LEGAL PROTECTION TOWARD INVESTOR

IN MARKET MANIPULATION

A THESIS

Presented as Partial Fulfillment of the Requirements of Obtaining

A Bachelor Degree of Law

By

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بسم الله الرحمن الرحيم

A THESIS

LEGAL PROTECTION TOWARD INVESTOR IN MARKET MANIPULATION

This Legal Case Study has been examined and approved by the advisor to be submitted before Board of Examiners in an oral exam on **Wednesday, February 29th 2011.**

Yogyakarta, November 10th 2011
Advisor,

(Dr. Siti Anisah, SH., M.Hum.)

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This Bachelor Degree Thesis has been examined and Approved by the advisorto be submitted to the Team of Examiners in the Examination of Final Assignment on **Wednesday, February 29th 2012.**

Yogyakarta, February 29th 2012.

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Bismillahirohman nirrohim

Yang bertanda tangan di bawah ini, saya:

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Dibuat di : Yogyakarta
Pada Tanggal : 27 Maret 2012
Yang membuat Pernyataan



angan & Nama Terang Ybs.

MOTTO

Be brave and do not be afraid. Always try and believe we can do it!

Key words of life is honest.

Dedicated to

To My Beloved Parents, Brothers

All people who concern and needed.

TABLE OF CONTENT

COVER PAGE ……..... i

MOTTO …….. ii

DEDICATION…… iii

TABLE OF CONTENT ……. iv

ACKNOWLEDGMENT ……... vi

ADVISOR APPROVAL PAGE …… ix

CHAPTER I: INTRODUCTION ……. 1

A. Context of Study …… 1

B. Statement of Problem ……. 8

C. Objective of Study ……. 8

D. Theoritical Framework …….. 9

E. Research Procedure ……... 13

F. Systematic of Writing …… 16

CHAPTER II : GENERAL OVERVIEW OF SECONDARY MARKET, DISCLOSURE PRINCIPLE AND FIDUCIARY DUTY …….18

A. Secondary Market …….. 18

B. The Parties on Securities Trading in the Secondary Market ….. 21

C. The Securities Trading process in Secondary Market …… 30

D. Material Fact or Information and Any Violations over Disclosure Principles ……. 43

E. Fiduciary Duty …… 51

CHAPTER III : LEGAL PROTECTION TOWARD INVESTOR IN MARKET MANIPULATION AND LIABILITY FOR PERSON WHO DOES MARKET MANIPULATION…….. 57

A. Legal Protection toward Investor im Market Manipulation …… 57

B. Liability for Person Who Does Market Manipulation ……. 77

CHAPTER IV : CONCLUSION AND RECOMMENDATION … 82

a. Conclusion ……... 82

b. Recommendation ……. 84

BIBILIOGRAPHY ……. 86

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Thietis dyGarudeyaning Rahma

CHAPTER I

INTRODUCTION

A. Context of Study

Capital market is the activity of trading and offering securities to the public, the activity of a public company with respect to the issued securities, and the activities of securities related institutions and professions.[1] The activity of trading and offering securities are the activities that conducted by person (company) who has fund and the other ones is who need fund. Both of them chose the sale purchase securities. They chose the sale purchase securities in the capital market as the solution of their funding. Then a company issued securities by changing the company's status first, from private company to a public company through public stock offering or initial public offering.[2] Actually, when a company goes public, it must be by institutions and supporting profession with respect to trading activity. So, it is why the capital market is the activities of securities related to institutions and professions.

Capital market activity needs to be supervised. In the Indonesian Capital Market, there is a board that has duty to supervise the activity. It is the Capital Market Supervisory Board and Financial Institutions or the Bapepam-LK. Beside to supervise, the Bapepam-LK also has duty to

[1] Article 1 section 13 of Law Number 8 of 1995 about Capital Market

[2] Initial public offering is the process that has to conduct by the company which wants to invest securities into the capital market. It is accordance with the provision of Article 1 paragraph 15 of Law Number 8 of 1995 about Capital Market.

construct and to regulate the capital market activity. The duties of the Bapepam-LK are covers some scopes in the capital market activity, such as corporate finance,[3] market regulation,[4] investment management,[5] rule making,[6] legal enforcement.[7] In doing their duty, the Bapepam-LK has authority to issue the regulations either in the form of the Bapepam-LK's regulation or Publish Letter. Beside it, the Bapepam-LK also has authority to give sanction in doing the functions.

The Bapepam-LK conducts the supervisory to the capital market activity, however the capital market activity is performed by three organs which obtain delegation of authority by the Bapepam-LK. The three organs are Stock Exchange, the Clearing and Guarantee Institutions, and the Central Depository and Settlement Institutions. Based on the delegation of authority, they also can issue own regulation. So as the

[3] Corporate Finance means the finance report of a company. The parties who conduct capital market activity has to fulfill some requirements, one of them are the information must based on the finance report of the company to the Bapepam-LK as stated in the Regulation of Stock Exchange Number I-A about Listing of Share and Equity Securities beside Share issued by a Listed Company.

[4] Market Regulation means the regulation on securities transaction that happened in the capital market activity and the regulation on the institution which related to the securities transaction as stated in the Law Number 8 of 1995 about Capital Market.

[5] Investment Management is provision about managing investment that usually stipulated in the form of contract by investment advisor as well as accordance with the Section Three about Licensing of Investment Advisor, Law Number 8 of 1995 about Capital Market.

[6] Rule making means that the Bapepam-LK has duty to construct, to regulate and to supervise the making rule with respect to create market orderly. Until now, the regulation on Capital Market consists of Capital Market Law, Government Regulation, Ministry Decree, and the Decision of the Head of Bapepam-LK as stated in the Law Number 8 of 1995 about Capital Market.

[7] Legal Enforcement means that the Bapepam-LK has duties to construct, to regulate and to supervise the capital market activity in order that there are no infringement of Capital Market law and its regulation as stated in Article 3 of the Decision of Financial Ministry Number 606/KMK.01/2005 on Organization and Work Method of Capital Market and Financial Institution Supervisory Council and Article 5 of Law Number 8 of 1995 about Capital Market.

consequence of that authority, they are known by Self Regulatory Organization or SRO.

The Stock Exchange is liable to organize the securities trading orderly, properly, and in efficient. In Indonesian Capital Market, previous time, there are two stock exchanges namely Jakarta Stock Exchange (JSX) and Surabaya Stock Exchange (SSX). In 2007, two of them were consolidated become Indonesian Stock Exchange (IDX).

The Clearing and Guarantee Institutions as provider the facility of clearing and settlement guarantee towards the stock exchange transaction. This function is conducted by PT KPEI or the Indonesian Clearing and Guarantee Institutions which obtain business license as Clearing Guarantee Corporation by the Bapepam-LK. Meanwhile, The Central Depository and Settlement Institutions is the SRO which has main function to provide facilities involving the securities transaction settlement and centralization settlement of stock exchange transaction through book entry settlement system with coordination with Stock Exchange and the Clearing and Guarantee Institutions. This function is conducted by PT KSEI which obtain business license as Depository and Settlement Institution by the Bapepam-LK too.

Beside them, to support the capital market activity, the structure of Indonesian Capital Market also consists of Securities Company[8],

[8] Securities Company is person who engages in the business of Underwriters, Broker-Dealer and/or Investment Manager, as stated in the Article 1 paragraph 21 of Law Number 8 of 1995 about Capital Market.

Supporting Institutions,[9] Supporting Profession,[10] Issuers,[11] and Investor. All of them has to conduct their authority properly and cooperative each others, because capital market has strategic role in the national development as source of funding for business for every person who conduct business. National development reflects to pursuit of continuous improvement in the prosperity and well-being of Indonesian citizens.

If the capital market is developing, so the national development can be developing too. In order to capital market develop, there must be a legal basis for person who conduct business in the capital market or investor and protect the public investment against practices that may cause loss. It is Law Number 8 of 1995 about Capital Market.

Law Number 8 of 1995 about Capital Market already covers the scopes in the capital market activity such as when a company does public offering, and securities trading in the secondary market[12]. This Law also covers the provisions for disclosure principle that as fundamental principles in the capital market. By the disclosure principle, the capital market actor shall be inform all information when the securities are listed

[9] Supporting Institutions consists of Securities Administration Bureau, Custodian, and Trustee as stated in the Chapter IV about Capital market Supporting Institutions, Law Number 8 of 1995 about Capital Market.

[10] Supporting Profession consists of public accountant, public notary, and legal consultant as stated in the Chapter VIII about Capital Market Supporting Profession, Law Number 8 of 1995 about Capital Market. They are giving aid to capital market actor such as investor accordance with their capability.

[11] Issuer is a person who makes public offering as stated in the Article 1 paragraph 6 of Law Number 8 of 1995 about Capital Market.

[12] Secondary market is one of market that exists in the capital market. Capital market consists of primary market and secondary market. Secondary market is where the listed stock in the Stock Exchange is traded. The stock is listed or registered in the Stock Exchange in the Primary Market through the process of initial public offering. All it as stated in the Law Number 8 of 1995 about Capital Market.

and traded in the Stock Exchange. Besides that, this Law covers the infringements of the Law and the sanction on it.

The capital market actors who conducting an activity of trading and offering securities to public in Stock Exchange is prohibited either directly or indirectly conducting an action that causing the infringement in the capital market. In this matter, the role of the Bapepam-LK is to enforce the Law. The Bapepam-LK is authorized to examine and investigate if there is infringement of the capital market law in the capital market activity. Then after do that, the Bapepam-LK also authorized to give sanction to person who does infringement of the Law.

For each infringements of the Law have different sanctions. There are administrative sanction, private sanction, and criminal sanction. An administrative sanction is imposed for violations of the Law and its implementing regulations against every person that is licensed, approved, or registered with the Bapepam-LK.[13] Meanwhile, related to private sanction, every person who suffer losses arising from the Law and its implementing regulation can sue compensation either jointly or severally with person who have similar claim against person who liable for such violations.[14] Furthermore, criminal sanction is sanction for person who does infringement of the Law and its implementing regulation that

[13] Article 102 of Law Number 8 of 1995 about Capital Market
[14] Article 111 of Law Number 8 of 1995 about Capital Market

included as the criminal action in the capital market, such as fraud, market manipulation, and insider trading.[15]

Until now, the giving sanction toward the criminal action in the capital market is limited on an administrative sanction. Whereas, we already know that for criminal action in the capital market imposed by criminal sanction. For example is in the giving sanction for the person who does market manipulation.

The example of this case is the case of the indication on market manipulation in share transaction of PT Dharma Samudera Fishing Tbk (DSFI). The case begins after the securities transaction of PT DSFI period August 2002. Market manipulation case of PT DSFI, two customers was estimated conducting unreal transaction in some Securities Company by using facility of T + 0. They were doing big amount on buying share through PT Jasabanda Garta (JG) and PT Ficor Securities Indonesia (FSI) and selling share through 20 Securities Company. In this case, BAPEPAM gives sanction which is fine as much totally Rp 2,15 billion for 14 Securities Company.

Another case is at year 2007, there was case of share trading on PT Agis Tbk (TMPI). It is case on the indication of market manipulation in which Director of PT Agis Tbk was conducting market manipulation by giving information that not containing material fact so causing the share trading becomes abnormal trading. The Bapepam-LK gives sanction

[15] Article 104 of Law Number 8 of 1995 about Capital Market

administrative sanction which is fine toward 15 brokers that involved in the share trading of PT Agis Tbk. The fine is as much Rp 5,3 billion or 2,1 % from loss as much Rp 250 billion.[16]

Those giving sanction towards person who does market manipulation is not accordance with the sanction provision that stated in the capital market law. The provision stated that for criminal action such as market manipulation is imposed by imprisonment. It appears questions how about the legal protection toward investor in market manipulation and the liability for person who conducts market manipulation.

Legal protection toward investor refers to the legal basic that prevail for capital market activity. If we look at the legal basic that prevail for capital market activity which is Law Number 8 of 1995 and its implementing regulations has been covers all scope of capital market activity and give protection for investor when they doing business in the capital market. Beside that there is the Indonesian Civil Code that as certainty as legal basic in the matter of private relationship that appears in the capital market activity, such as the private relationship between the Securities Company[17] with investor as consequence from the contract of sale purchase the securities that has been made by them. Based on the contractual relationship, investor can make a suit if they suffer losses arising from the capital market activity.

[16] Iman Sjahputra, *Hukum Pasar Modal Teori dan Kasus*, Jakarta, Harvarindo, 2011, p. 187

[17] Securities Company is person who engages in the business of Underwriters, Broker-Dealer and/or Investment Manager, as stated in the Article 1 paragraph 21 of Law Number 8 of 1995 about Capital Market.

The development of capital market is definite by the existence of legal certainty further legal protection for investor. Investor pays attention toward rule of law beside the enforcement on disclosure principle.[18] Investor would not choose capital market for their investment in Indonesia if Indonesian Capital Market does not have legal rule and weak enforcement of it.

B. Statements of Problems

The problem statements of this research are:

1. How the legal protection toward investor in market manipulation?
2. How the liability for person who does market manipulation?

C. Objective of Study

The objectives of study of this research are:

1. To get better understanding about legal protection toward investor in market manipulation
2. To get better understanding about the liability for person who does market manipulation

[18] Disclosure principle is the fundamental principle in capital market which shall be transparent when giving information related to securities trading in the capital market, when such information may influence decisions of investors in such Securities and/or the price of the Securities, as stated in the Article 1 paragraph 25 of Law Number 8 of 1995 about Capital Market.

D. Theoretical Frameworks

The infringement and the crime in capital market in this context is market manipulation is infringement toward disclosure principle. Disclosure principle is the main point and also the essence of the capital market itself.[19] What aim by disclosure, it is about the material fact. The material fact as the essence of capital market is based on the disclosure principle which possibly available as the consideration for the investor, so he is rationally able to decide to do the sale and purchase of share.[20]

The disclosure principle is fundamental principle that should be maintained by the capital market actors either investor or society that registered in a Stock Exchange. Saul Levmore explains that if the information is easily to be accessed by the capital market actors, so the information enters to the market by the accurate value.[21] In this context, the focuses of disclosure are *fairness*[22] and *efficiency*[23] because historically the supporter of disclosure principle highlight upon *fairness* and *efficiency*.[24]

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[19] Bismar Nasution, *Keterbukaan dalam Pasar Modal*, Jakarta, Program Pasca Sarjana Fakultas Hukum Universitas Indonesia, 2001, p.1

[20] *Ibid.*

[21] *Ibid.* p.63

[22] Fairness means that the exchange assures that no investor will have an undue advantage over other market participants, as stated in the presentation by Enid E Bissember, the Guyana Association of Securities Companies and Intermediaries Inc., accessed on http://www.google.co.id/url?sa=t&rct=j&q=eeb%20presentation%20to%20gasci&source=web&cd=1&sqi=2&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.authorstream.com%2FPresentation%2Fprashanttt-1205717-eeb-presentation-to-gasci%2F&ei=ufEnT7jvKo_zrQeF0rDTAQ&usg=AFQjCNHDBaWO3gj3FKM1gHgJRMtUHszVmQ dated December 11, 2011 at 11:23 am

[23] Efficiency means that orders are executed and transactions are settled in the fastest possible way, *Ibid.*

[24] *Ibid.*

Considering the disclosure principle, so every company that offering the securities through capital market or called issuer is obliged to uncover all of information transparently. The information is regarding condition of business either in respect of financial, legal aspect, management of production, or other matters related to the business. The information must be *accurate.*[25]

The disclosure information is not only obliged when the issuer offering his securities to society at the first time, but also must do when the securities is traded in the secondary market.[26] When public offering, issuer disclosure the information through prospectus,[27] legal audit and legal opinion.[28] After public offering, issuer shall be report periodically to the Bapepam-LK and publish to society and inform about material fact that influencing the stock price in the Stock Exchange.[29] Besides that, the director or the commissioner or public company is obliged to report to the Bapepam-LK about the ownership of shares or the change on the ownership of shares over the company at least 10 days after transaction is occurs.[30] Furthermore, the Issuer also must report to the Bapepam-LK

[25] Accurate means that the information shall be provide accordance with the fact and clearly statement, not containing misleading statement.

[26] Jusuf Anwar, *Pasar Modal sebagai Sarana Pembiayaan dan Investasi*, Bandung, PT Alumni, 2005, p.208

[27] Prospectus is written information that is intended to induce another person to buy securities in the public offering as stated in the Article 1 paragraph 26 of Law Number 8 of 1995 about Capital Market.

[28] Legal audit and legal opinion means document that obliged to make by legal consultant when public offering, as stated in Munir Fuady's book, *Pasar Modal Modern (Tinjauan Hukum)*, Jakarta, PT Citra Aditya Bakti, p.89

[29] Article 86 paragraph 1 of Law Number 8 of 1995 about Capital Maket

[30] Regulation of the Bapepam-LK No. X.M.I about the Disclosure Information of Certain Shareholder Paragraph 1

about financial report as periodic and the incident that have influence to the stock price in the Stock Exchange.

Considering that the existence of disclosure principle as fundamental principle in capital market so that the capital market actors should be enforces it to maintain the trust of investor. The trust is a key upon the existence of the market where investor also has important role upon the existence of capital market. To maintain the trust of investor is included in function of the disclosure principle that the disclosure principle has three functions are to maintain the trust of public toward the market, to create the mechanism of market efficiency,[31] to prevent any fraud.[32]

The transparency of information about accurately material fact can as a way to create the purpose of disclosure principle and to anticipate the misleading statement for investor. The purpose of disclosure principle is to protect investor. It is not hyperbola if Capital Market Law of a State included Indonesia obligating disclosure principle even though a State already has the provision of *anti fraud* as well as regulated in Criminal Code (KUHP).[33] The provision of anti fraud in the Criminal Code is stated in the Article 378.

However *anti fraud* that regulated in Criminal Code is not cover or not effective to give legal guarantee for investor in capital market. The Criminal Code is not cover about the obligation on transparency and not

[31] The mechanism of market efficiency is reflected in the speed and cost transactions. The orders of the market are executed and the transactions are settled in the fastest possible way and not waste much cost.

[32] Bismar Nasution, *loc. cit*, p. 11

[33] *Ibid.* p. 65

specifically regulates about fraud or trick measure in the share transaction.[34]

As mentioned before that the focuses of disclosure principle are *fairness* and *efficiency*, it is also supported by a dilemma condition in capital market itself. In other side, legal sector always chase as detail regarding the matters that must be disclosed by parties who has obligation to disclosure. However, in other side, law also must protect the information. The interest is seldom contradicted with the obligation on disclosure. For instance that issuer does not to disclose the information that as secret of company. So in this matter, legal sector must sharp in considering and harmonizing the interest of investor and market toward a disclosure, for the interest of issuer or other parties who has the information.

The harmonize between two contradictive interest is reflected in the juridical principle state that a disclosure in capital market is not only "full" but also must be "fair", in other word is in the term of *full and fair disclosure*.[35] Full means that the information covers all material fact information that influencing the securities trading in the capital market. Meanwhile fair means that the material fact information that given by capital market is fair and enough cover what the public wants for deciding investment in the capital market.

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[34] *Ibid.*

[35] Munir Fuady, *Pasar Modal Modern (Tinjauan Hukum)*, Bandung, PT Citra Aditya Bakti, First Book, 2001, p. 78

The main reason that why a disclosure is needed so that investor can do an informed decision to buy or not to buy securities.[36] It is back again to the trust as a key upon the existence of market so investor want to invest in capital market. Informed decision is as basis to build a market price in normal condition. In this matter, a price would be in normal price if can reflecting *intrinsic value*[37] of securities where *the intrinsic value* depends on how efficiency of information on related company is.[38]

The achievement of disclosure principle purpose to protect investor is only can achieve as long as the information that delivered to investor containing complete on data of issuer's financial and other information that containing material fact. By delivering information to investor can avoid investor from the form and or the modus of fraud and or market manipulation.

E. Research Procedure

1. Object of Study

   The objects of this research are:

   a. The legal protection toward investor in the market manipulation

[36] *Ibid.* p. 79

[37] Intrinsic value means the amount by which a call option or a put option is in the money, calculated by taking the difference between the strike price and the market price of securities. For example, if a call option for 100 shares has a strike price of $35 and the stock is trading at $50 a share than the call option has an intrinsic value of $15 share, or $1500. Meanwhile, if a put option for 100 shares has a strike price of $35 and the stock is trading at $20 a share than the put option has n intrinsic value of $15 per share, or $1500. If the stock price is less than the strike price the call option has no intrinsic value. Meanwhile, if the stock price is greater than the strike price that put option has no intrinsic value, as stated in http://www.investorwords.com/2587/intrinsic_value.html accessed dated on January 31, 2012 at 9:43 pm

[38] *Ibid.* p. 79-80

b. The liability for person who does market manipulation

2. Classification of Data

The data used in this research are secondary data. Secondary data are data in the form of documents and archives related to the problems. Secondary data are the data obtained from a library research. The purpose of this kind of data is to identity the data systematically in order to answer the problem.

Secondary data are divided into:

a. Primary legal materials:

1. Indonesian Civil Code
2. Law Number 8 of 1995 about Capital Market
3. Law Number 42 of 2007 about Limited Liability Company
4. Government Regulation Number 45 of 1995 about Activities Implementation in the Capital Market
5. Government Regulation Number 46 of 1995 about Examination Procedures in the Capital Market
6. Government Regulation Number 12 of 2004 about the Amendment on Government Regulation Number 45 of 1995 about Activities Implementation in the Capital Market
7. Regulations of PT Bursa Efek Jakarta No.I-A about Recording on Equity Shares and Stock besides Stock Issue by Recoded Company

8. Regulation of PT Bursa Efek Jakarta No.II-A about Stock Trading
9. Regulation Number III.A.10 about Securities Transaction, the Appendix of Decision of Chief of the BAPEPAM-LK No.KEP-42/PM/1997
10. Press Release of BAPEPAM-LK December 12, 2002

b. Secondary legal materials:
   1. Literatures
   2. Textbooks
   3. Law Journal
   4. Document related to Capital Market, Market Manipulation
   5. Electronic data

c. Tertiary legal materials; like Black's Law Dictionary

3. Data Collection

Secondary data to be used in this research are references and bibliography studies and documentation. To collect the data by means:

a. Looking for the data, for example browsing data.
b. Take the data, for example borrow the books in library.
c. Examine the data that has been obtained whether it is already match and proper as source.

4. Approach method of Study

Related to the problem statement above, this research is a normative research that identifies legal norm and legal views. The purpose is to

understand and answer the object of study by using juridical normative approach method.

5. Data Analysis

In this research, the collection of data is managed by descriptive way. To answer the statement of problem, certainty, the collecting data is related to the problem, and then it is researched further to achieve a descriptive analysis. The method of analyzing in this research is the data achieved is not in the form of number and statistic furthermore collected data is analyzed so that it can be elaborated descriptively.[39] It is as qualitative method. Generally it means that research does not use the number but use the word such as enough, well, better.[40]

F. Structure of Writing

Chapter I contains the introduction which encompasses the following parts context of study, statements of problem, objective of study, theoretical framework, research procedure, structure of writing.

Chapter II contains the theoretical review which encompasses the following parts secondary market, parties in secondary market, trading in secondary market, material fact or information and any violations of disclosure principle, and fiduciary duty.

[39] Soerjono Soekamto, *Pengantar Penelitian Hukum*, Jakarta, UI-Press, 1986, p.250

[40] http://lemlit.unila.ac.id/file/data%20lama/makalah%20pdf/ABDUL%20KADIR%20MUHAMMAD.pdf accessed dated on October 10, 2011 at 11.30 am

Chapter III contains the legal protection toward investor in the market manipulation and the liability for person who does market manipulation.

Chapter IV contains the conclusion and recommendation. It is made based on analysis which has been done.

CHAPTER II

GENERAL OVERVIEW OF SECONDARY MARKET, DISCLOSURE PRINCIPLE AND FIDUCIARY DUTY

A. Secondary Market

1. Definition

The secondary market is what people are talking about when they refer to stock market. In the Indonesian Capital Market, Secondary Market is beginning by listed and traded the securities in the Stock Exchange. The key distinction between a primary market and a secondary market is that in the secondary market the issuer of the asset does not receive funds from the buyer. Rather, the existing issues changes hands in the secondary market, and funds flow from the buyer of the asset to the seller.[41]

The defining characteristic of secondary market is the investor traded among them. That, in the secondary market, investor trade previously listed securities without the involvement of the issuing of company. For example, if investor goes to buy Microsoft share, they are dealing with another investor who own shares in Microsoft. Microsoft which is a company is no involved in the transaction.[42]

As explained before, secondary market is place where the securities trading are occurred. Typically, the secondary market is place

[41] Frank J.Fabozzi, Franco Modigliani, *Capital Markets Institutions and Instruments*, Prentice-Hall,Inc, 1996, Second Edition, p.144

[42] http://www.investopedia.com/articles/02/101102.asp#axzz1gC8RTIqe accessed on December 11, 2011 11:20 am

where previously listed securities are sold and purchased. The securities are generally sold by and purchased from one investor to another investor.[43]

The structures of secondary markets are continuous, which means that prices are determined continuously throughout the trading day as buyer and seller submits orders. Another market structure is call market, in which orders are batched or grouped together for simultaneous execution at the same price. In other word, at certain times, a market maker holds an auction will determine the market-clearing price at a particular time of trading day.[44]

Nowadays, also there is market that using the element of continuous and the call framework. For example, the New York Stock Exchange begins trading at 09:30 am with a call auction. With opening prices set in that manner, trading proceeds in a continuous way until closing. The Tokyo Stock Exchange also begins trading in large stocks with an auction.[45]

2. Legal Basis

Majority of securities trading is done in the secondary market. To maintain the securities trading, Indonesia Capital Market governs the Law namely Law Number 8 of 1995 about Capital Market. This law requires

[43]http://finance.mapsofworld.com/capital-market/secondary/ accessed on January 5th , 2012, at 6:52 pm

[44] *Op.cit*. p.145

[45] *Ibid.*

company making public offering. Beside it, this Law also requires public company to comply with disclosure requirements when their securities are traded in the secondary market.

Beside it, there is regulations that as implementation of its law, such as the Government Regulation of Republic of Indonesia Number 45 of 1995 about the Implementation of Activities in the Capital Market. Furthermore, this government regulation was changed by the Government Regulation of Republic of Indonesia Number 12 of 2004 about the Amendment on Government Regulation of Republic of Indonesia Number 45 of 1995 about the Implementation of Activities in the Capital Market.

There is provision in the previous regulation that has been changed by the new one. It is the provision of Article 8. The Article 8 governs about Securities Company which already not fulfill the requirement as the member of Securities Exchange or no longer as the member of Stock Exchange is obliged to transfer the stock that belong to them to other Securities Company which as the member of Stock Exchange or request the selling of stock to the Stock Exchange at least 12 months since Securities Company is already not fulfill the requirement as the member of Stock Exchange or no longer as the member of Stock Exchange.[46]

The implementation of capital market activity shall be supervised. The supervisory board that has authority to supervise is the Bapepam-LK. Beside to supervise, the Bapepam-LK also regulates and constructs the

[46] Government Regulation of Republic of Indonesia Number 12 of 2004 about the Amendment on Government Regulation of Republic Indonesia Number 45 of 1995 about the Implementation of Activities in the Capital Market

capital market activity. In doing those authority, the Bapepam-LK has own regulation that also as legal basis in doing securities trading in secondary market.

The Bapepam-LK performs the authority to construct, to regulate and to supervise the capital market activity. However, the capital market activity is performed by three organs which obtain delegation of authority by the Bapepam-LK. They are the Stock Exchange, the Clearing and Guarantee Institutions, and the Central Depository and Settlement Institutions. They also have authority to issue own regulation. Furthermore, as the consequence of that authority, they are known by Self Regulatory Organization. For example, the Regulation of the Stock Exchange Number III.A.10 about Securities Transaction, the Regulation of Stock Exchange Number III.B.6 about the guarantee and the settlement of stock exchange transaction, the Regulation of Stock Exchange Number III.B.7 about Guarantee Fund.

B. The Parties on Securities Trading in the Secondary Market

There are many parties that involved in the securities trading in the Secondary Market. They are investor who selling the securities (as seller) and investor who buying the securities (as buyer), Securities Company, Stock Exchange, Clearing and Guarantee Corporation, Centre Depository and Settlement Corporation, and other capital market actors.

1. Investors

Through capital market, there are two opportunities to become investor are as follows:

a. The opportunity in the primary market that is the opportunity between the licenses to go public until certain time accordance with the agreement between issuer with underwriters. At that time, the stock that offered in outside of Stock Exchange at the price that agreed by issuer and underwriter.
b. The opportunity in the secondary market that is the opportunity after the company's stock has been listed in the Stock Exchange. After closing the primary market, company registers their stock in the Stock Exchange, afterwards the secondary market is begin.[47]

If we look at from the purpose of investor, so the investor can be categorized four kinds are investor who want to take dividend, investor who want to trade, investor who want to be owner of the company, speculators. Investor who wants to take dividend has target which is the companies that stable. Investor who wants to trade has interest on the change of the stock price in the Stock Exchange. Investor who wants to be owner of the company tends to choose the stock companies that already have a good name. The change of stock price in the Stock Exchange is not really influence for them in deciding sale and purchase. Speculators are

[47] Marzuki Usman et all, *ABC Pasar Modal Indonesia*, Jakarta, LPPI/IBI and ISEI, 1994, p.32

person who like to make speculations in choosing a stock company. They believe that the stock has good development.[48]

In the capital market is also more known the term of Seller and Buyer. Seller is investor who selling his securities in the trade floor of Stock Exchange. Actually he is the party who was conducting an IPO previously. For the first offering, the Issuer in this matter the seller investor makes an agreement between the Underwriters to conduct public offering, with or without the obligation to purchase the securities is not sold. Buyer is investor who buying the securities that already listed in the Stock Exchange. He will give order to buy the securities to the Securities Company that is the selling broker.

2. Securities Company

Securities Company are the companies engages in the activities of Underwriters, Broker, and Investment Manager. Securities Company must be listed as the Member of Stock Exchange, when they are doing capital market activity in the Stock Exchange.

As explained before, a Security Company is the company engages in the activities of Underwriters, Broker, and Investment Manager. The activities of Underwriters is done when the public offering in the primary market. In this matter, investor asks to the Securities Company to make initial public offering over their securities.

[48] *Ibid.* p.33-34

A Broker – Dealer is a member of Stock Exchange which licensed by the Capital Market Supervisory Board (the BAPEPAM), that is permitted by the rules of the Stock Exchange to use facilities and the system. Law Number 8 of 1995 stated that a broker-dealer is a person who engages in the business of buying and selling securities for the account of others or for his own account.[49] It means that a broker – dealer has two meanings on his duty. First, he is as agent in the sale and purchase of securities, because investor may not conduct the sale and purchase activity directly without through the agent or broker. For his service as the agent, so he gets the fee from investor over the sale and purchase activity. Second, he is as the dealer of securities. It means that beside he is acting as agent so the Securities Company also can conduct the sale and purchase activity of stock for the Securities Company's interest.[50] However, if the interest between investor and Securities Company is collide, so the interest of investor shall be as the first.

Meanwhile, the activity of investment managers is managing securities portfolio, for the clients or collective investment portfolio for group of clients. Person who acts as investment manager is the company or people who have been obtained the license business to manage securities portfolio.[51]

[49]Article 1 section 18 of Law Number 8 of 1995 about Capital Market

[50] Tjiptono Darmadji, et all, *Pasar Modal di Indonesia Pendekatan Tanya Jawab*, Jakarta, PT Salemba Emban Patria, 2001, p.22

[51] *Ibid.* p.23

3. Stock Exchange

Law Number 8 of 1995 explain about Stock Exchange that is a person which organizes and provides the system and facilities that are used to bring together offers of those who intend to buy and sell securities.[52] The existence of Stock Exchange is aimed to provide the systems and facilities of securities trading that then to create regularly, proper, and efficient securities trading. With the effective systems and facilities, the shareholders and Members and both them may trade the securities in fair and efficient manner. Beside to provide the systems and the facilities of trading, Stock Exchange also makes rules which are called as Stock Exchange Rules.[53]

A Stock Exchange rule binds the Members, the Issuer of securities listed in the Stock Exchange, and other institutions such as the Clearing Guarantee Institution, the Central Depository Institution, and Custodian banks. A Stock Exchange must make rules on Memberships listing, fungibility of securities, clearing and settlement of exchange transaction and related exchange matters.[54] The Stock Exchange Rules shall be approve by the Capital Market Supervisory Board (the BAPEPAM) before it rules will prevail.

For the license to carry on the Stock Exchange's activity is only company that has been granted a business license by the Capital Market

[52] Article 1 section 4 of Law Number 8 of 1995 about Capital Market
[53] Munir Fuady, *loc.cit.* p.39
[54] Article 9 of Law Number 8 of 1995 about Capital Market

Supervisory Board (the BAPEPAM).[55] For a person that can be the shareholder of Stock Exchange is the Securities Company that obtains the trade licensing as the broker-dealer.[56]

Securities Exchange has self-regulatory powers. So, it is included in the Self Regulatory Organization in the Capital Market, beside two others ones institutions. Self Regulatory Organizations or SRO is organizations which have the authority to issue the regulation for their stakeholder.

Since years 2007, Indonesia only have the organizer of Stock Exchange's activity namely Indonesian Stock Exchange (IDX). The Indonesian Stock Exchange is the form of consolidation between Jakarta Stock Exchange (JSX) and Surabaya Stock Exchange (SSX).

4. The Clearing Guarantee Institution (PT KPEI or Indonesian Clearing Guarantee Institution)

Two other institutions that aimed in the previous explanation that included as Self Regulatory Organization where one of them is the Clearing Guarantee Institution (PT KPEI). The Clearing Guarantee Institution has duty to clears and guarantees the settlement securities exchange transaction. PT KPEI or the Clearing Guarantee Institution has obtained business license as clearing and guarantee institution by the

[55] Article 6 section 1 of Law Number 8 of 1995 about Capital market

[56] Article 5 section 1 of Government Regulation of Republic of Indonesia Number 45 of 1995 on Activities Implementation in the Capital Market

Capital Market Supervisory Board (the BAPEPAM).[57] The activities in the Clearing Guarantee Institution are a continuation of activities of Stock Exchange through the settlement of securities exchange transactions. Basically, the clearing process is a process that uses to decide the rights and the obligation of the Member of Stock Exchange over the transaction that has been conducted by them, either which is securities or money that must be settled at the time of transaction settlement.

The guarantee over the settlement of stock exchange transaction is the obligation of PT KPEI to take over when the member of stock exchange cannot fulfill the obligation over the stock exchange transaction that has been conducted. PT KPEI is doing the clearing and guarantees function through e-CLEARS and supported by risk management system namely ARMS or Automated Risk Monitoring System.

5. The Central Depository and Settlement Institution (PT KSEI or Indonesian Central Depository and Settlement Institution)

The main function of this institution is to facilitate all activities involving stock transactions settlement and to conduct centralized of exchange trades through book entry settlement in coordination with the Stock Exchange and the Clearing Guarantee Institution. Same like the KPEI, the KSEI has obtained the business license as Depository and Settlement Institution by the Capital Market Supervisory Board (the

[57] Article 13 of Law Number 8 of 1995 about Capital Market

BAPEPAM).[58] The Central Depository and Settlement Institution are as the principal custodian for safekeeping securities. The KSEI is doing the settlement over the stock exchange transaction and giving the certainty that the rights and the obligation of the Member of Stock Exchange which arise from their transaction are fulfilled.

6. Other Capital Market Actors

   a. Investment Advisor is person who, for a fee, renders advice to others regarding the sale or purchase of securities. For individual, it is called as the representative of investment manager.

   b. Capital market supporting institutions

      It is institution that supporting the capital market activity. Capital market supporting institution consists of Securities Administration Bureau, Custodian Bank, Trustee.

      1. Securities Administration Bureau is an institution responsible for registering all securities ownership and distributes entitlement of such securities. The license business as Securities Administration Bureau is obtained by the Bapepam-LK.
      2. Custodian Bank is Bank or other financial institution that provides services of safekeeping securities and others

[58] *Ibid.*

related services to securities, such as collecting dividend and interest, the settlement of securities transactions, on behalf of its client.

3. Trustee is an organization, usually combined with commercial bank, which act as trustee, or agent who represents all interest of bond or securities credit's holder.

c. Capital Market Supporting Professions

They are required to be registered in the Bapepam-LK. They have role to support the capital market activity.

1. Public Accountant

   Public Accountant is giving opinion regarding the financial matter to the investor in taking decision of his investment. Public Accountant must have license from Finance Ministry and listed in the Bapepam-LK.[59]

2. Public Notary

   General official who has authority to make authentic official document and listed in the Bapepam-LK.[60]

3. Legal Consultant

   Legal Consultant is giving opinion regarding the legal matter in the form of legal audit and legal opinion to the investor in taking decision of his investment.[61]

[59] Iman Sjahputra Tunggal, *Aspek Hukum Pasar Modal di Indonesia (Konsep dan Kasus)*, Jakarta, Harvindo, 2008, chapter VIII, p.87

[60] *Ibid.*

[61] *Ibid.*

4. Appraisal

   Appraisal is a company that has authority to appraise the securities for example bond. This activity is aimed to give opinion regarding the risk of that security.[62]

C. The Securities Trading Process in Secondary Market

In Indonesian Capital Market, the capital market activity is organized by PT Indonesian Stock Exchange (IDX) in which it is as result of consolidation between Jakarta Stock Exchange (JSX) and Surabaya Stock Exchange (SSX) in years 2007. Then, securities that aimed in the capital market activity is securities which is promissory notes, commercial paper, shares, bonds, evidences of indebtedness, participants units of collective investment contracts, futures contracts related to securities and all derivatives of securities.[63] All derivatives of securities are options and warrant. An option is the right to purchase or sell within certain time, a specified number of securities at specified price. Then, a warrant is security issued by a company giving the holder the right, six months or more after securities has been issued, to subscribe to shares of the company at a specified price.

The capital market activity is started by public offering process where the securities are first time listed in the Stock Exchange. After listing process the stock can be traded in the Stock Exchange, means that

[62] Tjiptono Darmadji. *loc.cit*. p. 26
[63] Article 1 section 5 of Law Number 8 of 1995 about Capital Market

enter into securities trading. Basically there are two main types of trading system use in the capital market. They are order driven systems and quote driven systems.

Order driven systems is one in which all of the orders of both buyers and sellers are displayed detailing the price at which they are willing to buy or to sell a security and the amount of the security that they are willing to buy and sell at that price. For example, if we place an order for 100 shares of Bakrie at Rp 25000 per shares, our order will be displayed in the market and can be seen by people with access to this level of information.

The other ones is the quote driven system. It is widely use overseas now, each market participating in the market posts their quotes for securities, with a transaction occurring when an investor decides to accept the quotes. There is a bid-offer spread which is the competing market maker. The companies wishing to take on the responsibilities of market-making are obliged to quote their prices to broker or dealer who then decides whether or not to respond them. These quote are two way prices, the lower of which is known as the bid price and the higher is the offer price. The bid price means the prices at which the holders can sell the shares. Whereas, the offer price means the price at which the holders can buy the shares.[64] The example of quote driven system is when we order for 100 shares of Bakrie at Rp 25000 per share will not be seen in the market.

[64] See on http://www.geocities.ws/CollegePark/Campus/3050/article5.htm dated on January 5, 2012 at 6:30 pm

However, if there were one market maker for the stock, it would be post the bid-say Rp 24500 and the offer-say Rp 25500. This would mean that we could buy the shares of Bakrie for Rp 25500 and sell shares for Rp 24500. However, it would be change constantly depend on the supply and the demand in the market.

So, we can see that the difference between an order driven systems and a quote driven system lies on what is displayed in the market terms of orders and bid and offer prices. The order driven system displays all of bids and offers in the market, while the quote driven system focuses only on the bids and the offers of market marker and other designated parties.

In the both them market has advantages. The advantages of an order driven system is transparency that it is clearly show all of the market orders and what price people are willing to buy at or sell for. Whereas, the advantages of a quote driven system is that they improve liquidity, because investors can be sure that they can at least deal in reasonable quantities of shares at a price quoted by a market maker.

Law Number 8 0f 1995 is cover about the securities trading in the secondary market. Securities trading in the secondary market generally can be divided into some kinds of trading based on the location of transaction, the source of its cost, and the derivative transaction. Based on the location of transaction, the trading divided into transaction in the Stock Exchange and transaction that happen outside the Stock Exchange or Over the Counter (OTC). Based on the source of cost, the trading divided into

margin trading and short selling trading. Meanwhile, based on the derivative transaction can be divided into the loan securities and repurchase agreement or repo.

Generally, the securities trading in the Secondary Market can be described that investor orders to the broker (the Securities Company) to buy or to sell certain stocks then the brokers can execute the transaction order through their own workstations which on-line to the computer network of the Jakarta Automated Trading Systems (the JATS).[65] An order that can be performed in Stock Exchange by the Members of Stock Exchange shall be only in limit order. Limit order means that order taken by the Members of Stock Exchange until the price limit determined by the investor.[66] The order to buy or to sell securities by investors will meet in the trading floor.

How those orders are match is if price priority and time priority is match. Price priority means that whoever the places are highest bid price, they will be in first priority in order to be matched with the whoever place the lowest for offer or ask price. Bid price is the price an investor is willing to buy, while offer or ask price is the price an investor is willing to sell. Time priority means whoever has placed the order first, they will be in the first priority in order to be matched at same price by the system.[67]

[65] Tjiptono Darmadji, et all, *loc.cit.* p.81
[66] Article II.4 of Regulation of PT Bursa Efek Jakarta No.II-A on Stock Trading
[67] See on http://www.bapepam.go.id/old/old/E_Public/Press/June2003/Chapter%20III.pdf dated on January 5, 2012 at 7:52 pm

The type of orders is become factor in the mechanism of secondary market trading. The types of orders are market orders, limit orders, all or none/ fill or kill, discretionary order, good through the week. Market order means the selling order or buying order at the best price. Limit order means the selling order or buying order at the price that has been determined by investor. Meanwhile, at the all or none/ fill or kill order, the transaction only can do if the amount of offering securities is accordance with the amount of ordering, if it is not, so there is no transaction. Discretionary order means the order that conducted based on the level of price that recognized as the best price by the securities company. Good through the week means the order that must be conducted in the time period that has been determined by investor.[68]

The mechanism of securities trading can be described as detail as follow below:

1. Opening the account, delivering the order, and processing the order on sale and purchase the securities

   Before the securities trading are done, investor shall open the account first in the Securities Company that becomes the Member of Stock Exchange. The investor can be derived from the member of Stock Exchange or the Securities Company non-member of Stock Exchange that cooperate with the Securities as the member of Stock Exchange.

[68] Tjiptono Darmadji. *loc.cit*. p.80

If the investor is directly from the Securities Company that as the member of Stock Exchange, so the contract on opening account at all is between investor and the Securities Company-the Member of Stock Exchange. Meanwhile, if the investor is not from the Securities Company-non member of the Stock Exchange, so the contract on opening account is between the Securities Company-the Member of Stock Exchange, the Securities Company-non member of the Stock Exchange, and Investor.

After the opening account is accepted by the Securities Company, investor can order on selling or buying the securities through the Securities Company. The delivering order can be conducted manually through trader in the trading floor, remote trading, or online trading.

Nowadays, the delivering order that conducted manually is aimed for back up if the remote trading system has trouble. The remote trading system can be recognized as the long distance trading system where every transaction order by Securities Company directly delivered to trading system of Stock Exchange or JATS without entering order in the trading floor. Thus, order can be conducted in the Securities Company anywhere as long as has connection with JATS.[69]

[69] Indonesian Stock Exchange (IDX), *Panduan Pemodal*, 2008, p.14

The JATS has been developed becomes a new transaction system called Jakarta Automatic Trading System Next Generation (JATS-NextG). The Indonesian Stock Exchange claims that this system can handle every financial product, such as bonds, obligation, or derivatives in one platform. The old version of JATS can only take 360.000 orders and 200.000 transactions per day. However, the JATS-NextG capacity is one million orders and 500.000 transactions per day.[70]

At the remote trading system, limit trading of investor is determined by e-PIS system in the Securities Company which having connection with JATS-NextG. So, if there is order out of limit trading, it is automatically rejected.

Meanwhile, at the online trading, investor using application on online trading of the Securities Company when input order, then the order continue as remote to the JATS-NextG. The mechanism of online trading is almost same with the remote trading. The difference is the order delivered by-pass through the system; it is not through sales of the Securities Company.

After the delivering process on order, either by manual, remote trading, or by online trading, it will be process in the JATS-NextG. The process of order is divided into the segmentation of market in the capital market. The segmentation of market can be

[70] http://en.vivanews.com/news/read/33256-idx_officially_uses_jats_nextg_on_2_march accessed dated on February 1, 2012 at 12:23 am

divided into three segments are Regular Market, Cash Market, and Negotiated Market. Any securities trading executed in Regular Market, Cash Market, and Negotiated Market, except Preemptive Rights may only be traded in session I of the Cash Market and Negotiated Market.

Stocks which are trading at the Regular Market are based on fix lot and time of the continuous auction market mechanism. The prices formed on the regular are used as the quoted prices for the Stock Exchange. In the Regular Market, the total shares traded in standard a lot of 500 shares. For the price below 500, the fraction is set at multiplies of Rp 5 and maximum price movement Rp 50. Then, for the price between Rp 500 to Rp 5000, the fraction is set at multiplies of Rp 25 and maximum price movement Rp 250. Whereas, for the price above Rp 5000, the fraction is set at multiplies of Rp 50 and maximum price movement Rp 500. All transaction is done based on price and time priority.[71] Then, any securities transaction settlement in the Regular Market shall be carried out on the third exchange day after transaction or T+3.

Regarding Negotiated Market, in this market stock are traded by direct negotiation between buying broker and selling broker based on the last stock price in the Regular Market. Any securities transactions settlement in the Negotiation Market shall

[71] Article 2 section f of Regulation Number III.A.10 on Securities Transaction, the Appendix of the Decision of Chief of the Bapepam-LK No.KEP-42/PM/1997

be carried out according to an agreement between a Member of the Stock Exchange for sale and Member of the Stock Exchange for purchase. Whereas, the Cash Market is provided for Stock Exchange Member who failed to settle their trading obligations in the Regular Market and the Negotiated Market. Any securities transaction settlement in this market shall be carried out on the same day Exchange day (Trading day) as the Transaction of the Stock Exchange or T+0.[72]

2. The Securities Transaction

Any securities trading process in the Stock Exchange shall be carried out by the JATS facility. Only the Stock Exchange members, who also as the member of the Indonesian Clearing and Guarantee Institution (the KPEI) can input the orders into the JATS. So, they are responsible for every transaction that they make in the Stock Exchange.

Actually there is transaction fee toward the transaction that has been done. For every transaction, investor has to pay fee to the securities company (the broker) based on an agreement between them. This fee may not exceed 1% of the value of both buying and selling transaction.[73]

[72] Article II.2 of Regulation of PT Bursa Efek Jakarta No.II-A on Stock Trading

[73] Article 2 section f of Regulation Number III.A.10 on Securities Transaction, the Appendix of the Decision of Chief of the Bapepam-LK No.KEP-42/PM/1997

By the JATS, the brokers and the investors can monitor trading activity in real time anywhere and respond to it immediately. The JATS automatically use continuous auction so the buying activity can be get at the lower market price and oppositely for the selling activity can be get at the higher market price. A transaction can be said success if it is already matched between the offer of sale and purchase (buying and selling activity).[74]

Stock Exchange Transaction that the negotiation is occur automatically binding when the offer of sale and purchase matched through computerize system, and the transaction only can be canceled if it is approved by the Stock Exchange Member of sale and purchase, and Stock Exchange at the same day before the clearing process is conducted. Whereas, the Stock Exchange Transaction that occur caused by directly negotiation between the Members of Stock Exchange started binding when as well as regulated by Stock Exchange Regulation that can be based on the confirmation by the Stock Exchange Member of sale and purchase, or both them, with or without the approval over the confirmation.[75]

3. The settlement of securities transaction

[74] http://www.bapepam.go.id/old/old/E_Public/Press/June2003/Chapter%20III.pdf dated on January 5, 2012 at 7:52 pm

[75] Regulation Number III.A.10 on Securities Transaction, the Appendix of the Decision of Chief of the BAPEPAM No.KEP-42/PM/1997. *Ibid*.

After the process of securities trading where the stock has been matched there will be the settlement of it. In the matter of settlement of Stock Exchange Transaction, it is conducted through the process of netting and transferring book. The settlement of its transaction is conducted by two institutions beside the Stock Exchange are the Indonesian Clearing and Settlement Institution (PT KPEI) and the Indonesian Central Securities and Depository (PT KSEI). Based on the process of settlement over the transactions, so the legal relationship between the Stock Exchange Members becomes the legal relationship between the relating Stock Exchange Members with the Clearing Guarantee Institution when the clearing process is conducted and each of the Stock Exchange Members that was conducting its transaction cannot sue each others.[76]

PT KPEI has two functions which is function in the clearing process and function in the guarantee over the securities transaction. The clearing process is a continuation process after stock transactions. The Stock Exchange supplied data transaction to the Indonesian Clearing Guarantee Institution (PT KPEI), then, PT KPEI calculates rights and obligations among broker who entered into transaction. It occurs at T+1 and T+2 trading day. In this matter, PT KPEI performs the function of Central Counter

[76]Article 2 section I of Regulation Number III.A.10 on Securities Transaction, the Appendix of the Decision of Chief of the BAPEPAM No.KEP-42/PM/1997

Party (CCP),[77] called Alternate Cash Settlement. In the event of an insufficient balance of securities on the part of the seller, PT KPEI guarantees the buying broker to pay cash equivalent 125 percent of the highest price of the day, or the securities. Therefore, PT KPEI constantly monitors the credit standing of participating members of the clearing, while asking for payment of a guaranty fund and secure fund.[78]

Transactions through Stock Exchanges are settled once during trading day. Transactions carried out at the Stock Exchange must be settled on the designated settlement date. PT KPEI sends instructions of securities settlement to PT KSEI after clearing process. PT KPEI sends instructions of settlement to PT KSEI, for transfer from the Exchange Member Delivering Account of Securities Delivery to the Exchange Member Receiving Account of Securities Receiving, and for booking disposal. Stock settlement is carried out based on Central Depository and Book Entry Settlement (C-BEST). It is a paperless system introduced in July 2000. It occurs at T+3, it means three day after transactions.

Beside the securities transaction in the Stock Exchange, investor can do securities transaction outside the Stock Exchange namely Over the

[77] A central counter party is an entity that interposes itself between transacting counterparties, to guarantee execution of transaction, as stated in http://ec.europa.eu/internal_market/financial-markets/docs/clearing/2004-consultation/each-annex3_en.pdf accessed dated on February 1, 2012 at 12:34 am

[78] See on http://www.scribd.com/doc/73033594/127/ii-Settlement-System-for-Corporate-Bonds dated on January 9, 2012 at 1:59 pm

Counter or OTC. In OTC mechanism, the requirement and the provision over the transaction is not determined by a Stock Exchange, but person who doing transaction. Based on the Regulation of the Bapepam-LK Number III.A.10 about Securities Transaction, transaction that conducted outside the Stock Exchange means transaction that conducted the Securities Company or between the Securities Company and other person who are not determined by the Stock Exchange, and transaction between people who are not as the Securities Company. So, any kinds of relationship that arise in that transaction included in the settlement over the transaction is based on the agreement that has been agreed by them.

The Securities Company that conducting transaction outside the Stock Exchange is obliged to register the transaction at the date when the transaction is binding. Then, they are also obliged to send confirmation over that transaction to the other Securities Company or other person who involved in that transaction at the dated when the transaction is conducted.

As explained before, other securities transactions in the capital market activity are based on the source of cost are margin trading, short selling trading, then based on the derivative transaction are loan securities transaction, and repo transaction.

Margin trading means transaction of buying securities for the client (investor) that expensed by the Securities Company. Meanwhile, short selling trading means that the transaction of selling securities where actually the seller does not have that securities when the transaction is

conducted. In a simple concept that investor borrow a securities, sell it, and then later buy it back to return it to the lender. Then, if the securities drop, the short seller buy back the securities at a low price and return it to the lender.[79]

The loan securities transaction can be happened if the member of Stock Exchange does not have enough securities to settle their obligation as consequence of the transaction that has been done in the Stock Exchange. Meanwhile, repo transaction means transaction on borrowing and lending the fund with guarantee on certain securities. Repo can be divided into Classic Repo and Sell/buy back. Classic Repo means repo that conducted without transferring the ownership over the securities. Sell/buy back means repo that conducted with transferring the ownership by the Law.

D. Material Fact or Information and Any violations over Disclosure Principles

Disclosure of information is one of characteristic in the Capital Market. Law Number 8 of 1995 state that Issuer and or Public Company shall implement the disclosure principle through deliver the information or material fact related to their business or their securities. It purposes to prevent the damage for stakeholders.

[79] Siti Anisah, *Hand Out Hukum Pasar Modal; Capital Market Law*, Yogyakarta, FH UII, 2010

Disclosure principles is the fundamental principles in the capital market where every person that involved in the activity of capital market shall keep secured information and implement the disclosure principle. Material information that shall be disclose is any important and relevant fact concerning events, incidents, or data that may affect the price of a Security on a Stock Exchange or that may influence the decision of investors prospective investors, or others that have an interest in such information.[80]

To an Issuer, he must to disclose a prospectus in IPO, annual report, and incidental report. An Issuer must provide a prospectus when doing IPO process. According to explanation on Article 78 paragraph 3 of Law Number 8 of 1995 about Capital Market, a prospectus is at least contains:

1. Information about public offering
2. The purpose and the utilizing of public offering fund
3. Analysis and explanation about the activity and the finance
4. Business risk
5. Data of finance
6. Information based on the law perspective
7. Information about the offering of selling on securities
8. Information about Article of Association

[80] Article 1 section 7 of Law Number 8 of 1995

Meanwhile, an Issuer that the registration statement has become effective or Public Company is obliged to:[81]

1. To submit annual report to the Bapepam and announce such report to the public,
2. To submit a report to the Bapepam and announce to the public concerning material facts which can affect the securities price at the latest at the end of second working day after the occurrence of such event

Beside annual report, an Issuer also obliged to submit incidental report to the Bapepam and announce to the public at the latest at the end of second working day after the occurrence of such event which can affect the securities price.[82]

Information or Material Facts that may affect the securities prices or investment decisions by investor are as follows:[83]

1. The merger, stock purchase, or joint ventures
2. A stock split or stock dividend
3. Revenue from extraordinary nature dividends
4. Obtaining or losing important contract
5. Product or meaningful new invention
6. Changes in control or significant changes in management
7. Announcements repurchase or payment of debt securities

[81] Article 86 paragraph 1 of Law Number 8 of 1995 about Capital Market
[82] Munir Fuady, *Op.cit*. p. 98
[83] The Regulation of the Bapepam-LK Number X.K.1 about Disclosure on Information which shall be announced immediately to the Public, Article 2

8. Additional sale of securities to the public or a limited amount of material
9. Purchase, or loss on sale of material assets
10. Labor disputes that are relatively important
11. Important lawsuit against the company, and/or directors and commissioners of the company
12. Submission of bids for the purchase of securities of other companies
13. Replacement of Accountants who auditing the company
14. Replacement of Trustee
15. Changes in company's fiscal year

In the development, an Issuer and/or a Public Company certainty conducts forms of corporate action, either in the form of distribution on dividends, bonus share issue, etc. The Bapepam-LK and the Stock Exchange has set the action in carrying out its corporate action of an Issuer and/or a Public Company remains focused on the disclosure principle to prevent any losses for the stakeholders. The types of corporate action are as follows:[84]

1. Merger

   Merger is a combination of two companies into one larger company. The actions are commonly voluntary and involve stock swap or cash payment to the target. Stock swap is often used as it allows the

[84] Siti Anisah, *Loc.cit.*

shareholders of the two companies to share the risk involved in the deal.

2. Spin-off

   It is the separation of a subsidiary or division of a corporation from its parent company by issuing shares in a new corporate entity. In this matter, shareowners in the parent company receive shares in the new company in proportion to their original holding and the total value remains approximately the same.

3. Stock buy-back

   Stock buy-back means the redemption of private or restricted holdings by the portfolio company itself or the act of re-buying something that one previously sold.

4. Stock-split

   Stock-split means stock divide increases the number of shares in a public company. In this matter the price is adjusted such that the before and after market capitalization of the company remains the same and dilution does not occur. If a company has one million outstanding shares announces a 2-for-1split, it means that the company has doubled the amount of its outstanding shares and it will have 2 million outstanding shares after the split. So, if stockholder held 100 shares worth Rp 2000 each, after the split he or she will have 200 shares with price Rp 1000 each.

Every person is also prohibited directly or indirectly violates the disclosure principle. Any violations over the disclosure principle are as follows[85]:

1. defrauding or deceiving other person by using way and or any tool;
2. Participate defrauding and deceiving other person;
3. Make a false statement regarding material fact or did not tell material fact in order to prevent false or misleading information regarding real situation, to give profit to him or to influence other person to buy or sell securities. Then, every person is prohibited make unreal transaction in the capital market.
4. Insider trading

   The violation that conducted by person who intentionally using insider information to gain more profits through the securities transaction in the Stock Exchange.

Regarding the false or misleading information matter, Law Number 8 of 1995 covers it in some articles which are Article 78, Article 79, and Article 80. A prospectus that is the main document in the initial public offering shall not contain false statements with respect to material information and shall not omit material information that would be necessary for the Prospectus to not be misleading.[86]

Beside a prospectus, an announcement in the mass media shall not contain false statement of material information and shall not omit material

[85] Iman Sjahputra, *Hukum Pasar Modal Teori dan Kasus*, Jakarta, Harvindo, 2011, chapter II, p.110

[86] Article 78 section 1 of Law Number 8 of 1995 about Capital Market

information but causing misleading to the investor.[87] For the liability over false or misleading information, person who involved in the action shall be jointly and severally liable for losses that are as consequences of such action. They are each person that signs in the registration statement, the issuer's directors and commissioners at the time the registration statements became effective, the managing underwriters, capital market supporting professionals and other person that consented to provide an opinion or an information included in the registration statement.[88]

Beside false or misleading information, the violations over disclosure principles are fraud and market manipulation and insider trading. For the provision of fraud crime in the capital market is governed in the Article 90 of Law Number 8 of 1995. Then, for the provision of market manipulation crime is governed in the Article 91 until 93 and for insider trading is governed in the Article 95 until 98 of Law Number 8 of 1995.

The elements of fraud crime under the Law Number 8 of 1995 are defrauding and deceiving, participate in defrauding and deceiving, and making unreal material fact.[89] Whereas, the elements of market manipulation crime under the Law Number 8 of 1995 are creating the unreal description or misleading trading, the engineering of stock price in

[87] Article 79 section 1 of Law Number 8 of 1995 about Capital Market
[88] Article 80 section 1 of Law Number 8 of 1995 about Capital Market
[89] Article 90 of Law Number 8 of 1995 about Capital Market

the Stock Exchange, and giving false or misleading statement so can influence the stock price in the Stock Exchange.[90]

The difference between fraud and market manipulation is lies on the consequence of such action. If market manipulation is causing that the stock price become appearance or unreal means that the market has been manipulated. If fraud is causing damage for person who involved in the trading activity without has consequence toward manipulated market.[91]

Regarding insider trading crime, it is the securities trading by using insider information (IOD). The Insider information (IOD) is material information that belongs to insider in which it is not publish for public yet. Insider is person who inside in the issuer or the public company or other company which conduct transaction with relating issuer or public company.[92]

Law Number 8 of 1995 does not strictly give the limitation of insider trading. Under the Law Number 8 of 1995, the transaction that prohibited is insider of issuer who has insider information conducts transaction of sale and purchase or other company conducts transaction with relating issuer or public company. Furthermore, the stock price depends on information, because without information, capital market is gambling.[93] Thus, insider who has insider information is prohibited to give

[90] Article 91, Article 92, Article 93 of Law Number 8 of 1995 about Capital Market
[91] Munir Fuady, *loc.cit.* p. 148
[92] Article 95 of Law Number 8 of 1995 about Capital Market
[93] Joni Emirzon, *Kejahatan Pasar Modal: Indikator, Kendala Pembuktian, dan Penegakan Hukum atas Pelaku Tindak Pidana*, Journal of Business Law , No.4, Vol.28, 2009, p.7

the insider information to any person who recognized that using information to conduct sale and purchase of securities.[94]

E. Fiduciary Duty

Description of fiduciary duty is done to explain the liability of director who conducts market manipulation in the case in this thesis. Fiduciary duty is derived from two words that are fiduciary and duty. Duty means something that has to do. Meanwhile, fiduciary means trust or to entrust. So, those words are combined means as hold something within a trust or someone who hold something within a trust for interest of other people.[95]

Someone has fiduciary duties when they have fiduciary capacity. Then, someone as recognized having fiduciary capacity if business that handled by him is not belong to him and for interest of other people. It means other people to entrust him.[96]

Fiduciary duties will occur if there is fiduciary relationship.[97] Concept of fiduciary relationship happened when there are two parties where one parties has obligation for act or gave an advice by and for the benefit of second parties about certain problems that exist within the scope

[94] Article 96 of Law Number 8 of 1995 about Capital Market

[95] Munir Fuady, *Doktrin-doktrin Modern dalam Corporate Law*, Bandung, PT Citra Aditya Bakti, 2002, p.32-33

[96] Munir Fuady, *Ibid*. p.33

[97] Ridwan Khairandy, *Perseroan Terbatas: Doktrin, Peraturan Perundang-undangan dan Yurisprudensi*, Yogyakarta, Total Media, 2008, p.205

of that relationship.[98] Thus, what aimed by fiduciary duty is a duty from someone that arises from legal relationship between him with other people, where he is entrusted and have obligation to do his duty by good faith and fully responsible to manage the assets for interest of other people, for example he as lawyer with their clients, broker with their clients, or director of a company.[99]

Bernad S. Black stated that there are four liabilities upon the fiduciary duty. The four types of fiduciary duty are:[100]

1. Duty of loyalty state that decision makers in the company shall act in the interest of company and not in their own interest.
2. Duty of care state that they shall be careful and thorough when taking the decision, and they do not have a conflict of interest.
3. Duty to disclosure state that disclosure all material information when seeking shareholder approval or when the conflict of interest exists.
4. Duty to extra care when selling company. For example, a company in the position as the targets of acquisition. This is aimed to get more certainty and avoid conflict of interest.

Regarding fiduciary duty, the Securities Exchanges Commissions (SEC) proposed fiduciary standard. The SEC staff's fiduciary duty study published at January 21, 2011, recommends:[101]

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[98] Ridwan Khairandy, *Loc.cit*., p.206

[99] Munir Fuady, *Loc.cit*. p.34

[100] Gunawan Widjaya, *Risiko Hukum sebagai Direksi, Komisaris & Pemilik PT*, Jakarta, Forum Sahabat, 2008, p.46

[101] Robert L.D Colby et all, *The Fiduciary Duty Puzzle*, see on http://www.google.co.id/search?client=firefox-a&rls=org.mozilla%3Aen-

1. A uniform fiduciary standard for broker-dealers and investment adviser when providing personalized investment advice about securities to customers,
2. That the SEC address through guidance or rulemaking how broker-dealers should fulfill the uniform fiduciary standard when engaging in principal trading,
3. That the SEC facilitate disclosure of conflicts to customers

Existing fiduciary duty relates to broker-dealers makes something compulsory that broker-dealers have a duty to not charge marks-up which are excessive and undisclosed and also a broker has duty to not excessively trade his customer's account. Besides that, a broker impliedly represents that it has a reasonable basis for the statements made with respect to a security which the broker recommends. Then, a broker impliedly represents to its customer (investor) in soliciting and accepting customer's order that it is solvent and able to discharge its liabilities. A broker is also required to consummate transactions for customers promptly.[102]

A Securities Company which engaging the activities of underwriter, broker-dealer, and investment manager is in the form of legal entity that have director, commissioner, or shareholder. Henry R.

US%3Aofficial&channel=s&hl=id&source=hp&biw=&bih=&q=the+fiduciary+duty+puzzle-SIFMA&meta=&btnG=Penelusuran+Google accessed at dated on January 23, 2012 at 12:33 am

[102] *Ibid.*

Cheeseman explains on understanding on understanding and responsibility of directors which has connection upon the concept of fiduciary duty:[103]

1. Fiduciary duty is a duty of loyalty, honesty, integrity, trust, and confidence, owed by directors, and officers to their corporate employers.
2. Duty of obedience is a duty that directors and officers of a corporation have to act within the authority conferred upon them by the state corporation statute, the articles of incorporation, the corporate by laws, and the resolutions adopted by the board of directors.
3. Duty of care is a duty that corporate and officers have to use care and diligence when acting on behalf of the corporation.

Relates to the fiduciary duty on duty to disclosure, Law Number 40 of 2007 regulates director in doing disclosure principle, in which stated in the Article 97 paragraph 2 that every board of director should in good faith and full responsibility perform tasks for the benefits and corporate business.[104]

According to opinion of Collins, which mean with duty to act in good faith are:[105]

1. Act on the best interest of the company,
2. Not put yourself in a position where your personal interest or a duty you owe to another conflicts with the duties you owe to the company,

[103] Munir Fuady, *Perseroan Terbatas Paradigma Baru*, Bandung, PT Citra Aditya Bakti, 2003, p.84
[104] Article 97 paragraph 2 of Law Number 40 of 2007
[105] Gunawan Widjaya, *op.cit*, p.50

3. Only use company property for the benefit of company and not for your own benefit

The directors are liable upon the fiduciary relationship with their position on the company. The directors will liable as personal when they neglect in doing their duties. It is accordance with the provision of Article 97 paragraph 3 of Law Number 40 of 2007 state that

> "Each member of board of directors is personally liable for losses of the company if such person guilty or negligent upon their duties in accordance with the provision referred to paragraph 2"

All acts by the directors in doing their duty shall be examined if there is losses that causing by decision as fault the directors. The examination can be asked responsibility based on the business judgment rules, where the rules are derive to maintain the function of directors toward the essence of duty of cares. Law Number 40 of 2007 about Limited Liability Company adopted this principle where stated that the director may not liable upon their act which affects to the losses of companies if they can prove:[106]

1. Loss was no fault or negligence
2. Have made arrangements in good faith and prudence for the benefit and in accordance with the aims and objectives of the company
3. Have no conflict of interest whether directly or indirectly on management that affect the losses
4. Has taken any measurement act to prevent such losing.

[106] Article 97 paragraph 5 of Law Number 40 of 2007

Thus, the directors obtained a chance to prove that they are not related with any decision where have decide and the company suffer a losses.

Within the development, the fiduciary duty by the directors is developed and also applied toward some others person on the company, namely shareholders and officers on the company. In this matter, what aimed by shareholder is a majority shareholder, because, they have authority to handle the company through gain votes in the General Meeting of Shareholders or the RUPS. Therefore, they also have responsibility on fiduciary, especially toward company and a minority shareholder. Beside it, the fiduciary duty is also applied toward commissioners as limit in doing their duty as commissioner of the company which is supervisory function.[107]

[107] Munir Fuady, *op.cit*., p.65

CHAPTER III

LEGAL PROTECTION TOWARD INVESTOR IN MARKET MANIPULATION AND LIABILTY FOR PERSON WHO DOES MARKET MANIPULATION

A. Legal Protection toward Investor in Market Manipulation

Market manipulation is one of the infringements of the disclosure principle which explain that shall be there disclosure of information. Disclosure of information over the securities price and the market situation is aimed to society gets real and objective description about market, not to be engineered or manipulated. The form of market manipulation itself can be in the form of manipulation on the securities trading and manipulation on the stock price.

Manipulation on the securities trading is when impressed there are active securities trading. Meanwhile, manipulation on the stock price is when impressed there is deceit over the increase and the decrease of the stock price.

One of the most serious abuses in the capital market was the operation of pools which ran up the prices of securities on an exchange by series of well-timed transactions, effected solely for the purpose of manipulating the market price of the security, and then unloaded their holdings on the public just before the price dropped. In the Indonesian

Capital Market, the provision of market manipulation crime is covered in the Article 91 until Article 93 of Law Number 8 of 1995. Market manipulation is the crime that the rules is only applied in the activity at the Stock Exchange, especially related to the securities trading that listed in the Stock Exchange.

Based on Law Number 8 of 1995, every person is prohibited either directly or indirectly with purpose to create unreal description or misleading trading, market situation, or the stock price in the Stock Exchange and also they are prohibited either individually or cooperatively with other person to conduct two or more transactions either directly or indirectly to influence other person to buy, sell, or keep the securities.[108]

Market manipulation is illegal buying or selling of security to create the false impression that active trading exist in an effort to convince other people to buy more shares or sell the ones they own. Manipulation is done to influence prices so the person doing the manipulating can achieve a more advantageous market.[109] Thus, in the market manipulation, the trading that conducted is aimed to give impression that the securities of certain company are active to be traded or called as wash sales. For example, issuer A asks someone to conduct sale and purchase simultaneously, in order to the securities of their company recognized as liquid. In this matter, scenario has been managed by involving person in the trading.

[108] Article 91 and Article 92 of Law Number 8 of 1995 about Capital Market

[109] R.J. Shook and Robert L. Shook, *The Wall Street Direct Dictionary*, h. 234 as quoted by M.Irsan Nasarudin et all in *Aspek Hukum Pasar Modal Indonesia*, p.263

Market manipulation crime is an action usually legitimate transactions that conducted by person who involved in the securities trading either individually or cooperatively to create unreal description of securities trading. There are several areas in which there have been continuing problems in drawing the line between manipulative activity and legitimate transactions. One is the extent to which securities dealers and others participating in a public offering or distribution of securities may simultaneously bid for or purchase the same security. Another is the extent to which corporations may influence the price of their own shares by purchasing them in the open market. A third is the activities of the participants in contested takeover bids.[110]

The unreal description of trading and misleading trading can be conducted by the Stock Exchange's Member through conducting securities trading without any change on the ownership of securities or it called as wash sales as well as mentioned previous paragraph, or conduct the offering sale and purchase of securities at the certain price that has been agreed. This transaction can conduct by securities or not at all. Thus, in this matter, seller does not give securities to the buyer, and the buyer also does not accept securities that sold. This transaction is aimed to create a misleading appearance of active trading.

The kinds of market manipulations are misinformation or false information and market rigging. Misinformation or false information

[110] David L.Ratner, *Securities Regulation*, St.Paul, West Publishing Co., 1992, Fourth Edition, p.129

means disseminating the information to influence price in the market. Such kind of this act is done to support the market rigging activities. The market rigging activities are a set of activities by some technical means that aimed to manipulate. Those activities are:[111]

1. Wash sale

   Transaction that happened between seller and buyer which not makes the change of ownership and/or the beneficiary of ownership over the transaction. It is aimed to increase, decrease the price, or unchanged and make impression that there are securities that traded.

2. Marking the close

   Placing of the order of selling or buying that conducted in the end of trading day that have purpose to create the closing price accordance with the price that has been desired, either cause on increasing the price, decrease or unchanged.

3. Pump and dump

   Securities transaction that conducted by controlling the big amount of securities, then selling it in proper time based on the price that has been determined. It is purpose to create chance to sell the securities at high price in order to gain profit.

4. Creating fake demand/ supply

[111]Indonesian Stock Exchange (IDX), *op.cit*., p.41-44

There is one or more person that conducting order on sale or purchase at the best price level, but if it has been at the best price, so the order is deleted or amended either in the amount and/or increased the price level repeatedly.

The existence of unreal description of trading and misleading trading is causing damage investor, because they want to get real description as consideration to decide investment. In this matter, the protection for investor is really needed.

The principal of investor protection can be analyzed through its legal concept and its concrete applications. Legal concept means that beyond the principle state that investors must be protected where the scope of such protection is determined by the various needs for the investor and a sophisticated investor requires special treatment.[112]

Law Number 8 of 1995 already covers legal protection for investor in the capital market. Its protection begins since the investor have willingness do investment, and in the initial public offering until the closing trading. Before the initial public offering, investor is permitted to know certainty everything about related securities. For example, especially, they have to know everything related to information on the issuer's company which issuing the securities. So, investor can predict whether the securities are good or not.

[112] Jean-Baptiste Zufferey, et all, *Regulation of Trading Systems on Financial Markets*, London, Kluwer Law International, 1997, p.58

Afterwards, the investor also protected in the initial public offering through implementation on disclosure by the issuer itself. For example, it is through the disclosure on prospectus which is document that must be provided for a company in the initial public offering process. The document must be provided properly that containing material fact information.

How the investor in Indonesia protected in respect to market manipulation is by the Law Number 8 of 1995 about Capital Market itself and the Regulation of the Capital Market Supervisory Board and Financial Institution (the Bapepam-LK) when the investor enter into capital market activity until close trading, which are as follows:

1. Article 37 of Law Number 8 of 1995 about the separation of client's securities with Securities Company

   This article explains that when receiving client, the securities company must separate the account from the Securities Company and safekeeping the securities. In this matter, it is avoiding the fake that can be conducted by the Securities Company.

2. The regulation of Bapepam-LK Number III.B.7 about Guarantee Fund

   The fund and or securities which managed by the Clearing and Guarantee Institution or the LKP can use to expense the settlement guarantee of stock exchange transaction by the LKP.

3. The regulation of Bapepam-LK Number V.D.3 about the Intern Control and Organize the booking by the Securities Company

   The fund and the securities are already booked properly and it shall be maintain.

4. The regulation of Bapepam-LK Number VI.A.3 about the securities account at Custodian that there is certainty on protection toward client's securities and the Securities Company and Custodian Bank must insurance the client's securities.[113]

5. Government Regulation Number 45 of 1995 about the Implementation of activity in the Capital Market Activity, Government Regulation Number 12 of 2004 about the alteration of Government Regulation Number 45 of 1995 about the Implementation of activity in the Capital Market Activity.

6. The Regulation of Bapepam-LK Number III.A.10 about Securities Transaction

   The regulation contains six provisions. They are provisions about definition, Stock Exchange transaction, and transaction of customer who have account, transaction of general customer, transaction outside the Stock Exchange, transaction of institution customer.[114]

7. The Regulation of Bapepam-LK Number III.B.6 about Guarantee Settlement of Stock Exchange Transaction

[113] *Sekolah Pasar Modal Bursa Efek Indonesia Kelas Intermediate*, p.50 as presented by IDX (Indoneasian Stock Exchange)

[114] The Regulation of Bapepam-LK Number III.A.10 about Securities Transaction

The regulation contains ten provisions that covering matters in the guarantee settlement process upon the transaction, such as the Stock Exchange is obliged to regulate every kinds of stock exchange transaction as well as stated in the Regulation Number III.A.10 about Securities Transaction and to make a contract with the Clearing and Guarantee Institutions regarding the procedure of guarantee settlement upon stock exchange transaction.[115]

8. Government Regulation Number 46 of 1995 about Examination Procedure in the Capital Market

   The regulation covers how to conduct the examination in the capital market where the Bapepam-LK as supervisory agency also has authority to conduct examination toward every person who do infringement or involved in the infringement toward the Law and its implementing regulation.

The implementation on legal protection for investor needs the capability and the responsibility of the person who involved in the trading activity in the capital market. The authorized institution that has duty as supervise the process of trading activity in the capital market is the Indonesian Capital Market Supervisory Board and Financial Institution or the Bapepam-LK. The trading activity in the capital market is performed by three organs which obtain delegation authority from the Bapepam-LK. Three organs consist of Stock Exchange, the Clearing and Guarantee

[115] The Regulation of Bapepam-LK Number III.B.6 about Guarantee Settlement of Stock Exchange Transaction

Institution (the LKP), and Depository and Settlement Institution (the LPP). As consequence from the capability which is had its organs to issued regulation, they were acquainted with self-regulatory organization.

The Stock Exchange is responsible in execute the securities trading to effect regularly. The LKP is as provider clearing services and settlement guarantee of the Stock Exchange transaction, while the LPP performs central custodian services and settlement of the Stock Exchange transaction.

The role of BAPEPAM in the legal enforcement and legal protection for investor in market manipulation crime is to supervise the trading activity in stock exchange and to conduct examination and investigation and giving sanction towards every person that has been proved conducts market manipulation crime. Further, it governs in the Article 100, Article 101, and Article 102 of Law Number 8 of 1995. From the role of Bapepam that may conduct examination and investigation, we can say that the Bapepam is special police in the capital market.

To conduct examination and investigation towards every person that has been proved conducts market manipulation crime, the Bapepam shall considering the modus operandi and potential for loss of an action that conducted by them. When the harm inflicted to the capital market system, the interest of public or the investors, and when the settlement of securities trading is not reached with respect to losses, so the BAPEPAM may initiate an examination and investigation.

The examination and the investigation conducted by public officer on Bapepam staff based on order by the Chairman of the Bapepam. The investigation in capital market is to find and gather evidence to solve a capital market crime, in this matter is market manipulation crime and to locate suspect and determine the amount of the harm that has been done.[116]

In giving sanctions toward every person that already proved conducting crime in the capital market, there are three kinds of sanctions. Such kinds of sanctions are administrative sanction, criminal sanction, and private sanction. Administrative sanctions are govern in the Article 102. Criminal sanctions are govern in the Article 103 until 110. Meanwhile, private sanctions are govern in the Article 111.

Administrative sanction may impose by the Bapepam for violation of the Law and regulation against every person is licensed, approved or registered with the Bapepam.[117] What aimed by person is licensed, approved or registered with the Bapepam is classified into twenty five person, they are issuer, public company, Stock Exchange, Clearing and Guarantee Institution, Depository and Settlement Institution, Mutual Fund,

[116] Article 101 section 1 of Law Number 8 of 1995 aout Capital Market

[117] Article 102 paragraph 1 of Law Number 8 of 1995, it is stated that

1. Bapepam may impose administrative sanctions for violations of this Law and/or its implementing regulations against every person that is licensed, approved or registered with Bapepam
2. The administrative sanctions referred to in paragraph 1 may consists of:
   a. Written admonitions
   b. Fines
   c. Restrictions on business activity
   d. Suspensions of business activity
   e. Revocations of business licenses
   f. Cancellations of approvals
   g. Cancellations of registrations
3. Further provisions regarding the administrative sanctions in paragraph 1 and 2 shall be determined by Government Regulation

Securities Company, Investment Adviser, Underwriter, Broker, Investment Manager, Securities Administrative Bureau, Custodian, Trustee, Public Notary, Legal Consultant, Public Accountant, Appraisal, Other person who obtain license or approval on registration by Bapepam, Director of Public Company, Commissioner of Public Company, Shareholder minimal 5% share of Public Company, Director of Issuer, Commissioner of Issuer, Shareholder minimal 5% share of Issuer.[118]

Regarding the procedure of pressing claim on administrative sanction which is fine it has been regulated in the Decision of Chief of Bapepam Number Kep-21/PM/1999.[119] Then, administrative sanction also governs in the Government Regulation Number 45 of 1995 about Implementation of Activities in the Capital Market. It stated in the Article 61, Chapter XII. Furthermore, in the Article 63 jo. 64 of this government regulation explain about administration sanction which is fine, consist of four categorizes of fund:

1. Fine as much Rp 500.000,00 per day with maximum at Rp 500.000.000,00
2. Fine as much Rp 100.000,00 per day with maximum at Rp 100.000.000,00

[118] Explanation of Article 102 paragraph 1 of Law Number 8 of 1995

[119] Decision of Chief of Bapepam Number Kep-21/PM/1999 stated that what aimed by Person is individual company, cooperative business, association, or organized group. While, fine that given as administrative sanction means obligation to pay certain money to State because do infringement toward Capital Market Law and its implementing regulations. Then, interest is the amounts of money that arise as consequence not fulfill the payment on fine in the time period that has been determined. If person does not pay at the time has been determined, there will be State's claim. State's claim means the amount of money that must be pay to the State or entity either directly or indirectly controlled by State based on agreement, regulation or other reason.

3. Maximum fine as much Rp 500.000.000,00

4. Maximum fine as much Rp 100.000.000,00

Regarding criminal sanction, it may subject to violation of the certain articles in the Law Number 8 of 1995 where the provision of criminal sanction covers in the Article 103 until 110. Law Number 8 of 1995 through Article 103 until 110 categorizes criminal action become two kinds. First is the crime and second is the infringement. Any person who engages in the capital market business that violates Article 6, 13, 18, 30, 32, 34, 40, 43, 50, 64, 70 and 73 shall be subject to imprisonment.[120] Furthermore, any person who violates Article 90, 91, 92, 93, 95, 96, 97 (1) and 98 in which those articles are regards to crime in the capital market, shall be subject to imprisonment for maximum ten years and a maximum fine of a fifteen billion rupiah.[121]

Private sanction can be in the form suing for compensation either jointly or severally with other person with similar claim, against the person responsible for such violation.[122] Furthermore, the private sanction is more based on Company Law where issuer or public company must be obeying it. The Capital Market Law and The Company Law provide the provision that shareholders has possibility to make private lawsuit to director, commissaries of company, other person or the decision that give damage for company itself.

[120] Article 103 section 1 and 2, Article 105, Article 106 of Law Number 8 of 1995 about Capital Market

[121] Article 104 of Law Number 8 of 1995 about Capital Market

[122] Article 111 of Law Number 8 of 1995 about Capital Market

Article 111 of Law Number 8 of 1995 about private sanction is in the same framework with Article 1365 of the Civil Code about unlawful act. If there are losses as the consequence of the infringement, the lawsuit upon such action makes based on *wanprestasi* over the contract.[123] There are four kinds of *wanprestasi* are not to do something what has been agreed, to do something but not accordance with the contract, late to do something that has been agreed, do something that prohibited by the contract.[124] It is obliging burden of prove for person who suffer losses and can be proved that there are losses as the consequence of such action.

Further, the lawsuit based on the Company Law in the Article 85 section 2 for director and 98 for commissaries of public company. If the damage is caused by the managers of company, so the responsibility cannot burden to the company, but the director and the commissaries must responsible. The Bapepam imposes sanction to the director and the commissaries in respect to proved to responsible over such violation against the regulation lieu of act in the capital market.[125]

Regarding the authority of the Bapepam, some cases of market manipulation that ever been occur in the Indonesian Capital Market has been solved. However, regards in giving sanction of those cases, the Bapepam is not enough strict. The market manipulation is one of criminal act in the capital market and based on the Capital Market Law, any

[123] M.Irsan Nasarudin, et all, *Aspek Hukum Pasar Modal Indonesia*, Jakarta, Kencana, 2008, 1st Edition, p.275

[124] Subekti, *Hukum Perjanjian*, Jakarta, Internusa, 1987, p.45 as quoted by M. Irsan Nasarudin, et all in *Aspek Hukum Pasar Modal Indonesia*, p. 276

[125] *Ibid*.

violation that recognized as the market manipulation shall be subject to imprisonment.

In the case of PT Agis Tbk that occur at years 2007, Bapepam-LK give sanction which is fine towards 15 brokers that involved in the stock trading manipulation of PT Agis Tbk. Its fine as much Rp 5,3 billion or 2,1% from the value of damages as much Rp 250 bilion. There are nine brokers that got administrative sanction which is fine as much Rp 500 million because breaches the Regulation of Stock Exchange about The Prohibition of Sale Entrusted and The Principle of Know Your Customer[126]. Its nine brokers are PT Danpac Securities, PT KUO Capital Raharja, PT Sekuritas Indo Pacific Investasi, PT Philip Securities, PT Net Sekuritas, PT Panin Capital, PT Buana Capital, PT CIMB-GK Securities, PT Reliance Securities, PT Asjaya Indosurya Sekuritas, PT NISP Sekuritas, PT Paramitra Alfa Sekuritas, PT BNI Securities, PT Optima Karya Securities, and PT Mahakarya Artha Securities. Four brokers that PT Optima Karya Securities, PT Paramitra Alfa Sekuritas, PT Mahakarya Artha Securities and PT BNI Securities was get minor fine as much Rp 100 million because recognized only breaches one of those two regulations. Beside the fine, administrative sanction that given by Bapepam-LK in this case is the withdrawn of license business.[127] From this case, Bapepam-LK only gives administrative sanction. Bapepam-LK

[126] The Principle of Know Your Customer is principle that shall be applied by financial service providers in the capital market sector before accepting the clients, as stated in the Decree of Chairman of the Bapepam-LK Number KEP-476/BL/2009

[127] Arif Gunawan S, et all, *15 Brokers Agis didenda*, Harian Bisnis Indonesia, October 8, 2007, p.1 as quoted by Iman Sjahputra in *Hukum Pasar Modal Teori dan Kasus*, p.187-188

does not enough strict to give criminal sanction accordance with the provision of Article 104 regarding violations of market manipulation crime.

Same, in the case of PT Dharma Samudera Fishing Tbk (DSFI). The case begins after the securities transaction of PT DSFI period August 2002. This transaction was not causing the change of ownership of those securities as well as it is recognized as market manipulation. Then, the Bapepam-LK as the authority conducts examination and investigation over this case. The examination and investigation is conducted towards person who involved in the transaction and research the document that related to the transaction. Based on the examination and the investigation, PT Dharma Samudera Fishing Tbk (DSFI) and some person who involved in transaction with PT DSFI is proved violates the provisions of Article of 91 and Article 92 of Law Number 8 of 1995 about market manipulation crime. Besides that some Securities Companies also breaches the Article 91 and Article 92 because they facilitate and help the running process of transaction of PT DSFI. Relating to this case, the Bapepam-LK gives administrative sanction and written warning sanction for some person as the perpetrator in this case. Administrative Sanction which is fine jointly as much Rp 3 bilion for Yulianus Indrayana, AG Marfiyatmo, PT Jaya Makmur Sejahtera, Hendri Aristo Sirait, Afrizal, Irfan Riyadi, Akub Sudarsa, Haryadi, Meiske Herlina Tengker, Mohamad Permana, and Agustina Harahap. Some securities companies also given administrative

sanction, there are 14 Securities Company. Then, the written warning sanctions and fine for some person in this case. The written warning sanctions will continuing by next action which is the withdrawn of business license for individually as representative of Securities Company if in the time of one year they breach the regulation in the capital market.[128]

Same matters related to the giving sanction for capital market actors in the case of PT Mentari Securindo that occurs at years 2005 before the case of PT Agis Tbk was occurred and after the case of PT Dharma Samudera Fishing Tbk was occurred. PT Mentari Securindo as the securities company of buying dated on September 21, 2005 accepts order from his client, Raharja Mukti, to buy the stocks of PT Sugi Samapersada Tbk (SUGI) and of PT Aroma Bina Sejati Tbk (ARTI) in the Jakarta Stock Exchange from PT Suprasurya Danawan Sekuritas as the securities company of selling. PT KPEI recognizes these transaction of sale and purchase securities is deceit, because these transaction is outside habit of trading either look at volume or the value of transaction where as much Rp 47,39 billion.[129] After the settlement process of stock trading, dated on September 23, 2005 the Bapepam-LK was freezing for a while the transaction activity of PT Mentari Securindo.[130] In this case, Bapepam-

[128] See http://www.bapepam.go.id/old/old/news/Des2002/PR_27_12_2002.PDF accessed dated on January 9, 2012 at 2:15 pm

[129] See http://202.169.46.231/News/2006/08/10/Nasional/nas10.htm accessed dated on September 15 at 12:29 pm

[130] See http://finance.detik.com/read/2005/09/29/140654/451475/6/bej-nyatakan-pt-mentari-bersalah accessed dated on September 15, 2011 at 11:57 pm

LK was acknowledged that this case is difficult to be settled. The difficulties that faced by Bapepam-LK is related to the evidencing process.[131]

The role of evidencing process in the legal process is very important, because without the evidence the case cannot be solved. Theory of legal evidencing process state that the evidence can be used as the evidence in the court if fulfill some requirements:[132]

1. Permitted by the Law
2. The evidence can be trusted
3. The evidence is indeed to be needed
4. The evidence has to relevant with the fact that would be show up

Then, there are kinds of evidence that can be divided into three categories are as follows:[133]

1. Testimonial evidence means that oral testimonial given by witness before the court.
2. Tangible evidence means that real evidence that can be seen the form.
3. Tangible evidence but has testimonial characteristic means mixed evidence between testimonial evidence and tangible evidence.

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[131] See http://finance.detik.com/read/2006/03/08/110534/554603/index.html accessed dated on September 15, 2011 at 11:50 pm

[132] Munir Fuady, *Teori Hukum Pembuktian (Pidana dan Perdata)*, Bandung, PT Citra Aditya Bakti, 2006, p.4 as quoted by Joni Emirzon in *Kejahatan Pasar Modal:Indikator, Kendala Pembuktian, dan Penegakan Hukum atas Pelaku Tindak Pidana*, Journal of Business Law, No.4, Vol.28, 2009, p.9

[133] *Ibid.*

The activity in the capital market is supported by sophisticated technology that all transaction is already use e-commerce system and in the electronic form. It gives positive impact in the transaction process, because it is make easy and quickly so investor can conduct transaction anywhere as long as there on-line network. Furthermore, if based on the experience of the infringement that happen in the Indonesian Capital Market, this technology or system gives negative impact which appearing a problem. The problem is the Bapepam-LK as the supervisory board of capital market facing difficulties in the evidencing process. It can be seen in the case of PT Mentari Securindo that has been explained before.

Every infringement of capital market law and its regulation is need the evidence when settlement process. If the evidence is difficult to show up and there is no enough evidence like in the case of PT Agis Tbk, the settlement of the case is only administrative sanction.

Based on the experience of market manipulation cases that happen in Indonesian Capital Market as well as the example of such crime has been explained above, we can say that the role of Bapepam-LK and Self Regulatory Organization (the Stock Exchange, the Indonesian Clearing and Guarantee Institution or KPEI, the Indonesian Central Depository and Settlement Institution or KSEI) in the legal protection for investor in doing legal enforcement in the capital market is very important.

However, we look at again in the giving sanction for capital market actors who commit a crime and who involved in the market manipulation

crime, the Bapepam-LK is not enough strict to give proper sanction. But, it is not fair if we say the Bapepam-LK is in the condition of incapable to solve infringement that recognized as the crime in the capital market, such as market manipulation.

The Law Number 8 of 1995 about Capital Market and its regulations are already enough as legal basis for the Bapepam-LK to enforce the law and to protect the investor's interest. The obstacles that facing by the Bapepam-LK in enforcing the law through giving sanction in such kind of crime in the capital market is related to the evidencing process that has been explained before, the capability of official such as police, investigating officer in the general attorney, and the knowledge of investor itself related to capital market.

The police of Republic of Indonesia shall have knowledge on capital market. Thus, if there is an infringement in the capital market or an infringement that can be recognized as the infringement in the capital market, it can be solved easily by cooperative between the police and the Bapepam-LK, and other legal apparatus.

In the case of infringements of Capital Market Law and its regulation, the Bapepam-LK is like special police that has authority to examine and investigate the person who involved in those cases. When the Bapepam-LK is already finish in investigating and for this case is needed the continuous settlement over the case before the court, however it refused by investigating officer in the general attorney because of the case

cannot be recognized in the scope of criminal law and private law. For such kind of event, can be seen that there is no same framework and same understanding about the capital market law between the Bapepam-LK with legal apparatus or legal officer that outside the Bapepam-LK.

In the giving sanction for the capital market actors who commit and who involved in the market manipulation crime upon legal protection for investor, it can be said that it is already protect the interest of investor if investor itself feelings enough towards the sanction that has been given for person who give damage for them. However, it is also cannot as one indicator that legal protection of investor is already enforced.

We already know that the proper sanction in giving sanction for the capital market actors who commit a crime and who involved in the market manipulation crime is criminal sanctions in which it has been governed in the provision of Article 104 of Law Number 5 of 1995. But, based on the experience of capital market case, in this matter is market manipulation, is only limits on administrative sanction, such as fine and the withdrawn of business license.

However, it also cannot be said if the investor does not get the legal protection or in other word there is legal protection for investor. For example, administrative sanction which is the withdrawn of business license and all at once in order to recovery the company to become a good company, it is also the form of legal protection for investor. Investor can know which one the company that as a good company and has good track

record, so investor can more be careful in choosing the company for their investment and conducting securities transaction in the capital market.

In legal protection for investor, it is also need cooperative by the investor itself, that investor shall have knowledge and understanding on capital market activity and the system. Related to this matter, Indonesian Stock Exchange (IDX) or PT BEI has been enough provide the knowledge, information, and understanding on capital market activity where it can be accessed in the website of IDX itself. Through it, the Indonesian Stock Exchange has been protecting the investor's interest.

B. Liability for Person Who Does Market Manipulation

Person who does market manipulation can be categorized into two meaning. First is person who intentionally conduct market manipulation namely as intellectual perpetrator. Second is person who involved in the market manipulation where they are participating and giving aid in that action.

Market manipulation is the case where securities trading have been manipulated by person who conducts capital market activity. Actually in this matter, what aimed by person are Securities Company. Securities Company is the company that engages in the activities of underwriter, broker-dealer, and investment manager. Then, Securities Company has important role in the developing securities trading in the capital market where they are directly faced with investor.

Securities Company is liable toward everything on activity which related to securities that conducted by Director, employee, and other persons which working for the company. What aimed by everything on activity which related to securities is the activity that conducted by Securities Company as broker-dealer. Meanwhile, employee is someone who works on other person where the other person has authority to handle and give direction in doing his job with salary regularly. Then, other person is person that appointed by Securities Company to do certain duty although he is not employee of Securities Company.

Securities company is a limited liability company which obeyed under the Law Number 40 0f 2007 about Limited Liability Company. As Limited Liability Company, they have Director and Commissioner Board as the organ of company. Director is person, who has authority and fully responsibility over management of company for the company's interest accordance with purpose of company, and representing the company either in the court or outside accordance with article of association. Meanwhile commissioner is the organ of company that has authority on supervisory accordance with article of association and gives the advice to Director.

Directors run the business for the company's interest and accordance with the purpose of company, so they have to responsible over the business. In doing the business, they have to do by good faith and fully responsibility.[134] Thus, if Director have fault and neglect in doing their

[134] Article 97 paragraph 2 of Law Number 40 of 2007 about Limited Liability Company

duty, they have to fully responsible over the damage that suffered by the company.

Responsibility of Directors either in the court or outside the court is based on the principle of fiduciary duty and duty of skill and care. Fiduciary duty is principle that arises from the relationship between Director and the Company. Meanwhile, duty of skill and care is principle that refers to the capability and the prudential of Director's action.

In the market manipulation case which happened on PT Dharma Samudera Fishing Tbk (PT DSFI) case, that PT Dharma Samudera Fishing Tbk (PT DSFI) and some person who involved in transaction with PT DSFI is proved violates the provisions of Article of 91 and Article 92 of Law Number 8 of 1995 about market manipulation crime. Besides that some Securities Companies also breaches the Article 91 and Article 92 because they facilitate and help the running process of transaction of PT DSFI. Relating to this case, actually those persons who proved has guilty must liable.

The liability for person who does market manipulation case can be in the form of administrative liability, private liability, and criminal liability where it depends on the Article that has been breached by them. The provision related to those liability has been regulated in the Capital Market Law and its implementing regulation and related to the provision on private liability also has been regulated by the Company Law.

Administrative liability is referring to administrative sanction that has been regulated in the Capital Market Law and its implementing regulation. Actually, administrative sanction which is fine, it is entered into the Cash of State as State's revenue. Beside it, the other sanction is withdrawn of business license. Meanwhile, criminal liability is referring to criminal sanction that has been regulated in the Capital Market Law where person who proved committing a criminal action in the capital market shall be subject to imprisonment.

Regarding the private liability, it is refer to private sanction that has been regulated by Capital Market Law which stated that persons who suffer losses arises by the infringement of this Law and its implementing regulation can sue for compensation. Relating to this liability, under the company law, person can make lawsuit to the director, commissioner of the company, and other person who involved in the company over the damage of the infringement than committed by director or person of the company. The private sanction which is compensation is aimed for the investor's interest not as State's revenue.

In other circumstances, the liability, actually the liability of Directors which obliged by Law of Capital Market might be not applied if the directors can prove some circumstances where it is explain in the Law of Limited Liability Company. According to Article 97 paragraph 5 the director may not liable upon their act that affects to losses toward the company if they can prove that the loss was no fault or negligence, they

have made an agreements in good faith and prudence for the benefit and in accordance with the aims and objectives of the company, they have no conflict of interest, whether directly or indirectly on management that affect the losses, and they have taken any measurement act to prevent such losing.[135] Thus, regarding each administrative sanction, criminal sanction, and private sanction, certainty applied the general legal principle that those kinds of sanction may applied (but not have to do) as cumulative.

[135] Article 97 paragraph 5 of Law Number 40 of 2007

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. CONCLUSION

Based on what has been stated in the last two chapters, it can conclude that:

1. The legal protection for investor in market manipulation is begin since the investor entered in to the process of initial public offering in the primary market until the closing of trading activity of securities transaction in the secondary market. The legal protections for investor can be given by two means are preventive and repressive. Preventive means the legal protection for investor that conducted by the Bapepam-LK to supervise the securities trading activity in the Stock Exchange by cooperative with Self Regulatory Organization and Supported Institution. Further, repressive means the legal protection for investor is conducted by the Bapepam-LK in conducting their authority to examine and investigate the capital market actor who involved in the infringement and criminal act of capital market law and its regulation. The capital market law and its implementing regulation are already enough covers legal protection for investor in market manipulation in which it is related to disclosure of material

information regarding the market situation and the stock price in the Stock Exchange as consideration in deciding investment, such as what has been stipulated in the Regulation of Bapepam-LK and the Regulation of Stock Exchange. Based on what happen in the settlement of market manipulation case in Indonesia which is limits on administrative sanction, it cannot be said that there is no legal protection for investor. Inside of giving administrative sanction there is legal protection for investor. An administrative sanction which is the withdrawn of business license and all at once in order to recovery the company becomes a good company, it is also as the form of legal protection for investor. Investor can know and be more careful in choosing company in respect to decide investment in the capital market. The Bapepam-LK can be said that they are not enough strictly in solving the case of market manipulation crime. The sanction for capital market actors who involved in the market manipulation crime over under the provision of Article 104 in the Law Number 8 of 1995 is criminal sanction which is imprisonment for maximum ten years and maximum fine as much fifteen billion rupiah. Thus, the Capital Market Law and its implementing regulation are already enough to protect the investor in the case of market manipulation, only through giving administration sanction.

2. Person who does market manipulation is Securities Company which engages the activities of underwriter, broker-dealer, and investment manager. Securities Company as important role in the developing of capital market activity which directly faced with the investor. In the case of market manipulation, the giving sanction toward Securities Company is enough cover legal protection toward investors, in the condition that investors felt enough satisfy upon such sanction or there is no objection from them. Furthermore, the giving administration sanction toward Securities Company which is withdrawn of business license and all at once in order to recovery the company becomes a good company, so the investor can know and be more careful in choosing company when they want to invest in the capital market activity.

B. RECOMMENDATION

1. The Law Number 8 of 1995 about Capital Market and its implementing regulations are already enough as legal basis for the Bapepam-LK to enforce the law and to protect the investor's interest. However, it still need an emphasizing strictly in the giving sanction toward person who conducts crime and infringement of Capital Market Law and its implementing regulation where it must be accordance with the provision that has been stipulated in the Capital Market Law. The role of Government is also needed especially at the General Attorney

that have more understanding the case that happened in the Stock Exchange. The case that happened in the Stock Exchange either criminal or private is seldom to be settled before the court, in the fact it is only given administration sanction by the Bapepam-LK. Regarding Article 111 of Law Number 8 of 1995 which accordance with Article 1365 of Indonesian Civil Code as article on suing but it is difficult to be done, so government need to amend part of provision of Capital Market Law.

2. Persons who conduct capital market activity shall have understanding on their rights and obligation accordance with the Law. They are also do capital market activity in good faith and full responsibility toward what has been entrusted to them by the investor. If they are committing the crime and the infringement that make damage for the investor, they shall liable upon their act that may affect losses accordance with the provisions that has been regulated by the Law.

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