhoni Lie, "Perlindungan Hukum Terhadap Investor Dalam Transaksi Pasar Modal Akibat Praktik Penipuan," *Jurnal Ilmu Hukum Prima* Vol. 6, no. No.2 (2023): hlm. 237.

investors enable companies to acquire the necessary funds for expansion, innovation, product development, or financing day-to-day operational activities.¹³

Thus, the existence of investors as key players in the capital market underscores their significant role in the financial and economic ecosystem as a whole. Therefore, protecting the interests and rights of investors is essential in maintaining trust and stability in the capital market.

The presence of effective capital market laws also helps create a conducive and fair business environment for all parties involved. This will encourage the growth of the capital market by attracting new investors and increasing public participation in investing their funds to support sustainable economic development.

Therefore, the main goal of establishing capital market laws is to create a safe, fair, and attractive investment environment for investors, thus enabling the mobilization of funds necessary to support economic growth and productive infrastructure development within society.

Legal protection for investors from potential losses due to violations in the capital market sector is crucial for maintaining trust and stability in the capital market¹⁴. Legal entities that have been established are responsible for adhering to the applicable capital market regulations and standards, as well as providing accurate and transparent information to investors. In this way, investors can receive adequate protection and feel more confident in making investments in the capital market.

Meanwhile, insider trading refers to the practice in which an individual or party within a company, known as corporate insiders, engages in stock or securities transactions using confidential or exclusive information that they possess. This information is often not known to the general public and is used by the insider to gain an unfair or improper advantage in the capital market.¹⁵

¹³ Burhanuddin S, *Pasar Modal Syariah* (Jakarta: UII Press, 2008) 41.

¹⁴ Riezdiani Restu Widyoningrum, "Perlindungan Hukum Pemegang Saham Minoritas Terhadap Implikasi Praktik Insider Trading Dalam Perdagangan Saham Di Pasar Modal," *Privat Law* Vol. V, no. No 2 (Juli 2017): 106.

¹⁵ Budi Untung, *Hukum Bisnis Pasar Modal* (Yogyakarta: CV Andi Offset, 2011)174.

Insider trading can occur when corporate insiders use privileged information obtained from their position or special access within the company to predict the movement of stock prices or specific securities. They can then use this information to buy or sell shares before the information is made public, thus gaining an unlawful advantage or causing harm to other investors.

Insider trading is generally prohibited or strictly regulated by capital market authorities because it can undermine the integrity and trust in the capital market. This is because insider trading practices can lead to unfairness for other investors, harm market efficiency, and disrupt the balance of information that should be equitable for all market participants.

Strengthening the Financial Services Authority (OJK) in Protecting Investors in Indonesia

The Financial Services Authority (OJK) plays a crucial role in maintaining the stability and integrity of Indonesia's capital market while providing protection to investors. As an institution regulated by Law No. 21 of 2011 on the Financial Services Authority, OJK is responsible for implementing an integrated regulatory and supervisory system in the financial services sector, including the capital market. Article 6 of the OJK Law states that one of the primary goals of OJK's establishment is to protect the interests of consumers and the public, which in the context of the capital market, means protecting investors from various violations such as insider trading and market manipulation.

OJK has broad authority to regulate and supervise capital market activities. One of OJK's main focuses is to prevent insider trading, which often undermines fairness and transparency in the capital market. According to Shara, insider trading is a form of capital market crime that is complex because it involves the use of material information that has not yet been disclosed to the public for personal gain.¹⁶ In this regard, OJK has the responsibility to ensure that regulations related

¹⁶ Made Cinthya Puspita Shara, "Pendekatan Hukum Pada Pengaturan Insider Trading Dalam Kaitannya Dengan Penegakan Di Dunia Pasar Modal," *Litigasi* 22, no. no 1 (19 April 2021): 39–70, <https://doi.org/10.23969/litigasi.v22i1.3856>.

to insider trading are effectively enforced, including through investigation and strict law enforcement.

As a regulator, OJK also plays a role in imposing both administrative and criminal sanctions on violators of capital market regulations. This law enforcement is essential to maintaining investor trust. Strengthening institutions such as OJK can provide a deterrent effect on capital market criminals while creating a safer and more attractive investment environment.¹⁷

In carrying out its duties, OJK adopts various strategies to protect investors, including strengthening regulations, enhancing financial literacy, and providing mechanisms for reporting violations. Strong regulations form the foundation of investor protection. For example, OJK strives to adopt more modern approaches, such as the misappropriation theory applied in the United States.¹⁸ This approach allows individuals who use confidential information for personal gain, even if they are not formal insiders, to be subject to legal sanctions.

In addition, financial literacy is a key pillar of investor protection. According to OJK's 2022 report,¹⁹ the increase in the number of retail investors in Indonesia, particularly among millennials, requires ongoing education to ensure they understand investment risks. This literacy program also helps investors recognize signs of market manipulation and insider trading practices.

Although OJK has strong authority, its implementation still faces various challenges, especially in proving insider trading cases. As pointed out by Widyoningrum, the complexity of transactions in the capital market and the lack of transparency are often major obstacles.²⁰ Therefore, strengthening OJK's capacity,

¹⁷ "Insider Trading dan Kendalanya Di Pasar Modal," *Business Law*, 18 Juli 2021, <https://business-law.binus.ac.id/2021/07/18/insider-trading-dan-kendalanya-di-pasar-modal>.

¹⁸ Fabian Jonathan, Fajar Sugianto, dan Tomy Michael, "Comparative Legal Analysis of The Competence of The Indonesia's Financial Services Authority and Monetary Authority of Singapore on The Enforcement Of Insider Trading Laws," *Journal of Central Banking Law and Institutions* 2, no. 2 (25 Juli 2023): 283–300, <https://doi.org/10.21098/jcli.v2i2.24>.

¹⁹ "'Jumlah Investor Melonjak 370 Persen, Bos OJK: Jangan Hanya Kejar Yield Tinggi Tanpa... | tempo.co,' *Tempo*, Agustus | 14.00 WIB 2022, <https://www.tempo.co/ekonomi/jumlah-investor-melonjak-370-persen-bos-ojk-jangan-hanya-kejar-yield-tinggi-tanpa--308228>."

²⁰ "Riezdiani Restu Widyoningrum dan Yudho Taruno Muryanto, 'Perlindungan Hukum Pemegang Saham Minoritas Terhadap Implikasi Praktik Insider Trading Dalam Perdagangan Saham Di Pasar Modal,' *Jurnal Privat Law* 5, no. 2 (1 Juli 2017): 102–8, <https://doi.org/10.20961/privat.v5i2.19402>."

including the use of technologies such as big data analysis and artificial intelligence, is necessary to more effectively detect transaction anomalies.

Moreover, revisions to existing regulations are an urgent need. The lack of clarity regarding the definition of "secondary tippee" in Law No. 8 of 1995 on the Capital Market is one legal gap that can be exploited by insider trading perpetrators.²¹ By expanding the scope of regulations, OJK can more effectively protect investors from various forms of violations.

OJK's success in protecting investors does not only depend on strengthening the institution internally but also on cooperation with other parties such as law enforcement agencies and international institutions. Cross-sector and cross-border collaboration is essential given the global nature of the modern capital market. Additionally, there must be a clear compensation mechanism for investors who are harmed due to capital market violations. This would provide a sense of justice while increasing public trust in the capital market.

In order to create an ideal legal framework, OJK should also conduct regular evaluations of the effectiveness of regulations and law enforcement. By involving input from various stakeholders, including academics, practitioners, and investors, OJK can ensure that the policies implemented remain relevant to the dynamics of the market.

The Financial Services Authority plays a strategic role in protecting investors in Indonesia's capital market through regulation, supervision, and firm law enforcement. However, to face increasingly complex challenges, OJK's capacity needs to be strengthened, regulations need to be revised, and broader collaboration is required. With these measures, OJK is expected to create a more just, transparent, and integrated capital market, providing maximum protection to investors.

²¹ Yosia Clementino Moningga dan Ariawan Gunadi, "Analisis Perlindungan Hukum Atas Kerugian Investor Publik Akibat Praktik Insider Trading Berdasarkan Hukum Positif Indonesia," *UNES Law Review* 6, no. 2 (7 Desember 2023): 4540–47, <https://doi.org/10.31933/unesrev.v6i2.1231>.

Legal Reformulation of the Regulation of Investor Protection Against Insider Trading in Indonesia's Capital Market

Insider trading has become one of the most notorious crimes in the capital market due to its nature, involving the use of confidential or material information that is only available to insiders of a company. The term "insider trading" refers to the trading of stocks or securities by individuals who have access to information that has not yet been publicly disclosed, such as executives, directors, or major shareholders within a company.²²

The most well-known and harmful capital market crime today is fraud, the dissemination of false or misleading information, and market manipulation conducted by parties who exploit insider information, commonly known as insider trading.

Through stringent enforcement of the insider trading ban, Indonesia's capital market is committed to maintaining market integrity and protecting investor interests. This aligns with global efforts to establish higher standards in financial practices and ensure the sustainability of a healthy and efficient capital market.²³

Article 95 of the Law further elaborates on who is considered an "insider" prohibited from engaging in insider trading. This definition includes several categories of individuals who have access to or the potential to obtain sensitive insider information.

1. **Commissioners, Directors, or Employees of the Issuer:** This includes officials and employees working within listed companies who hold positions that enable them to access confidential company information.
2. **Major Shareholders of the Issuer or Public Company:** This refers to individuals or entities holding significant shares in the issuer or public company, thereby potentially gaining access to sensitive internal information.
3. **Individuals Whose Position, Profession, or Business Relationship with the Issuer or Public Company Enables Them to Access Insider Information:** This includes individuals who, through their professional roles or business

²² Sypranus A, "Penegakan Hukum Terhadap Insider Trading Di Pasar Modal Dan Upaya Perlindungan Terhadap Investor" (Cililitan: Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia RI, 2011), hlm 10.

²³ Edy Santoso, *Pengaruh Era Globalisasi Terhadap Hukum Bisnis Di Indonesia* (Jakarta: Kencana, 2018)205.

relationships, have the opportunity to access confidential information not available to the general public.

4. **Parties Who, Within the Last 6 Months, Were No Longer in the Positions as Defined in Subsections a, b, or c Above:** This indicates that the insider trading prohibition remains in effect for individuals who have recently left positions that allowed them to access insider information, even after they are no longer directly involved with the company.

This explanation provides a broader scope regarding who is prohibited from engaging in insider trading, aiming to close gaps and prevent the misuse of confidential information that could harm public interests and the integrity of the capital market. Indonesia's Capital Market Regulations not only prohibit direct insider trading but also prohibit efforts to influence others to engage in transactions or tip others who may potentially exploit confidential information. Article 96 of Law No. 8 of 1995 on the Capital Market explicitly addresses this, stating: "Insiders, as described in Article 95, are prohibited from influencing others to buy or sell securities related to insider information." This aims to prevent the spread of insider trading practices through the direct influence of individuals who have access to sensitive information.

The objective of this prohibition is to strengthen the integrity and fairness of the capital market by preventing practices that could harm investor interests and undermine public trust in the market. By implementing this rule, capital market regulators aim to create a fair, transparent, and trustworthy trading environment for all market participants, as well as increase investor confidence in the security and integrity of the market. In addition to regulations governing insider prohibitions, Capital Market Regulations also address the prohibition against parties attempting to obtain insider information unlawfully, as emphasized in Article 97 of Law No. 8 of 1995 on the Capital Market.

The Capital Market Law (UUPM) still follows the classical theory in determining insiders, where only individuals or entities that have a fiduciary duty to the company are considered insiders. Others or external parties who do not have such a fiduciary relationship are not categorized as insiders according to the UUPM. In determining insider trading perpetrators, two aspects must be considered:.

1. First, from the subject (actor) perspective Individuals or entities that have access or positions allowing them to obtain confidential company information. This includes commissioners, directors, employees, and major shareholders of a listed company.

From the perspective of the perpetrator, a subjective analysis can be conducted based on two main theories: the fiduciary duty theory and the misappropriation theory. Both theories provide frameworks for evaluating an individual's behavior in the context of insider trading.²⁴

- a. Fiduciary Duty Theory, This theory emphasizes the trust relationship between the insider trading actor and the other parties affected by their actions. An individual is considered to have a fiduciary duty if they have the capacity and responsibility to act on behalf of or for the benefit of another, and the other party places significant trust in them. In the context of the capital market, this means that individuals such as directors, commissioners, or employees of a company who have access to confidential information have a moral and legal obligation not to misuse this information for personal gain or for interests that conflict with the interests of the company or investors.
- b. Misappropriation Theory, This theory highlights the behavior of individuals who misuse their position or access to confidential information for personal gain, even if they are not direct members of the company involved. In this case, the individual may not have a fiduciary duty to the company or investors, but they still have a moral and legal obligation not to misuse the information. An example of actors who might be involved under the misappropriation theory includes consultants, investment advisors, or others who gain access to confidential company information through business or professional relationships.²⁵

Issuers and institutions involved in the capital market, due to their fiduciary duty to shareholders and investors, are considered insiders under the fiduciary duty theory. They have access to sensitive information that can affect stock prices and the capital market as a whole, thus having the opportunity to engage in insider trading practices.²⁶

Based on the misappropriation theory, the concept of insider trading becomes broader because it does not only involve individuals with a fiduciary duty to the company, but also includes any person who uses non-public information to

²⁴ Munir Fuady, *Doktrin-Doktrin Modern Dalam Corporate Law dan Eksistensinya Dalam Hukum Indonesia* (Bandung: Citra Aditya Bakti, 2010) 32.

²⁵ Bismar Nasution, "Tanggung Jawab Direksi dan Komisaris Dalam Pengelolaan Perseroan Terbatas Bank" (Makalah yang Disampaikan pada Seminar Sehari: Tanggung Jawab Pengurus Bank dalam Penegakan dan Penanganan Penyimpanan di Bidang Perbankan Menurut Undang-undang Perseroan Terbatas dan Undang-undang Perbankan, diselenggarakan oleh Bank Indonesia dan Forum Komunikasi Direktur Kepatuhan Perbankan, Surabaya, 2008), hlm 5.

²⁶ *Ibid* 264.

trade stocks. Thus, anyone who exploits confidential information for personal gain, even if they do not have a direct relationship with the company, can be categorized as an insider.²⁷

The application of the misappropriation theory makes the concept of insider trading more inclusive, so that anyone who uses confidential information for stock trading can be considered an insider²⁸. However, the Capital Market Law does not explicitly regulate individuals who receive indirect information from insiders but focuses more on individuals who use such confidential information for stock trading.

Second, from the perspective of the object (the act) The actions or behaviors performed by the perpetrator that lead to the misuse of confidential information for personal or third-party gain. This can include practices such as insider trading, market manipulation, the spreading of negative rumors, and other practices that harm the integrity and fairness of the capital market.

A combined approach between fiduciary duty theory and misappropriation theory is an effective way to define the category of insiders under the capital market law. By integrating both theories, the Capital Market Law can be more effective and efficient in identifying insiders who have access to sensitive information and may potentially engage in insider trading.

By implementing this combined approach, the Capital Market Law can be more effective in identifying and addressing insider trading practices and maintaining the overall integrity of the capital market. It also helps ensure that all parties involved in the capital market, including related institutions, act in good faith and adhere to high standards of conduct in managing and overseeing the capital market.

The lack of successful insider trading cases uncovered and prosecuted by the Capital Market Supervisory Agency (Bapepam-LK) and the Financial Services Authority (OJK) since the enactment of the Capital Market Law (UUPM) raises concerns. Several issues that may contribute to this include:

1. Substance of Articles 95, 96, 97, and 98 of UUPM: There may be doubts or

²⁷ *Ibid* 55.

²⁸ Bahtiar, "Pengaturan Kaidah Manajemen Risiko Atas Penawaran Saham Berbasis Teknologi Informasi," *Jurisdictie* Vol 3, no. No 2 (t.t.): hlm 85.

ambiguities regarding the material substance of the articles regulating insider trading in the UUPM, which could create obstacles. Unclear interpretations or the scope of these articles can make law enforcement more challenging.

2. **Inability to Detect:** Insider trading practices are often difficult to detect due to their secretive nature and involvement with confidential information. The limitations in resources and technology available to regulators can also constrain their ability to effectively monitor the market.
3. **Lack of Evidence:** In insider trading cases, strong and reliable evidence is often difficult to obtain. Confidential material information is typically concealed, and perpetrators often attempt to hide the traces of their transactions, making it difficult to build a solid case.
4. **Legal and Procedural Obstacles:** Complicated and convoluted legal processes can also become obstacles in enforcing the law against insider trading. Inadequate evidence or complex legal procedures may hinder the progress of investigations and prosecutions.
5. **Limited Public Involvement:** Sometimes, there may also be limitations in public participation in exposing insider trading cases. Factors such as fear of retaliation or lack of awareness about the importance of reporting fraud can contribute to the low number of cases being uncovered.

By identifying these issues, regulators and capital market authorities can work to enhance the effectiveness of law enforcement against insider trading by strengthening regulations, improving market surveillance, and increasing awareness of the importance of compliance with capital market laws.

Although the explanation of Article 95 of the Capital Market Law (UUPM) may seem clear at first glance, there is still confusion regarding the definition of “employees of the issuer.” This may be due to the lack of in-depth explanation in the article about who exactly is meant by “employee of the issuer.”

While the definitions of Commissioner and Director are clearly regulated in Law No. 40 of 2007 on Limited Liability Companies (UUPT), the status of an issuer’s employee is not as clear within the context of the UUPM. An employee of the issuer can include various individuals within the company, such as administrative staff, financial analysts, or even other employees who have access to sensitive company information.

The lack of clarity in the definition of an issuer’s employee can lead to confusion and uncertainty in the application of Article 95 of the UUPM. This could be a serious issue in law enforcement and surveillance of capital market

practices, as it may create a gap for undetected violations if there is no clear classification of who qualifies as an employee of the issuer.

Therefore, there is a need for more detailed clarification or a more precise definition of an issuer's employee in the UUPM or its implementing regulations. This would help ensure consistency and clarity in the enforcement of the rules and prevent misuse or confusion regarding the status of an issuer's employee in the context of capital market law.

The ambiguity regarding the definition of an issuer's employee in Article 95 of the UUPM could lead to varied interpretations among different parties. A question that may arise is whether non-permanent employees are also considered insiders, or whether this article only applies to permanent employees. If the article only refers to permanent employees, then the UUPM would not be able to impose sanctions on non-permanent employees who are involved in securities transactions based on material information that has not been publicly disclosed and was obtained inadvertently, not through an insider.²⁹

The lack of clarity in Article 96 of the Capital Market Law (UUPM) regarding the obligations and prohibitions for Tippee III, which refers to parties who receive information from an Insider (Tippee II) and then use that information to execute securities transactions, indeed presents a gap that needs to be addressed. Although this article regulates the Insider's obligation to exercise caution in disseminating material information and prohibits influencing others in securities transactions, there is no specific provision addressing the responsibility of Tippee III in such cases.

This ambiguity raises questions about whether Tippee III can be prosecuted for insider trading. Can Tippee III be considered in violation of the law if they use material information received indirectly from an Insider to engage in securities transactions? This remains an unanswered issue and can lead to confusion in the application of insider trading rules in the capital market. To resolve this uncertainty, further clarification or revision of the UUPM is needed to regulate the responsibilities of Tippee III in such cases. More detailed and

²⁹ Najib A, *Gisymar, Insider Trading dalam Transaksi Efek* (Bandung: PT Citra Aditya Bakti, 1999)74.

specific rules would help ensure that all parties involved in the use of material non-public information are treated fairly and consistently according to the applicable capital market laws. This would increase legal certainty and minimize the potential for misuse of information, thereby strengthening the integrity and transparency of the capital market as a whole.

The ambiguity in Article 97 of the UUPM regarding how to handle situations where an individual engages in securities transactions based on material information acquired inadvertently or accidentally is also an issue that requires attention. This article does not provide specific guidance on the responsibilities or sanctions for individuals who acquire material information unintentionally and then use that information for securities transactions.

For example, if someone accidentally overhears material confidential information and then uses it to execute securities transactions, it highlights a gap in capital market regulations. Although this action may be considered unjust enrichment because it harms the issuer and other shareholders, if no clear rule governs it, such an individual may not be subject to insider trading penalties.

To address this issue, changes or additions to capital market regulations are needed to cover situations where individuals use material information obtained inadvertently or by chance. Stronger and clearer law enforcement against such practices is essential to ensure better integrity and transparency in the capital market. Additionally, educating the public about the importance of compliance with capital market rules and business ethics can help prevent practices that undermine the capital market as a whole.

Non-compliance with Article 98 of the UUPM, which prohibits securities companies or parties working with securities firms possessing insider information from conducting securities transactions solely for the benefit of their clients, is indeed a serious issue in capital market law enforcement. In practice, this rule is often exploited by insiders planning to engage in insider trading.

Insiders intending to engage in insider trading often choose brokers with special or affiliated relationships with them. By doing so, they can ensure that their securities transactions are not easily detected by regulatory authorities. The special or affiliated relationship between the insider and the broker creates a

loophole for conducting illegal transactions, as the broker may execute the transaction without much scrutiny or oversight³⁰.

To address this issue, stronger law enforcement and market surveillance are needed. Regulators must increase oversight of brokers and securities companies to ensure they comply with Article 98 of the UUPM and are not involved in insider trading practices. Additionally, it is necessary to strengthen the rules and sanctions for insider trading offenders and brokers involved in practices that harm the integrity of the capital market.

Imposing restrictions on insiders to buy or sell significant amounts of shares, as well as requiring them to provide written explanations for such transactions, is a step that can increase transparency and accountability in the capital market. This can also help reduce the risk of harmful insider trading practices. However, it is true that regulations related to the role of securities companies in preventing insider trading are still incomplete. More detailed and clear regulations are needed regarding the obligations and responsibilities of securities companies in monitoring their clients' activities and preventing insider trading. This lack of clarity could complicate law enforcement and pose new challenges for regulators in handling insider trading cases.

Therefore, the government and capital market authorities need to revise or add to existing regulations to strengthen the role of securities companies in preventing insider trading. This can also be accompanied by enhancing surveillance and providing training for securities company staff to better understand and recognize signs of insider trading and take appropriate preventive actions. By doing so, the capital market can become fairer, more transparent, and trustworthy for all market participants.

The second challenge in the failure to uncover insider trading cases lies in the fact that the regulations still adhere to the classical theory within the Capital Market Law (UUPM), specifically the Fiduciary Duty theory. Black's Law Dictionary defines Fiduciary Duty as: "(1) A duty of utmost good faith, trust,

³⁰ Anyta, "Voluntary Corporate Governance Disclosure (VCGR) Versi Investor dan Determinan VCGR di Indonesia," *Jurnal Reviu Akuntansi dan Keuangan* Vol.2, no. No. 2 (Oktober 2012): hlm 310.

confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); (2) a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another)."³¹.

In practice, however, the capital market is often not fully efficient, and stock prices do not always reflect all available information.³² Insider trading can distort the balance of the market by providing unfair advantages to those who have access to material non-public information. Thus, the regulation still following the classical theory in the UUPM may not be sufficiently effective in addressing the increasingly complex and sophisticated practices of insider trading. More modern and proactive regulations are needed to ensure that the capital market operates fairly, transparently, and efficiently. Changes to the UUPM that accommodate more modern theories and strengthen rules related to insider trading could enhance regulators' ability to detect and uncover insider trading cases. This would also send a clear message to market participants that insider trading practices will not be tolerated and will be subject to strict sanctions.

Additionally, a more holistic approach involving collaboration between regulators, financial institutions, and law enforcement agencies is also needed to overcome obstacles in uncovering insider trading cases. With these measures, it is expected that the disclosure and enforcement of insider trading cases can be improved, thus maintaining the integrity and trust in the capital market.

This definition emphasizes that the board of directors has the duty to perform their tasks to the best of their ability, known as the duty of diligence. They must act as representatives of the company, applying high ethical and economic standards in their managerial functions and as corporate representatives. The UUPT, in this case, indirectly adopts the Fiduciary Duty Theory, as seen in Article 79 paragraph 1 and Article 82. Based on these two

³¹ Agus Riyanto, Agus Riyanto dan Suwardi, "Insider Trading Dan Kendalanya Di Pasar Modal," dalam <https://business-law.binus.ac.id/2021/07/18/insider-trading-dankendalanya-di-pasar-modal/>.

³² Tatang Ary Gumanti, "Bentuk Pasar Efisien Dan Pengujiannya," *Jurnal Akuntansi & Keuangan* Vol. 4, no. No. 1 (t.t.): hlm 56.

articles, it can be concluded that the board of directors has dual authority: to manage and exercise fiduciary responsibility for the company.³³

Therefore, as an extension of the company, the board of directors has both a moral and legal responsibility to act in the best interests of the company and shareholders. They must make decisions based on careful ethical and economic considerations, taking into account their impact on all stakeholders, including employees, customers, and the broader community.

In the context of the Fiduciary Duty Theory, the board of directors is considered a fiduciary of the company and must act in good faith, honesty, and integrity. They must avoid conflicts of interest and prioritize the company's interests above personal or small group interests. This is essential to ensure that the company is managed responsibly and sustainably, so it can achieve its long-term goals and provide optimal value to all stakeholders.

The scope of insiders subject to fiduciary duty in the Capital Market Law (UUPM) is relatively limited. Article 95 of the UUPM restricts the definition of insiders to include commissioners, directors, or employees of the issuer; major shareholders of the issuer; individuals who have special access due to their position or profession, or due to their business relationships with the issuer or public company; and parties who were previously insiders within the last six months. However, in reality, many suspected insider trading cases involve perpetrators from outside parties or those who are not included in the definition of insiders according to Articles 95 and 97 of the UUPM. These may be third parties who receive material information unlawfully and use it for personal gain in securities transactions.

This legal gap, known as a loophole, has indeed become an obstacle in efforts to enforce the law against insider trading. The limitation of the insider definition, which only considers perpetrators with fiduciary duty, means that the UUPM can only address violations related to specific positions within a company. To address this issue, an evaluation and revision of the UUPM are

³³ Bismar Nasution, "Pertanggungjawaban Direksi dalam Perspektif Business Judgment Rule," dalam *diakses dari* <https://bismarnasution.com/pertanggungjawaban-direksi-dalam-perspektif-business-judgment-rule/> diakses pada 13 Maret 2024., t.t.

needed to broaden the definition of insiders and strengthen provisions related to insider trading. These steps will help improve the effectiveness of law enforcement, reduce legal gaps, and maintain the integrity of the capital market as a whole.

The misappropriation theory, adopted by the United States, takes a different approach to handling insider trading cases. According to Black's Law Dictionary, the misappropriation theory states that anyone who wrongfully uses confidential information to buy or sell securities in violation of the duty they owe to the source of the information is guilty of securities fraud. With this approach, the misappropriation theory places emphasis on protecting market integrity and investor confidence by prohibiting the use of confidential information for personal gain. This makes it a powerful tool in enforcing the law against insider trading in the United States.

Examining how law enforcement agencies in the capital market sector handle suspected insider trading cases is a key factor in measuring the success of uncovering and addressing such cases. This can become the third challenge in handling insider trading in Indonesia. In the Capital Market Law (UUPM), law enforcement has indeed been a primary focus, which is addressed through two main approaches:³⁴

1. Increasing penalties, The latest amendments to the Capital Market Law (which replaced Law No. 15 of 1952 concerning the enactment of the Emergency Law on the Stock Exchange) significantly increase the severity of penalties, particularly criminal sanctions. The criminal penalties vary, ranging from 10 years in prison (as outlined in Articles 104 and 106 paragraph 1), to 5 years in prison (as in Article 103 paragraph 1), 3 years in prison (as in Articles 106 paragraph 2 and 107), and 1 year in prison (as in Articles 103 paragraph 2, 105, 108, and 109). Generally, violations related to insider trading are penalized with the harshest punishment, which can include up to 10 years in prison (as per Article 104).
2. Strengthening regulatory authority, The UUPM also expands and strengthens the authority of the Capital Market Supervisory Agency (now the Financial Services Authority - OJK), as the institution responsible for law enforcement in the capital market. This is done to ensure that insider

³⁴ Elis Herlina, "Tinjauan Tentang Insider Trading Sebagai Kejahatan Di Bidang Pasar Modal," 2008, hlm 12.

trading cases can be handled effectively and comprehensively, providing the necessary legal certainty to combat these harmful practices

Although these efforts have been made, there are still challenges in enforcing insider trading laws in Indonesia. One of the challenges is the need to improve the capacity and competence of law enforcement agencies, as well as better coordination between relevant institutions in handling insider trading cases. Therefore, the disclosure and enforcement of insider trading laws can be more effective, enhancing the integrity and trust in Indonesia's capital market.

Law enforcement and the application of sanctions against insider trading perpetrators require strong political will from the law enforcement authorities. This political will includes firm commitment and unwavering integrity in enforcing the rules applicable in the capital market. Without strong political will, effective enforcement of insider trading laws will be difficult. Law enforcement authorities must recognize the importance of maintaining the integrity of the capital market and protecting investor interests. They must also be ready to face the pressures and challenges that may arise during the enforcement process.

In addition, strong integrity and commitment from law enforcement are needed to ensure that the enforcement process is fair and transparent. There should be no room for nepotism, corruption, or political intervention that could undermine the integrity and public trust in the law enforcement institutions.

Therefore, it is essential for the government and relevant institutions to provide sufficient support and resources for law enforcement authorities, as well as to develop an effective and independent enforcement system.³⁵ Only in this way can the enforcement of insider trading laws be effectively realized, which will ultimately help build a fairer, more transparent, and more trustworthy capital market. To increase the effectiveness of insider trading law enforcement, improvements in legal regulations are needed, including expanding the scope of the UUPM to address the limitations of the fiduciary duty theory, as well as strengthening commitment and support from law enforcement personnel.

³⁵ Made Cinthya Puspita Shara, "Studi Komparasi Pendekatan Hukum Pada Pengaturan Insider Trading Dalam Kaitannya Dengan Penegakan Di Dunia Pasar Modal," *Jurnal Litigasi (e-Journal)* Vol. 22 (1) (April 2021): hlm. 54.

Only through joint efforts from all involved parties can the handling of insider trading cases become more effective and just. Therefore, through clear regulations and firm law enforcement, OJK can help create a more predictable and reliable legal environment for all market participants. This not only helps maintain the integrity and security of the capital market but also provides better protection for investors. Law enforcement plays a crucial role in providing legal certainty to investors in Indonesia's capital market. It ensures that investors can rely on the fair and consistent application of the law, allowing them to invest with confidence, knowing that their rights and interests are protected by law. In this way, Indonesia's capital market can develop properly and contribute to the country's economic progress.

Conclusion

This study reveals that the regulations concerning legal protection for investors against insider trading practices in Indonesia's capital market still have many shortcomings, particularly in terms of the scope and clarity of the rules. The current Law No. 8 of 1995 on the Capital Market has not comprehensively addressed the role of secondary tippees, creating a legal gap that can be exploited by perpetrators. Legal reform is urgently needed, particularly by adopting modern approaches such as the misappropriation theory, which has been successfully implemented in advanced countries. This approach broadens the scope of individuals who can be sanctioned, including those who exploit confidential information for personal gain, even if they do not have a direct fiduciary relationship with the company. In addition to regulatory revisions, this study highlights the importance of strengthening the capacity of the Financial Services Authority (OJK) in detecting and addressing insider trading practices. The use of technologies such as big data analysis and artificial intelligence becomes a strategic step to enhance the effectiveness of market surveillance. Furthermore, cross-sector collaboration, including with law enforcement agencies and international institutions, is key to creating a fair, transparent, and integrated capital market. With legal reform and the strengthening of OJK's capacity, it is hoped that legal justice for investors can be achieved. These measures will not only protect investors'

interests but also strengthen the integrity of the capital market as a cornerstone of Indonesia's economic development.

Author Contribution

Emir Adzan Syazali, as the main author in the preparation of this article, contributed to designing and compiling the research concept, conducting data collection, and writing the main manuscript in its entirety. Johni Najwan contributed to writing the methodology section, editing the manuscript, and the data analysis process. Muskibah helped in compiling the systematic draft of the manuscript, compiling the introduction section, and literature review.

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