



## Disgorgement (Fund): A New Era of Investor Protection in the Capital Market

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### **Abstract**

*Violations in the capital market often harm investors. Despite administrative and criminal sanctions, the losses suffered by investors are not recoverable. If an investor wants to make a collection or claim for compensation, they must go through a civil suit that takes time, cost and energy. This causes a crisis of confidence in investment in the capital market due to the lack of legal protection. Therefore, the return of profits received illegally must be returned which is called disgorgement. Disgorgement is a legal protection for investors in the capital market that significantly impacts the return of compensation. This paper uses normative legal research with a statutory and conceptual approach. The results obtained that the importance of legal protection for investors will affect the existence of the capital market itself. Through disgorgement, investors will feel protected by their interests, thus creating justice. The existence of justice for investors as victims is the goal of legal protection itself.*

**Keywords:** *Investor Protection, Disgorgement, New Era*

## Abstrak

Pelanggaran di pasar modal sering merugikan investor. Meskipun dikenakan sanksi administratif maupun pidana, kerugian yang diderita investor tidak terpulihkan. Apabila investor hendak melakukan penagihan atau tuntutan ganti rugi harus melalui gugatan perdata yang memakan waktu, biaya dan tenaga. Hal ini menyebabkan krisis kepercayaan terhadap investasi di pasar modal karena minimnya perlindungan hukum. Oleh karena itu, pengembalian keuntungan yang diterima pelaku secara ilegal harus dikembalikan yang mana disebut sebagai *disgorgement*. *Disgorgement* merupakan sebuah perlindungan hukum bagi investor di pasar modal yang secara nyata berdampak pada pengembalian ganti rugi. Penelitian ini menggunakan penelitian hukum normatif dengan pendekatan perundang-undangan dan konseptual. Hasil yang didapat bahwasannya pentingnya perlindungan hukum bagi investor akan memengaruhi eksistensi pasar modal itu sendiri. Melalui, *disgorgement* investor akan merasa terlindungi kepentingannya sehingga menciptakan keadilan. Adanya keadilan bagi investor selaku korban merupakan tujuan dari perlindungan hukum itu sendiri.

**Kata Kunci:** *Perlindungan Investor, Disgorgement, Era Baru*

## INTRODUCTION

The existence of investment through the capital market is moving towards a new era. This can be seen from the increasingly active and incessant Indonesia Stock Exchange (IDX) holding a Capital Market School (SPM) in collaboration with securities companies and promotions related to investment in the capital market. Indirect investment through this stock exchange is an option that is increasingly in demand by the public, especially the younger generation (Liputan6, 2020).

The capital market, as market in general term, is a place where the sellers and buyers meet. The difference between those two terms is just on the goods they sell (Tavinayati and Yulia Qamariyanti, 2009:1). In the capital market, they sell a 'trust' (Ana Ro'matussa'diyah and Suratman, 2016:167), such as people's trust in the value of shares, the truth of company reports, prospects for future profits, government policies that support the capital market, to the process of guaranteeing

that the law will be obeyed by the parties (Ana Ro'matussa'diyah and Suratman, 2016:167).

In the capital market, those who have money can invest these money in order to get return, while the issuer (the company) can use these funds for investment purposes without having to wait for the availability of funds from the company itself (Kadiman Pakpahan, 2003: 139). Therefore, it is very important to provide legal protection to investors as a milestone in capital market activities. In relation to investor protection, a company has been established that has obtained an OJK business license to organize and manage the Investor Protection Fund as regulated in POJK No. 49/POJK.04/2016.

The Investor Protection Fund only functions when the Custodian does not have the ability to return the lost Investor Assets and cannot continue its business activities until it will be revoked by the OJK (Article 24 POJK Number 49/POJK.04/2016). In addition, the Investor Protection Fund is formed from the membership fees of Broker-Dealers (*Perantara Pedagang Efek*) and Custodian Banks (Article 3 POJK Number 49/POJK.04/2016). Thus, if the assets of the investor are lost due to a violation by another party, it will not be protected by any institution. In fact, investors' losses in the capital market is not only the Custodian should return the investors' assets, but these losses can also occur when there is a violation and also a crime in the capital market.

In general, administrative violations are subject to administrative sanctions, while criminal offenses are subject to criminal sanctions (Article 102 jo 103 of the Capital Market Law). However, both sanctions are viewed from the point of view of investors who have been harmed, have no effect on the investors themselves. The point is, investors do not benefit directly from the sanctions imposed on perpetrators of violations because the losses are not compensated. Then, this causes a crisis of confidence for investors to invest in the capital market, due to the non-recovery of the losses (Nikmah Mentari, 2019:2).

One of the important considerations for protecting investors is the losses they suffer. Therefore, the form of protection for the injured party

is essential to be carried out through recovering the losses because of a criminal act (Mahrus Ali, 2018: 262). Therefore, OJK plans to form a new institution that will help to recover investors' funds or assets called Disgorgement and Disgorgement Fund. Regulations regarding Disgorgement have been issued by the Draft of Financial Services Authority Regulation (RPOJK) since 2019. Then on December 29<sup>th</sup>, 2020, the issuance of Financial Services Authority Regulation Number 65/POJK.04/2020 concerning the Return of Illegal Profits and Investor Loss Compensation Fund in the Capital Market Sector ( POJK 65/2020) which was then promulgated on December 30<sup>th</sup>, 2020. Although the OJK regulation no longer uses the terms disgorgement or disgorgement fund, as in the RPOJK, but it has the same intent and purpose to return illegal profits to investors, especially retail investors who often harmed.

Therefore, the author examines what is meant by Disgorgement in the Capital Market based on POJK Number 65/POJK.04/2020 and how the new era of protection for Investors in the Capital Market is.

## **RESEARCH METHODOLOGY**

This study is a normative legal research using both statutory approach and conceptual approach. The statutory approach is carried out by reviewing all laws and regulations interrelated with the legal issues in this research (Peter M Marzuki, 2017: 133). While the statutory approach is applied to study the consistency of the law with the constitution and other laws and regulations as well as to answer legal issues (Abdulkadir Muhammad, 2004:52). The conceptual approach is an approach that departs from the views and doctrines that develop in legal science (Peter M Marzuki, 2017: 135).

## **RESULTS AND DISCUSSION**

### **Disgorgement in the Capital Market: Review of Financial Services Authority Regulation Number 65/POJK.04/2020**

According to Black's Law Dictionary, Disgorgement is “[t]he act of giving up something (such as profits illegally obtained) on demand or by legal

compulsion (Jacqueline K. Chang, 2018:310). Meaning giving up profits based on orders or legal coercion obtained illegally (Nikmah Mentari, 2019:3). There are three elements of disgorgement, namely the act of giving up, profit illegally obtained, on demand or by legal compulsion. Giving the benefits can be carried out through legal orders or coercion. Since it is officially regulated by law, it must go through an order from an authorized official or legal coercion (*dwingen recht*). The profit mentioned above is the profit obtained by the perpetrator of the violation. He is obliged to return the profits he obtained, apart from other sanctions that burden him as the perpetrator of the violation.

Disgorgement is the return of illegal profits obtained by perpetrators of violations through the courts. Funds received through illegal activities or unethical business transactions must be returned. In general, disgorgement is a restitution that is measured by the profits from the wrongdoing of the offender (Supreme Court of The United States, 2017: 2).

In the United States, through an order issued by the SEC, disgorgement has been enforced since 1970 (Jacqueline K. Chang, 2018:309). Disgorgement is an effort and a way for the SEC to charge money, seek equitable relief that may be appropriate or necessary for the benefit of investors (Jacqueline K. Chang, 2018:311) in order to provide sense of justice for investors, therefore efforts to provide fund recovery should be done by forcing the perpetrator to pay a number of losses suffered by investors. In the concept of disgorgement which is assumed as an equitable remedy (Jacqueline K. Chang, 2018:311), is a fair remedy. One of the principal objectives of disgorgement in the context of SEC enforcement is to prevent offenders from profiting from their fraudulent actions (James Tyler Kirk, 2014:155).

In Federal Securities law, disgorgement describes an act to restore unlawful profits. In the United States, disgorgement has been applied in court to enforce the restoration of illegal profits obtained through insider trading (Thomas C. Mira, 1985:448). The purpose of disgorgement is to prevent unjust enrichment, i.e. those who have

violated securities laws are not allowed to profit from their illegal behaviour. Therefore, disgorgement is an effective prevention tool against material abuse in the form of non-public information (Fatema Dalal, 2007:81).

As a just remedy, disgorgement is technically not intended as a means to punish, but as a means to prevent acts of unjust enrichment. Therefore, the SEC is only allowed to recover estimated amounts obtained from the suspected illegal activities (fcpablog.com, 2019). Disgorgement is an indispensable tool to resolve the act of unjust enrichment carried out by every participant in the capital market (Vidhi Shah, 2019: 138).

Disgorgement itself is interpreted as returning the profits of the perpetrators of violations for their illegal actions (Nikmah Mentari, 2019:14). In addition, it is aimed at preventing offenders from getting any benefits for their actions, besides it also expected to prevent similar actions in the future (John C. Kairis, 2011:5).

A material penalty for a loss, namely fines and disgorgement, is actually contrary to compensatory losses. Fines and disgorgement focus on offenders. Fines are imposed for outrageous actions of the perpetrators, while disgorgement is charged for the profits obtained by the perpetrators through illegal acts (Ernest J. Weinrib, 2003:55).

In practice at the SEC, to calculate disgorgement, it is required to distinguish between legal and illegal profits. The first step in the calculation is to identify a causal relationship between the unlawful activity and the benefits to be returned (fcpablog.com, 2019). Once this causal relationship is established, the SEC through its jurisdiction revokes the illegal profits derived from the breach. However, given that such calculations often prove difficult, courts tend to give the SEC considerable discretion in determining what constitutes profits by requiring only a reasonable approximation of the profits which are causally connected to the violation (fcpablog.com, 2020).

According to the Draft of Regulation of the Financial Services Authority (RPOJK) regarding Disgorgement and Disgorgement Fund.

Article 1 Number 3 of the RPOJK defines Disgorgement as a form of OJK's efforts to give orders to parties who violate the laws and regulations in the capital market sector to return the money in the amount of profits / losses that are avoided illegally or against the law.

Furthermore, Article 1 Number 9 of the RPOJK explains that Disgorgement fund is funds collected from the imposition of disgorgement to parties who violate laws and regulations in the capital market, with the aim of being administered and distributed to parties who are disadvantaged for from those violations of laws and regulations in the capital market. The said aggrieved party have submitted a claim within the specified period of time.

After more than one year since the RPOJK was issued in early 2019, OJK finally established the regulation through POJK Number 65/POJK.04/2020 concerning Return of Illegal Profits and Investor Loss Compensation Fund in the Capital Market. Even though it ended up using a different regulatory name and some additions to it, the essence of the contents of both RPOJK and POJK 65/2020 is the same. The name of the regulation that does not attach disgorgement or disgorgement fund to it, according to the author, is used to avoid debate on foreign terms. The disgorgement institution and the disgorgement fund itself are not well known in Indonesia, which adheres to the civil law system (Nikmah Mentari, 2019). Thus, the name of the regulation is taken from the understanding or translation of the disgorgement and the disgorgement fund itself.

The consideration for the issuance of POJK 65/2020 is because the implementation of the functions, duties and authorities of regulating and supervising activities in the financial services sector including the capital market is with OJK. As well as to realize financial service activities that are fair and able to protect the interests of consumers and the public in accordance with Article 9 letter d of the OJK Law. In addition, OJK also has the authority to issue written orders.

According to the explanation in POJK Number 65/POJK.04/2020 that an effort to improve effectiveness and justice in law enforcement in

the capital market sector is through the implementation of Illegal Profit Returns (Disgorgement). Refunds of Illegal Profits are made so that the party who violates the law cannot enjoy the benefits they have been obtained illegally. In order to ensure their act of violation, the Financial Services Authority is authorized to issue a written order in the form of a request for blocking to their financial service institution as well as a written order in the form of book-entry and transfer disbursement of assets to parties who commit violations and financial service institutions.

Furthermore, the funds raised from the imposition of Illegal Profit Returns can be used to provide compensation for losses to victims of violations and/or development of the capital market industry. Through the imposition of Illegal Profit Returns to the party who committed and/or the party that caused the violation, the Financial Services Authority may take remedial action by establishing an Investor Loss Compensation Fund (Disgorgement Fund) which will be returned to the injured investor. With the regulation regarding the Return of Illegal Profits and the Investor Loss Compensation Fund, it is expected to increase investor protection and confidence in investing in the capital market.

Article 1 Number 2 of POJK 65/2020 explains that the Return of Illegal Profits is an order from the Financial Services Authority to return profits obtained or losses that were illegally avoided by the party committing and/or the party causing a violation of the laws and regulations in the capital market. Furthermore, in Number 4, the Investor Loss Compensation Fund is the fund collected from the imposition of Illegal Profit Returns with the aim of being administered and distributed to investors who are harmed and meet the requirements to file a claim.

### **A New Era of Investor Protection in the Capital Market**

Legal protection means to provide protection for human rights that are harmed by others and that protection is given to the community so that they can enjoy all the rights granted by law (Rahardjo, 2000, p. 53). He added that the law is exists in the society to integrate and coordinate interests that may cause conflict with one another. The coordination of



these interests is carried out by limiting and protecting these interests (Rahardjo, 2000).

Progressive law views that the relationship between law and humans is emphasized that law is for humans, not vice versa, humans are for law meaning that the law does not exist for itself but for something wider and bigger. Thus, whenever there is a problem in and with the law, it is the law that is reviewed and corrected and not humans who are forced to be included in the legal scheme (Rahardjo, 2009).

According to Satjipto Rahardjo, the law can function to realize protection that is not only adaptive and flexible, but also predictive and anticipatory. Law is needed for those who are weak and not yet strong socially, economically and politically to obtain social justice (Priyonggojati, 2019, p. 167). Organizing is done by limiting certain interests and giving power to others in a measurable manner. The theory of legal protection from Satjipto Raharjo was inspired by Fitzgerald's opinion about the purpose of law, namely to integrate and coordinate various interests in society by regulating the protection and restrictions on these interests (Nola, 2016).

Legal protection is derived from legal provisions and all legal regulations provided by the community. This legal regulation is basically a community agreement to regulate relations between community members and between community members and the government (Rahardjo, 2000, p. 54). Meanwhile, according to Philipus M. Hadjon, there are two kinds of legal protection for the people, namely: preventive legal protection and repressive legal protection. Preventive legal protection means that the people are given the opportunity to raise objections (*inspraak*) or opinions before a government decision gets a definitive form. Thus preventive legal protection aims to prevent disputes from occurring, while on the contrary, repressive legal protection aims to resolve disputes (Rahardjo, 2009).

Preventive legal protection is very meaningful for government actions based on freedom of action because of the preventive legal

protection the government is encouraged to be careful in making decisions based on discretion.

Repressive protection aims to resolve disputes, including their handling in the judiciary. Legal protection is a subjective condition that states the presence of a necessity in a number of legal subjects to immediately obtain a number of resources, for the continuity of legal subjects that are guaranteed and protected by law, so that their power is organized in the process of making political and economic decisions, especially in the distribution of resources, both at individual and structural levels.

The essence of protection through disgorgement is emphasized on the losses suffered by investors. Investors lose because of an investment risk is not a problem. As people said high risk high return, low risk low return, which means that all business activities including investment in the capital market have risks. However, it should be understood that if losses arise outside of investment risk or business risk, it is an unfairness and injustice for investors in the capital market. These irregularities and injustices arises because of violations.

Basically, all forms of violation result in losses. Both material losses (valued by a sum of money) and immaterial losses. Even if the value of material violations can be clearly known, then immaterial losses can actually become an unlimited loss in value and get more severe (Mentari, 2019, p. 29, 2020, p. 504)

Legal protection can be divided into two, they are (Novasih Muharam, 2018:66): Preventive Legal Protection and Repressive Legal Protection. In legal protection in the capital market, the role of investors is very important, but on the one hand, investors have a weak position due to limited access to a prospectus. Several reasons that require protection to investors (I Putu G. A, 2000:93) are the equity gap and the founder's access to information and financial resources.

This matter reminded that violations and crimes in the capital market can cause consequences because losses are not only limited to investors, but also suffered by issuers and other capital market players

(Hamud M. Balfas, 2004:397). Legal protection is a guarantee that someone will get their rights and obligations concerned with a sense of security (Sudikno Metokusumo, 2003:39; Beta Pandu Yulita, 2016:5).

The existence of legal protection will improve the investors' willingness to invest their fund (Novasih Muharam, 2018: 65). The principle of investor protection in the capital market is a principle that can be implemented if all the principles in the capital market go hand in hand so as to produce a protection for investors. Legal protection in the capital market is to provide protection for human rights that have been harmed by others (Novasih Muharam, 2018:65).

Legal protection of investors in the capital market is a shared responsibility. The government through laws, market players with good corporate governance and investors through Know-Your-Risk-Investment. The government through regulation establishes a market authority to monitor and control the market and protect all parties equally. Market participants, in this case are issuers, securities companies and stock exchanges, must also have professional standards in carrying out their roles in the capital market. This is because the existence of market participants depends on investor confidence. If there are no investors investing in the capital market, then the capital market is meaningless. Furthermore, regarding investors who must recognize their investment risks (Know-Your-Risk-Investment), investors must be independent and try to protect themselves from losses with careful investment considerations.

The United States capital market authorities through the Securities and Exchange Commission have 3 (three) missions in carrying out their roles. It is to protect investors, ensure fairness and efficient markets and facilitate market formation. The most important mission is to protect investors. Because if the market is not fair and safe, the capital market will not attract investors to provide the company's capital that is being sought (Chair M.J White, 2020).

Meanwhile, the Indonesian capital market authority is currently under the authority of the Financial Services Authority (OJK) which is a

transfer of authority from the Capital Market Supervisory Agency (BAPEPAM). Article 4 of the Capital Market Law, Guidance, regulation, and supervision as referred to in Article 3 is carried out by Bapepam with the aim of creating an orderly, fair and efficient capital market activity as well as protecting the interests of investors and the public.

The supervisory can be carried out by making regulations, guidelines, guidance and direction as well as repressively by conducting examinations, investigations and imposition of sanctions if there are strong indications and evidence of violations of Capital Market Law (Nindyo Pramono, 2013: 250). The form of legal protection carried out by the OJK for investors is regulated in Law Number 21 of 2011 concerning the Financial Services Authority (OJK Law) as a preventive and it provides sanctions or repression, given that OJK's task is to carry out the function of regulating and supervising the financial services sector.

The purpose of establishing OJK according to Article 4 of the OJK Law is to ensure that all activities in the financial services sector are organized in orderly, fair, transparent and accountable manner; and able to realize a financial system that grows in a sustainable and stable manner; and able to protect the interests of consumers and the public. In the Elucidation of Article 4 letter c, what is meant by "protecting the interests of Consumers and the public" includes protection against violations and crimes in the financial sector such as manipulation and various forms of embezzlement. In addition, Article 28 of the OJK Law provides legal protection in the form of preventing consumer and public losses, one of which is in the form of other actions deemed necessary in accordance with the provisions of laws and regulations in the financial services sector.

Therefore, OJK, as the authorized institution to protect investors, has the authority to issue regulations that bind the financial services industry, including the consumers of the industry. In accordance with Article 31 of the OJK Law regarding the protection of consumers and the public, it is regulated by OJK Regulations. Therefore, OJK can issue

regulations related to disgorgement in order to carry out their duties as supervisors. The position of disgorgement is to provide a sense of security because investors are protected by legal protection for the losses they will suffer because of another party.

Protection through disgorgement is emphasized on restoring the rights of aggrieved investors as victims of violations or fraud in the capital market. So far, the imposition of sanctions for a violation or crime only looks at the aspect of the perpetrator. However, it is very rare to see the victim's position. All fines from violations and crimes go into the state treasury. Meanwhile, victims who want to get compensation must go through another process which requires a lot of time, effort, money and thought.

The very initial step to take when the violation that causes real losses to investors occurred is to return the losses. However, the return of these losses will not necessarily be obeyed because not all violators are willing to return the illegally obtained profits. Therefore, it is necessary for an authority that has coercive power to comply with this obligation. Disgorgement is the obligation of the offender to return profits or funds they obtained illegally. Meanwhile, fines and other sanctions are a consequence of the perpetrator's disgraceful actions.

To accommodate investor protection in the capital market through disgorgement, Article 3 paragraph (1) of POJK 65/2020 states that the determination of illegal return of profits is imposed along with the imposition of administrative sanctions. When the determination of the return of illegal profits is issued, OJK appoints the Fund Account Provider. Fund Account Provider is a party appointed to provide a fund account for payment of illegal profit returns and distribution of Investor Loss Compensation Funds (Article 1 Number 3 POJK 65/2020). The formation of this fund account provider is made based on each determination. So that aggrieved investors can claims on target.

The illegal profits should be returned within 30 days after receiving the letter of determination to the perpetrator of the violation. If it has not been paid within the given period of time, then OJK will issue a first

warning letter to the second warning (Article 5 POJK 65/2020). If the offender who is subject to an invalid profit return determination cannot make payments through a fund account, then he can make payments using fixed assets (Article 7 POJK 65/2020). So in this case, there is no reason for the perpetrator of the violation not to carry out the obligation to determine the return of the illegal profit.

In addition, in order to ensure the implementation and distribution of the return of profits, if the second warning is not obeyed, the OJK will instruct the Depository and Settlement Institution and/or the Financial Services Institution to block Securities accounts, block other accounts, and/or transfer assets ( Article 8 POJK 65/2020). Furthermore, if the blocking and book-entry of assets have been carried out, the offender does not return the profits, then according to Article 9 of POJK 65/2020, OJK will carry out processing actions to the investigation stage, filing a civil lawsuit and/or filing a bankruptcy application.

Technically, aggrieved investors can access information related to unauthorized returns through the Investor Loss Compensation Fund website created by the Administrator. The website contains at least the following information: a. the case underlying the establishment of the Investor Loss Compensation Fund; b. criteria for investors who are entitled to submit claims; c. claim submission period; d. procedures for submitting claims; and e. the distribution of the Investor Loss Compensation Fund in the form of the total amount of the Investor Loss Compensation Fund distributed, as well as the number of investors who submitted claims and received the Investor Loss Compensation Fund (Article 19 POJK 65/2020).

Regarding the distribution of the Investor Loss Compensation Fund to the injured investors, the distribution is as follows (Article 23 POJK 65/2020):

- a. the amount of the Investor Loss Compensation Fund that has been collected is greater than the number of claims submitted by the injured investor, the distribution of the Investor Loss Compensation

Fund is carried out in accordance with the number of claims submitted by each aggrieved investor;

- b. the amount of the Investor Loss Compensation Fund that has been collected is smaller than the number of claims submitted by the aggrieved investor, the distribution of the Investor Loss Compensation Fund shall be made proportionally; or
- c. after the distribution of the Investor Loss Compensation Fund to all aggrieved investors and there is still remaining Investor Loss Compensation Fund, then fund is used for the benefit of developing the capital market industry.

POJK 65/2020 is valid for 6 (six) months from the date of promulgation, it is on December 30<sup>th</sup>, 2020. So, it is estimated that the regulation can be implemented by the end of July 2021.

## **CONCLUSION**

Investors are the parties who are often disadvantaged when a violation occurred in the capital market. Their loss of funds in the capital market cannot be returned immediately. A lawsuit must be taken to get the funds back. However, it requires money, energy, time and thought, so that not many investors as victims fight for their rights. Therefore, the concept of disgorgement by forcing the return of illegal profits is a form of legal protection for investors. Whereas OJK as the authorized institution need to apply protection in the form of disgorgement must pay attention to the element of justice for all parties. Because basically, legal protection is aimed at achieving a degree of justice for the parties who suffer from financial loss.

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