

**Implementation of The Good Corporate Governance at the *Backdoor Listing Prosedur*
as Means of Business Development in The Indonesia Stock Market**

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Abstract

Developments in the field of capital markets encourage the emergence of various corporate actions to obtain benefits such as a public company. One of the emerging corporate actions which have been done is Backdoor Listing. Regulations in the capital market is generally allowed backdoor listing. Backdoor Listing procedure are often executed in Indonesia are as follows: (1) The acquisition of control of a public company by private company through the rights issue (2) the acquisition of private company by an public company that has an affiliate relationship with the private company into standby purchaser/ new controllers. Study fulfillment of the Good Corporate Governance principles in the backdoor listing procedure is known that this procedure is still not met the Principles of Transparency, Accountability, as well as fairness and equity. It is needed to establish the rules of providing transparency obligation to assess the feasibility of a new public company controller.

Keywords: *Good Corporate Governance, Stock Market, Backdoor Listing*

A. Introduction

Indonesia is one of the developing countries, based on the capital market perspective. The capital market of this country can be seen growing from a number of the company go public, recorded until 2016 about 533 (five hundred thirty three) companies had gone public in indonesia stock exchange (Indonesia Stock Exchange <http://www.idx.co.id/id-id/beranda/perusahaantercatat/aktivitaspencatatan.aspx>, access in 19 Agustus 2016, at 23.44 WIB). In the order hand, a company has public offering or initial public offering (IPO) through the primer market. The process of public offering consist of the long steps, including the pra-emisi, the emission, and after the stage (Irsan Nasarudin, 2004: 216-219). The company which exercise a public offering (go public) must enter clear register and positive thing, for example a record of good financial, its advantage, enlargement of the volume of business because the potential profit, and the position of company in community (Irsan Nasarudin, 2004:214). Public offering in addition to providing advantage there are also weakness arising among other: (1) The additional costs to register effect on public offering. (2) increasing spending and exposure to potential obligation with regard to regulations and

regular reports, (3) loss of control in management, since occur dilution ownership of stocks, (4) the requirement to announce the size of the corporate income and the distribution of dividend, (5) the effect has published could be nothing absorbed by the community in accordance with the company calculations (Irsan Nasarudin, 2014: 216).

Based on obstacles, arising various forms the act corporation. Takeover the issuer which has been listed on the one way committed by private company or who had not go public to enjoy the benefits as issuer without through the process of IPO. This strategy knows as backdoor listing/ reverse takeover. Logman dictionary (Sibiya Viljoen, 2007: 10) explain of backdoor listing is “A method of listing a business on the stock market without going through an IPO”. David Logan Scott (2003: 22) has opinion about backdoor listing are “acquisition and merger with a listed company by an unlisted company in order to gain a listing on a securities exchange. Based on the explain it can be discovered that the backdoor listing performing, aimed at making a company had advantage from stock market unless going through the IPO procedure, but it can be obtainable through acquisitions and/ or merger with public company. Backdoor listing which be discussed during the study was conducted with takeover the company from the acquisition.

Backdoor listing is an option to private company without IPO Procedure, because there are some advantages, including the following: (1) backdoor listing is capable to condense time and cut bureaucratic IPO process, where the preparation processing and licensing are needed a long time and involved many parties relevant institutions; (2) a company want to get access to the exchanges without the additional cost; (3) A private company is not qualify to register and share the trade, but it can enjoy all benefits as issuer recorded on the stock market; (4) Avoid full disclosure which often be the weakness of the company, and safer business because of the detail of company unknown by the opponents (Plus Minus Backdoor Listing, 1997: 80). This high advantages lead to increased the implementation of backdoor listing procedure. The procedure can trim the long time phase and amount of spending money. Implementation of backdoor listing is not balance with the existence of regulations of this procedure. Backdoor listing as a new procedure which is known and have been conducted in indonesia still don't have legal protection. Investigation the feasibility of certain backdoor listing can be analyzed with good corporate governance principle. Issues about good corporate governance is used as the benchmarks economic performance essentially as key determinant in the public welfare. All of company in Indonesia used this principle. The government seriousness to apply GCG in Indonesia company with formation of national committee governance policy, which has issued

guidelines on the implementation of GCG. The importance of the application of helped the company attract investor or domestic and international business operators, especially at the time of global economy is implemented.

Backdoor listing obviously cause some questions whether the procedure was done with rules in the capital market, and whether the backdoor listing have met the corporate governance.

B. Implemented Backdoor Listing Procedure with Private Company Against Issuer in Indonesia

Indonesia doesn't have backdoor listing regulations, so there is no standard reference of prosedures performed. The existence of a backdoor listing procedure can be seen when corporation action can meet with Vancouver Stock Exchange criteria, are as follows:

- a. New shareholder own more than 50% of shares or votes in the General Meeting of shareholders of public companies through newly issued securities, transfers of existing securities, or any other combination of issue
- b. There is an increase of 50% or more of the shares of public companies
- c. There was a significant change in the board of Directors or the management of public companies; or
- d. The public company's business activities have changed (Velliana Tanaya dan Andreas Soetandi, 2014: 117).

Referring to the criteria, some actions of the company may be indicated as backdoor listing. Here is a company that indicated action as backdoor listing:

Table1. Companies that Implement Backdoor Listing In Indonesia

Year	Standby Purchaser	Target Company	New Name Target Company
2009	PT Ratu Prabu	PT Arnoa Bina Sejati Tbk	PT Ratu Prabu Energi Tbk
2011	Amstelco Plc Ltd	PT Indo Citra Finance Tbk	Amstelco Indonesia Tbk
2011	SAMTAN Co., Ltd	PT Myoh Technology Tbk	
2012	J&Partners Indonesia Tbk	PT Pelita Sejahtera Abadi Tbk	J Resources Asia Pasifik Tbk
2014	PT Rajawali Capital	PT BW Plantation Tbk	

	International		
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Source: Erik P.M., 2014:6.

Based on the examples of corporate actions above can be seen that the flow of execution backdoor listing is as follow:

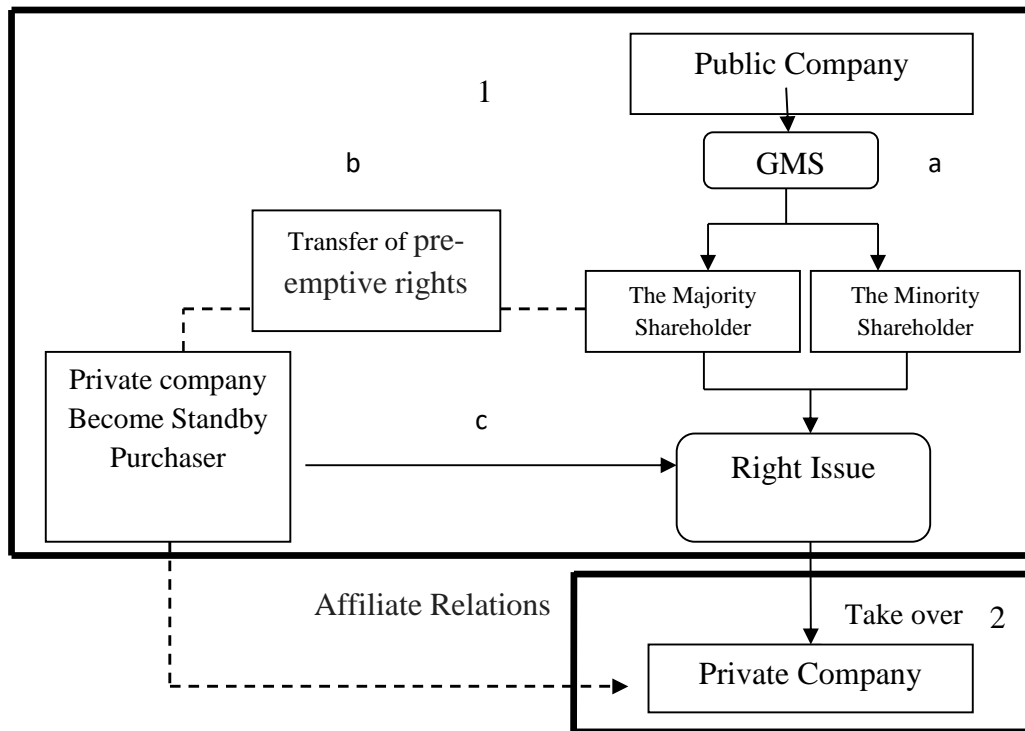


Chart 1. Backdoor Listing Process
Source: Anisa Dwi Wulandari, 2016:93.

Based on the chart can be seen that the flow of execution backdoor listing procedure in indonesia carried out in 2 (two) phases are as follows:

- a. Takeover control of public company by private company through the Right Issue

Takeover of control in public company by private company that are important things on implementation of backdoor listing. As described by Andrew Ferguson (2015: 24) in his article Backdoor Listing in Australia that: It is important to note that a change of control in the listed entity is critical to the BDL process. Without a change of control, the transaction is simply a change in the direction and/or scale of a listed entity's busines. The importance of takeover in the backdoor listing so it needs to be discussed further. Here is the process of takeover of the company open the backdoor listing procedures :

1. The GMS of the Public company's

The special feature is the implementation of the backdoor listing of the company's capital increase, and can only be done based on the approval of the GMS (Article 41 point (1) of the Company Law). GMS shall be held accordance with the provisions stipulated in the OJK

rules on the Plan and the General Meeting of Shareholders of Public Company and the public company's articles of association. Through this GMS public company explained that the funding requirements needed additional capital. Article 43 points (1) Company Law states that all shares issued for the capital increase must first be offered to each shareholder balanced by the ownership of shares for the same class of shares. Shareholders' rights is reinforced by Article 2 POJK No. 32 / POJK.04 / 2015 on Public Company Capital Increase to Provide Pre-emptive Rights. Preemptive Right are the rights attached to shares that provide opportunities shareholders concerned to buy shares and / or other equity instruments are good that are convertible into shares or which give the right to buy shares before they are offered to other parties (Article 1 paragraph (1) POJK No. 32 / POJK.04 / 2015).

GMS in backdoor listing not only agreed on the capital increase with pre-emptive rights but usually also provide followed by changes in the Directors and / or Commissioners, as well as changes in the type of business. Changes of both of these is one of the characteristics of implementation backdoor listing.

2. Transfer Agreement of the pre-emptive Rights between the majority shareholder with a standby purchaser

Multiplication Rights Agreement is intended that the majority shareholders will not exercise the pre-emptive rights that are owned and was diverted to a standby purchaser. Through the transfer of Rights owned by the majority shareholder resulted in the standby Purchaser can acquire new shares of a public company with a very large number. Exercise of the Rights owned by the majority shareholder by a standby purchaser has very clearly made a standby purchaser becomes the new controller of the public company. This makes the transition through the majority shareholder will switch to a standby purchaser (Anisa Dwi Wulandari, 2016:96).

3. Implementation of Preemptive Right

Implementation of Preemptive Right which is based on the percentage of ownership can be implemented if the former has submitted a registration statement and supporting documents to the OJK, and the registration statement has become active (Article 8 point (1) letter b and c POJK No. 32 / POJK.04 / 2015), Information regarding the capital company's increase with pre-emptive rights open entirely contained in a prospectus. Purchase Rights carried out in accordance with the procedures for share subscription and / or securities in the prospectus issued by the public company.

Existence of standby purchaser is necessary to ensure remaining shares and / or other equity instruments are the lowest on the offering price of the shares and / or other equity

securities, which are not held by the holders of Rights (Article 12 POJK No. 32 / POJK.04 / 2015). Standby purchaser in the exercise of the Rights will carry out pre-emptive rights belong to the majority shareholders and the purchase of the remaining shares of the right issue. Acquisition of new shares issued by the public company's enough so that they can make a standby purchaser becomes the new controller of a public company.

b. The Public Company Take Over A Private Company Which Have Affiliate Relations With A Private Company That Standby Purchaser In The Right Issue

Right Issue is usually performed public company to fund the acquisition of the private company. The acquisition complements the backdoor listing of action has been planned by an public company with the objective to increase revenue and strengthen the efforts of the company. The proposed acquisition has been stated in the prospectus Right Issue, which is the purpose of the use of these funds. Article 13 letter a number 2 POJK No. 31 / POJK.04 / 2015 explained that:

In the case of the use of funds for the purpose of stock purchases or acquisitions or investments in other companies, information that should be disclosed include a brief description of the reasons and considerations does the purchase of shares or the acquisition or participation in another company, the name of the seller, the business activities of another company whose shares will purchased and the status of the purchase of shares or the acquisition of acquisitions or investments in other companies, as well as the nature of the affiliation (if any).

Based on that article it is necessary to be clear disclosure regarding the affiliation between the the private company become standby purchaser and the private company that will be acquired. Through this acquisition the standby purchaser would still have covered the company into subsidiaries, with indirect ownership through public company.

Backdoor listing prosedur need to be observed, the existence of the standby purchaser in any capital increase the company gave it the opportunity to become the majority shareholder or the new controlling of the public company. Takeover of control of a public company becomes a very important issue in this action backdoor listing.

C. BACKDOOR LISTING PROCEDURE IN THE PERSPECTIVE OF INDONESIA CAPITAL MARKET LAW

Backdoor listing procedures is takeover of public company in accordance with the regulations in Decision Chairman of Bapepam-LK No. KEP-264 / BL / 2011 on takeover public company essentially. Takeover in backdoor listing procedure is done by buying additional shares were issued a public company at the time of the Right Issue. Pursuant to Article 125 paragraph (1) of the Company Law "Takeover done by the acquisition of shares

already issued and / or to be issued by the company through the company directors or directly from shareholders”, thus indeed possible change of control occurs at the time of the capital increase.

Right Issue as a cover in order to enjoy the benefits obtained as a public company. The most important point here is still poorly understood. Through the Right Issue prospectus only illustrated that the action of the company carrying out its Right Issue to raise funds and used for acquisition of another company. Another fact of Right Issue prospectus to be considered is the possibility of a change a control of public company. Change of control of a public company is very possible to occur when the majority shareholder or controlling shareholder is not carrying out pre-emptive rights to the standby purchaser is able to acquire stock in large quantities. It is of course able to make a standby purchaser becomes the new controller to public company. Procedure from Right Issue is used by the public company to the acquisition of the Private company. The private Company that will be acquired have an affiliate relationship with the private company become standby purchaser in the right Issue.

A change of control in the backdoor listing has been planned so it is not as a result of don't held Rights owned by shareholders. Their motives or objectives to open corporate takeover procedure is done with a rights issue in which the obligations to be met only slightly. Based on the attachment of Decision Chairman of Bapepam-LK No. KEP-264 / BL / 2011 provisions on obligations that need to be done in a public company takeover is not carried out if the takeover occurs due to the acquisition of shares as the implementation of the rules on pre-emptive rights. This regulation is certainly a gap for capital market players to be able to control the company without the obligation to tender offer.

POJK No. 32 / POJK.04 / 2015 on Capital Increase Public Company by providing Pre-emptive Rights provides opportunities to occur implementation of a takeover by a standby purchaser. The takeover through transfer of pre-emptive rights are held by the majority shareholders. Transfer of Rights carried out by the majority shareholder who has the obligation to provide a statement indicating the main shareholders will carry out or not carry out pre-emptive rights held and get the names to divert Rights (Article 21 points (1) letter q). The statement must also be contained in the Rights stating prospectus major shareholder will carry out or not carry out pre-emptive rights that are owned and update the name that will receive the pre-emptive rights (if any) (Article 7 letter v POJK No. 33 / POJK.04 / 2015 on Form the contents of the Prospectus and in the framework of the Public Company Capital Increase by giving ER).

Implementation of the capital increase company is providing an opportunity for foreign investors to become the new controlling shareholder of a publicly listed company into a position with a standby purchaser. After the occurrence of a change of control through a capital increase public company has an obligation under POJK No. 31 / POJK.04 / 2015 on disclosure of information or facts material by the Issuer or Public Company. Article 6 letter K POJK No. 32 / POJK.04 / 2015 states that information or material facts involves a change in control, whether directly or indirectly, to the issuer or public company.

D. IMPLEMENTATION GOOD CORPORATE GOVERNANCE PRINCIPLES IN THE BACKDOOR LISTING

Regulations in capital market does allow backdoor listing, but the other needs to be examined whether the existing regulations have accommodated and able to curb this action. It takes a more in-depth analysis of backdoor listing about action on compliance with the principles and the protection of the rights of existing stakeholders. Analysis by fulfilling the principles of Good Corporate Governance (GCG) can be viewed feasibility of this procedure to be carried out.

Implementation of GCG have Importance in a company because it can protect, search for, cultivate professional human resources and capital investment for the betterment of the company (Misahardi Wilamarta, 2002: 56). In developed countries, the issue of good corporate governance (GCG) serve as benchmarks of economic performance essentially as a major determinant of people's welfare. This condition is growing in developed countries are mostly the investors to invest their capital (investment) in developing countries (Alessio M. Paces, 2012: 1-2). Investors invest in seeing the extent to which the quality of corporate governance that run investment. That is, the failure or success of the company depends on "good corporate governance" (GCG) (Alessio M. Paces, 2012:1-2).

Indonesia requires the entire company in order to apply the principles of GCG. The seriousness of the government in the implementation of GCG in the element of the company in Indonesia is marked by the establishment of the National Committee on Governance Policy, which has issued guidelines on the implementation of GCG. Importance of GCG implementation helped the company attract investors or domestic and international businesses, especially when the global economy implemented. The following analysis of GCG were not implemented in the backdoor listing is as follows:

a) Transparency

The principle of openness is the terminology that is very important and fundamental principles. Embodiments of the implementation of the transparency principle with regard to the delivery of any information disclosure and disclosure of accurate and precise on stakeholders related to the management company. Openness is the main requirement in the context of the acquisition and use of the information needed in order to do an efficient coordination. Management company deals with all matters relating to the performance of both the company financial statements and the management report, the appointment of directors, board meeting, the acquisition, which is done by the management to stakeholders. Stakeholder here can be translated into two, namely the internal and external company's parties. A company official consists of the company's management (directors), supervisory board and shareholders. As for external parties consist of the public, governments, suppliers, creditors, and other groups. (Yudho Taruno Muryanto, 2016: 137). Adequate disclosure is required by investors in his ability to make decisions about the risks and benefits of his investment.

Implementation of the backdoor listing as a corporate action that was planned by a company would need to also apply the principle of openness. Backdoor listing must fulfill the principles of openness because this action has been a change of control public company. Obligations regarding the fulfillment of the principle of transparency is important in backdoor listing action. The analysis of the fulfillment of the obligations arising from the principle of openness in the implementation of the takeover in backdoor listing in Indonesia:

1. Disclosure Information about Takeover Control Process

Undergoing a backdoor listing practices there are of course those who play a role. When observed closely, the parties have the most important role in the practice of backdoor listing, the views of the elements that have been described is a new controller. The existence of this new controller will also impact the renewal of the company's policies. The takeover of the company in the open has been regulated solely by the FSA in the Chairman of the Capital Market Supervisory Agency and Financial Institution No. KEP-264 / BL / 2011 on Company Takeover. On the other hand, backdoor listing shares held by way of taking over the newly issued through the Right Issue, the company's prospective position controller acts as the Standby purchaser. Standby purchaser as stipulated in POJK No. 32 / POJK.04 / 2015, is the party that will buy either part or all of the remaining shares and / or other equity instruments that are not taken up by holders of Rights. The existence of a standby purchaser is required if an public company intends to make additional capital use of funds used to carry out transactions with certain values which have been determined in order to guarantee

the purchase of the remaining shares and / or securities other Equity lowest bid prices for shares and / or equity securities the other, which was not carried out by holders of Rights (Article 12 POJK No. 32 / POJK.04 / 2015). Standby purchaser must make a statement that it has sufficient funds and is able to fulfill its obligations under the purchase agreement residual effect.

Be a standby purchaser also means having the chance to become the new controller at the public company. A tremendous opportunity for a change of control of the company if the majority shareholder does not conduct any pre-emptive rights held. The main goal is the right issue to do a capital increase of the company, but this path is also used by the company is closed to take control of a public company.

The difference is very clear that being a standby purchaser for the takeover of a public company must be very summarize and eliminate the various obligations that must be met. The implementation of the takeover of a public company as part of the action backdoor listing is obviously more profitable for the company which is a candidate for controller. However, compliance with the disclosure of information as a basis for investors to maintain their investment or want to take it off still are lacking. The takeover of control of a company is made possible through the right issue, but in terms of backdoor listing occurs opposite that of right issue this as a means of takeovers.

2) The purpose of takeover

Regulation KEP-264 / BL / 2011 on Company Takeover set some things need to be done as the new controller of transparency regarding control objectives and background of takeover be included in the takeover report. Implementation of the takeover of the public company in backdoor listing using OJK Regulation No. 32 / POJK.04 / 2015 which prospective new controller as a standby purchaser shall have no obligation to make disclosures about its purpose as a standby purchaser that will eventually become the new controlling shareholder of the public company. Existence of standby purchaser, followed by agreement on transfer of the Rights is certainly have ensured that the standby purchasers acquire new shares of the company's portion of the open in large quantities.

3) Affiliate Relations

Based on existing obligations still there is information that should be met, namely the portrayal of themselves if the company is a holding company. In accordance with the above discussion that the backdoor listing of action consists of two (2) actions that are important, which one was the acquisition of the private company as a result of use funds of the Right Issue. It is known that the acquisition of private company by a public company has an

affiliate relationship with a private company which is a standby purchaser. Acquisition of private company, which have affiliation with the standby purchaser, may trigger various questions that public company held Right Issue is really going to make a profit. On the other hand, the existence of a publicly listed company into a holding company is only as a fund-raiser for business development for the company to be acquired.

b) Accountability

The principle of accountability is an embodiment of the obligation to account for the success or failure of the implementation of the vision and mission of the company, to achieve the goals and objectives that have been set. Implementation of accountability has an obligation to present and report on all actions and activities of the company to interested parties. Reporting of all activities related to finance company starting from the procedure (report generation), the accountability mechanism of financial statements, and media used will determine the quality of corporate financial reporting (Yudho Taruno Muryanto, 2016: 137). Accountability is also about the protection and guarantees to every shareholder, in order to convey the right to vote to participate in the Annual General Meeting and other GMS.

Application of the principle of accountability in a takeover implementation can be seen from liability in a takeover to obtain shareholder approval by the GMS. The principle of accountability is supported also for compliance with mandatory requirements to be met one of them is the annual report mainly annual accounts the last fiscal year of legal entities that carry out the takeover (ISWA Hariyani, 2011: 82). Both of these obligations in a takeover are not implemented in the takeover of backdoor listing process.

GMS is run in a series of backdoor listing action to approve the Right Issue and implementation of the company's acquisition of the other private company. On the other hand, the implementation of the takeover of a public company serve as an action arising from the Right Issue, so that the takeover is considered not planned at the beginning.

c) Fairness and Equality

This principle is the form of fair and equal treatment in fulfilling the rights of stakeholders arising under the agreement and the legislation in force. This principle emphasizes that the minority shareholders and foreign and should be treated alike and equal (Joni Emirzon, 2007: 98).

The existence of this principle ensures the fulfillment of the rights of shareholders, especially minority shareholders. Individual rights of shareholders in a limited liability company is the inherent right of self shareholders. The fulfillment of the rights of minority

shareholders in the implementation of backdoor listing are still lacking. This is evident from the implementation of the takeover of a public company would need the approval of the shareholders, but the GMS that exist only to agree on the implementation of the right issue. The rights voice of shareholders to disagree with implementation of the takeover in the backdoor listing is clearly not met. This is based on an public company takeovers were not planned, and the result of the action of the right issue. Those reasons were used the company to break the rules about taking an public company.

Lack of compliance with the principle of equality and unfulfilled supported by the principles of fairness in the implementation of backdoor listing. Outdoor corporate takeover in the backdoor listing is not done by KEP-264 / BL / 2011 on Company Takeover. KEP-264 / BL / 2011 on Company Takeover mention some of the obligations that need to be done for the takeover of a public company. Obligations that should be done is the implementation of the tender offer and perform the duty of openness to transactions conducted.

Preparation of a prospectus which only focus on discussing a capital increase which the funds will be used to acquire other companies as a subsidiary open, making investors do not monitor the impact of the capital increase of the company can change the control of a public company. Things like this must be one of the desired public company that plans to enter a new controller is not rejected by the shareholders at the GMS.

Based on the analysis of the implementation of backdoor listing using GCG principle it can be seen that in the implementation of backdoor listing obviously does not meet the Principles of Transparency, Accountability, as well as fairness and equity. This is because the takeover process is not based on Regulation KEP-264 / BL / 2011 on Company Takeover but was based on the OJK Regulation No. 32 / POJK.04 / 2015. OJK Regulation No. 32 / POJK.04 / 2015 allows a standby purchaser becomes the new controller in the implementation of this right issue, but the backdoor listing capital increase measures have actually been planned as a means of change of control of a public company. In fact, if we understand the more fundamental changes will have an impact on change control policies of the company. Openness and approval by the GMS in this action are needed. This situation, which also impacted on the fulfillment of protection to investors especially minority shareholders. Openness as one of the efforts to implement the legal protection for minority shareholders has not been implemented properly.

Another impact of the implementation of backdoor listings that can happen is the cause jealousy among the companies that have a listing where the other side to be able to enjoy the

advantages of being a public company needs to go through a very lengthy process, while there are companies who are unable and unwilling listings can obtain benefits such as public company. Seeing it is certainly less fulfilled to justice to obtain benefits such as a public company. Besides simply by utilizing a public company that has a listing for the benefit of the capital market resulted in decreasing the number of listed companies, also impact on the number of existing companies could not increase significantly.

Seeing the impact that may result from the implementation of backdoor listing is needed to study about the feasibility and legality of backdoor listing. Establishment of regulations considered very necessary for the implementation of this backdoor listing involves various aspects to be considered. Regulations in the Capital Markets does allow for such action but has not accommodated existence. This is certainly encouraging to make regulations to provide for the disclosure obligations of the new controller to determine the feasibility of a takeover of a public company. A clear mechanism will certainly reinforce the feasibility of this action carried out by the company in Indonesia.

D. Conclusion

Referring to the analysis of the problems outlined in the discussion section, it can be concluded the following matters:

1. Based on existing action backdoor listing, it can be seen that the procedure is done through a backdoor listing 2 (two) important stages, namely:
 - a. Takeover control of public company by Private company through the right issue
 - b. The public company take over a private company which have affiliate relations with a private company that standby purchaser in the right issue
2. Regulation of the capital markets made possible the backdoor listing, but from the existing regulations are still not able to accommodate for the fulfillment of Transparency, Accountability, as well as fairness and equality that are part of the implementation of the Good Corporate Governance. It is needed to establish rules to provide transparency obligation to assess the feasibility of a new public company controller.

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POJK Nomor 33/POJK.04/2015 tentang Bentuk dan Isi Prospektus dalam Rangka penambahan Modal Perusahaan Terbuka dalam Memberikan HMETD.