

## The Notary Responsibilities for Delay in Registration of the Fiduciary Guarantee Deed

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**Abstract.** *This study aims to analyze how Notaries are responsible for late registration of Fiduciary Guarantees carried out by Corporations. The approach method in this study uses a Juridical Sociological approach and is analytically descriptive in nature. The results of the study show that if there is a delay in registering a fiduciary guarantee, for the sake of legal certainty and as an effort to resolve the delay in registering a fiduciary guarantee object, it is by making a new Fiduciary Guarantee Deed by presenting all the parties concerned to the fiduciary agreement or a notary can also provide other solutions such as making the Affirmation Deed on the Fiduciary Guarantee Deed that was previously made. Based on the Affirmation Deed, fiduciary guarantees that were previously registered late can be immediately registered by the Financing Company.*

*Keywords: Fiduciary; Guarantee; Registration.*

### 1. Introduction

The presence of fiduciary guarantees in business and trade practices has more or less provided solutions and convenience for prospective customers (debtors) who need capital guaranteed by movable property without having to hand over collateral objects to the creditor. Fiduciary guarantees were born on the encouragement of practical needs that could not be accommodated by pawn guarantee institutions, the weakness in pawn guarantees where the collateral must be physically handed over to the creditor's hands creates its own difficulties, especially for items that are specifically needed by the debtor in supporting the day's work.<sup>1</sup>

The definition of fiduciary guarantees is contained in Article 1 point 2 of Act No. 42 of 1999 concerning Fiduciary Guarantees, namely:

Fiduciary Collateral is a guarantee right over movable objects both tangible and intangible and immovable objects, especially buildings that cannot be

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<sup>1</sup>DY Witanto, 2015, Fiduciary Guarantee Law in Consumer Financing Agreements, CV Mandar Maju, Jakarta, p. 9

encumbered with mortgage rights as referred to in Act No. 4 of 1996 concerning Mortgage Rights which remain in the control of the Fiduciary Giver, as collateral for repayment of certain debts, which gives a priority position to the Fiduciary Recipient over other creditors.

Fiduciary Guarantees are made in the form of a Notary deed, this is regulated in Article 5 paragraph (1) of Act No. 42 of 1999 which states that "Fiduciary Guarantees are made with a Notary deed in Indonesian and constitute a Fiduciary Guarantee Deed". The notary deed is an authentic deed because the law determines that a notary is a public official who is given the authority to make civil deeds.

The Fiduciary Guarantee Deed made by a new Notary has legal force as a fiduciary guarantee against creditors if the Fiduciary Guarantee Deed has been registered online at the office of the Ministry of Law and Human Rights. If the Fiduciary Guarantee Deed is not registered by the Notary at the office of the Ministry of Law and Human Rights, then the Fiduciary Guarantee Deed will not have legal force as a preferred guarantee for creditors. Preference rights apply to creditors if the Fiduciary Guarantee Deed has been registered online by a Notary marked by a Fiduciary Guarantee Certificate issued by the system from the Ministry of Law and Human Rights as an indication that the creditor is the holder of the Fiduciary Guarantee Certificate which has priority rights over creditors other.<sup>2</sup>

The purpose of registration of fiduciary guarantees is to provide legal certainty to fiduciary recipients and givers as well as interested third parties because with this registration everyone can know that the object in question is really still in the sense that it is not used as collateral for debt which can be done by how to see the list in a place that is authorized to carry out the registration in question.<sup>3</sup>

Registration of Fiduciary Guarantees is currently carried out online through the Fiduciary Online system, namely since March 5, 2013 with the issuance of Regulation of the Minister of Law and Human Rights of the Republic of Indonesia number 9 of 2013 concerning Enforcement of Electronic Registration of Fiduciary Guarantees and Regulation of the Minister of Law and Human Rights of the Republic of Indonesia number 10 of 2013 concerning Procedures for Electronic Registration of Fiduciary Guarantees, and finally with the issuance of Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 25 of 2021 concerning Procedures for Registration, Amendment, and Abolition of Fiduciary Guarantees.

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<sup>2</sup>Yurizal, 2011, Criminal Aspects in Law Number 42 of 1999 concerning Fiduciary Guarantees, Media Nusa Creative, Malang, p. 27

<sup>3</sup>Ibid., p. 31

In contrast to the previous provisions, now to be able to apply for registration, amendment and removal of fiduciary guarantees electronically the applicant must have access rights first. The right of access is the right given to the applicant to access the fiduciary guarantee registration system in the form of an account consisting of a user name and password. Access rights can be obtained through an application at [fidusia.ahu.go.id](http://fidusia.ahu.go.id). The application for this right of access is subject to a fee in accordance with the provisions of the laws and regulations in the field of non-tax state revenue that apply to the Ministry of Law and Human Rights of the Republic of Indonesia and is valid for a certain period of time, and if the period expires, the applicant can apply for the right of access again.

Not only fiduciary recipients, their proxies or representatives can apply for this right of access. Notaries, Corporations and individuals can also apply for access rights. Corporations include corporations engaged in the banking industry, non-bank financial industry, and other business fields. This means that the reach of fiduciary applicants is expanded, not only fiduciary recipients, their proxies or representatives can become applicants, but also notaries, corporations and individuals concerned.<sup>4</sup>

Granting the right of access to the fiduciary registration system to the corporation creates legal uncertainty regarding the responsibility of the Notary for the Fiduciary Guarantee Deed made before the Notary while the registration of the fiduciary guarantee is carried out by the corporation.

## **2. Research Methods**

The approach method in this study uses a Juridical Sociological approach using secondary data as initial data, which is then followed by primary data in the field or on the community. The specification of this research is analytical descriptive in nature, namely research that besides providing an overview, writing and reporting an object or an event will also draw general conclusions from the issues discussed. Source of data comes from primary data and secondary data. Data collection methods include interviews, document studies or library materials. The data analysis method used in this study is qualitative analysis, namely by evaluating the data obtained by analyzing, interpreting.

## **2. Results and Discussion**

### **3.1. The role of a notary in drawing up and registering a fiduciary guarantee deed**

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<sup>4</sup><https://kliklegal.com/simak-implementasi-3-perbedaan-aturan-fidusia-pasca-terbitnya-permenkumham-nomor-25-tahun-2021/> accessed on April 10, 2022 at 23.30

The authority of a Notary in making a fiduciary deed is based on his authority contained in Article 15 paragraph (1) of Act No. 2 of 2014 concerning the Office of a Notary, namely making authentic deeds regarding all actions, agreements and stipulations required by laws and regulations and or what is desired by the interested party to be stated in an authentic deed, guaranteeing the certainty of making the deed, keeping the deed, providing grosse, copies and excerpts of the deed, all of that as long as the making of the deed is not also assigned or excluded to other officials or other people stipulated by law act.

Based on Article 5 paragraph 1 of the Fiduciary Guarantee Law, the fiduciary guarantee charge is made in the form of a notarial deed, in the Indonesian language and is a Fiduciary Guarantee Deed. After the Consumer Financing Agreement has been signed by the parties and the other supporting documents are complete, the parties come before the Notary to draw up a Fiduciary Guarantee Deed along with Fiduciary Guarantee Registration. If one of the parties is unable to appear before the Notary for the preparation of the Fiduciary Guarantee Deed, a power of attorney can be made to appear before the Notary for the preparation of the Fiduciary Guarantee Deed.

Based on the authority of a Notary listed in article 15 paragraph (1) of Act No. 2 of 2014 concerning the position of a Notary, the Notary is responsible for:<sup>5</sup>

- a. Making a Fiduciary Guarantee deed in the form of an authentic deed, namely fulfilling the conditions required in Article 1868 of the Civil Code and Article 1 number 7 of the Notary Office Law.
- b. Guarantee the certainty of the date of making the deed, in this case the Notary guarantees the certainty of the date of making the Fiduciary Guarantee Deed in accordance with the date of signing of the Fiduciary Guarantee Deed.
- c. Keeping the deed, in this case the Notary keeps the original deed along with the notes or minuta of the deed in the form of a minuta document and stored in a special cupboard for storage of the minuta deed.
- d. Provide grosse, copy and excerpt of the deed, in this case the Notary provides a copy of the Fiduciary Guarantee Deed along with the Fiduciary Guarantee Certificate to the Financing Company.

Pursuant to the provisions of Article 15 of Act No. 42 of 1999 concerning Fiduciary Guarantees, the Fiduciary Guarantee Certificate contains the irah-irah clause "FOR JUSTICE BASED ON THE ONE ALMIGHTY GOD" The Fiduciary Guarantee Certificate has the same executorial power as a court decision that

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<sup>5</sup>Interview with Mr. Dwi Kusnandar, SH, M.Kn, Notary in Cirebon Regency, on May 17 2022

has permanent legal force, so Fiduciary Guarantee Certificate holders can immediately execute debt repayment without having to go through a lawsuit in court. If the debtor defaults, the Fiduciary Recipient has the right to sell the object which is the object of the Fiduciary Collateral on his own power.

The juridical consequence is that the application of the principle of *droit de suite* has only been recognized since the date of recording of the fiduciary guarantee in the fiduciary register book. The purpose of this affirmation is none other than if the fiduciary guarantee is not recorded in the fiduciary register book, it means that the fiduciary guarantee right is not a material right but has the character of an individual right so that the consequence for third parties is that the fiduciary guarantee right is not respected by the creditor holding the fiduciary guarantee. After the Fiduciary Guarantee is registered, fictive law applies that everyone will be deemed to know about the granting of the fiduciary guarantee so that the recipient of the guarantee can retain the object of the guarantee to anyone and as a continuation of this publicity principle is that the holder of the guarantee can execute the object of the guarantee in the hands of anyone it is located.<sup>6</sup>

Registration of Fiduciary Guarantees is carried out no later than 30 (thirty) days from the date of the Fiduciary Guarantee Deed and is carried out online through the Fiduciary Online system, namely since March 5, 2013 with the issuance of Regulation of the Minister of Law and Human Rights of the Republic of Indonesia number 9 of 2013 concerning Enforcement of Electronic Registration of Fiduciary Guarantees and Regulation of the Minister of Law and Human Rights of the Republic of Indonesia number 10 of 2013 concerning Procedures for Electronic Registration of Fiduciary Guarantees, and finally with the issuance of Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 25 of 2021 concerning Procedures Registration, Amendment, and Removal of Fiduciary Guarantees.

Financing Companies as creditors and the public as consumers or debtors need legal certainty and authentic evidence for their actions, therefore agreements or bonds made by the Financing Companies legally require the assistance of a Notary in his capacity as a public official who has the authority to make authentic deeds.

The guarantee agreement or authentic binding made by the Financing Company with the customer requires the assistance of a Notary because it is the Notary who has the authority to make an authentic form of deed that is able to provide legal certainty for the parties to the agreement.

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<sup>6</sup>DY Witanto, Op. City, p. 118.

Fiduciary registration that is not made with a notarized deed, the deed cannot be registered. Theoretically the function of the deed is for the perfection of legal actions (*Formalitas Causa*) and as a means of evidence (*Probationis Causa*), thus a deed made under the hand will result in this fiduciary guarantee being unable to be registered because a deed under the hand does not have strong evidentiary power because the signature on the deed under the hand can still be denied.

Making a Deed of Fiduciary Guarantee by a Notary and then registering it until the issuance of a Fiduciary Guarantee Certificate based on the theory of authority and theory of legal certainty because legal certainty as one of the goals of law can be said to be part of an effort to achieve justice.

### **3.2. Notary Responsibilities for Delays in Registration of Fiduciary Guarantees by Corporations**

Article 3 paragraph (2) Regulation of the Minister of Law and Human Rights of the Republic of Indonesia number 25 of 2021 states that access rights to the fiduciary registration system can be granted to Notaries, Corporations, or individuals. The granting of access rights to the fiduciary registration system to corporations provides an opportunity for corporations, in this case Financing Companies, to register fiduciary guarantees themselves and not be carried out by a Notary. The notary only makes the Fiduciary Guarantee Deed while the registration of the fiduciary guarantee is carried out by the Financing Company.<sup>7</sup>

The basic considerations for Financing Companies to register their own fiduciary guarantees include saving time and being able to directly access their own Fiduciary Guarantee Certificates through the website when needed. Even so, in reality, sometimes there are still Fiduciary Guarantee Deeds that are registered late by the Financing Company.

The purpose of registration of fiduciary guarantees is to provide legal certainty to recipients and fiduciary givers as well as interested third parties, because with this registration you will obtain a Fiduciary Guarantee Certificate that has the right of executive power which is equated with a court decision with permanent legal force, meaning that with a Certificate of Guarantee This fiduciary can be directly executed or carried out without going through a trial and examination process through a court and is final and binding on the parties to implement the decision.<sup>8</sup>

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<sup>7</sup>Interview with Mr. Dwi Kusnandar, SH, M.Kn, Notary in Cirebon Regency, on 17 May 2022.

<sup>8</sup>Yurizal, *Op. City*, p. 33.

If there is a delay in registering a fiduciary guarantee or a fiduciary guarantee that is not registered, the Financing Company cannot carry out the execution with an executorial title, but this does not mean that the Consumer Financing Agreement is also deleted or cancelled. This is because the fiduciary guarantee agreement is an *accessoir* agreement and the Consumer Financing Agreement is the main agreement so that even if the guarantee agreement is canceled or deleted, it is not certain that the main agreement is also deleted or canceled because the main agreement was created by an independent cause so that a main agreement can stand alone without any guarantee agreement.

The parties must be present and face the notary to affix their initials to the changed deed as legal evidence that the page has been changed and the parties involved agree to the change. Based on the Affirmation Deed, fiduciary guarantees that were previously registered late can be immediately registered by the Financing Company.<sup>9</sup>

The making of this Fiduciary Guarantee Affirmation Deed when viewed from the perspective of responsibility theory, the notary's responsibilities are the result of the implementation of his duties and position. In carrying out their duties, a notary assumes responsibility for his position and is required to be responsible for his client and be responsible for all his actions including the deeds made by the notary.

### **3.3. The form and nature of the Fiduciary Guarantee Deed**

Based on Article 5 paragraph (1) of the Fiduciary Guarantee Law, it states that "The imposition of objects in this fiduciary guarantee is made with a notarial deed, in the Indonesian language and is a Fiduciary Guarantee Deed"

Notary deed or Notarial Deed, in Article 1 point 7 of the Law on Notary Office, is defined as an authentic deed drawn up by or before a Notary, according to the form and procedure stipulated in this Law. Article 1868 of the Civil Code states that an authentic deed is a deed which, in the form determined by law, is made by or before public officials who have the power to do so at the place where the deed is made.

An authentic deed must fulfill what is required in Article 1868 of the Civil Code, which is cumulative in nature or must cover everything. Deeds made, although signed by the parties, do not meet the requirements of Article 1868 of the Indonesian Civil Code, cannot be treated as authentic deeds, only have the power of handwriting.

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<sup>9</sup>Interview with Mr. Dwi Kusnandar, SH, M.Kn, Notary in Cirebon Regency, on May 17 2022

The fiduciary guarantee deed is a partij deed, namely a deed made before (ten overstaan) a notary which in practice is referred to as a party deed, meaning that the notary in this case reads and witnesses the signing made before him.

If one of the parties cannot attend or wants to be represented in making the Fiduciary Guarantee Deed, the Fiduciary Giver and Fiduciary Recipient can make a power of attorney. The power of attorney does not have to be made in the form of a notarial deed but should be legalized by a notary, meaning that the signing of the power of attorney is carried out before a notary even though the parties make the contents and provisions of the power of attorney themselves so that even though the form is not a notary deed, the notary is involved in the process signing of the power of attorney.<sup>10</sup>

The Fiduciary Guarantee Deed is no different from other agreement deed, the difference is the title of the deed, the premise and the contents of the agreement contained in the deed. Broadly speaking, the systematics of the Fiduciary Guarantee Deed is divided into five parts, including:

#### 1. Deed title

The title is listed at the top of a deed, the title is adjusted to the type of agreement made. In connection with a fiduciary guarantee agreement, the title section says "Fiduciary Guarantee" in capital letters.

The title generally describes the matters explained in the contents of the deed, with the title listed at the top of a deed, it will be easy to find out what is regulated in the contents of the deed.

#### 2. Deed Head

The head of the Deed is located below the title, which is a series of sentences explaining the parties facing before the Notary. The head of the deed becomes an authentication of the notary's deed because it will show that the deed was drawn up by or before a notary.

If it turns out that the provisions in the head of the deed are not fulfilled then the deed will not have formal binding force and the strength of proof will only be a deed under the hand.

#### 3. Deed comparison

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<sup>10</sup>Interview with Mr. Dwi Kusnandar, SH, M.Kn, Notary in Cirebon Regency on May 23, 2022.



The comparison section is the part that explains the parties who appear before and make an agreement. The comparison section must contain, among others:

- a. The names and addresses of the parties;
- b. The position of the parties entering into the agreement;
- c. The legal basis that gives authority to the appearer.

#### 4. Cause (Premises)

The premise or cause for the emergence of the agreement which explains the background of the agreement by the parties. The premise in an agreement is not absolute must always exist, if the agreement does not include a premise, then after the comparison the parties directly arrange the terms and conditions in the agreement made.

#### 5. Contents of the Deed

The most important part in a notarial deed is the content part, because it is in this part that the agreements between the parties are made. The contents of the deed are generally made in the form of as many articles as agreed by the parties.

#### 6. Closing Deed

In the closing part of the deed, it is stated about the time and place where the deed was made, information about the witnesses who witnessed the making and signing of the deed, and information about when the deed was signed.

Based on the provisions of Article 6 Act No. 42 of 1999 concerning Fiduciary Guarantees, the Fiduciary Guarantee Deed contains at least:

- a. Identity of the Fiduciary Giver and Recipient
- b. Fiduciary guaranteed principal agreement data
- c. A description of the objects that are the object of the Fiduciary Guarantee
- d. Guarantee value; and
- e. The value of objects that are the object of the Fiduciary Guarantee.

The guarantee agreement is an assessor of other agreements which are generally in the form of a debt agreement or credit agreement. The nature of the assessor

in the guarantee agreement has the consequence that if the debt agreement or credit agreement is declared null and void, then the guarantee agreement by law is also canceled or deleted because the guarantee agreement cannot stand alone, but vice versa if the guarantee agreement is canceled or deleted, it is not certain that the main agreement is also become null and void because the main agreement was created by an independent reason or it can be interpreted that the main agreement can stand alone without being followed by a guarantee agreement but a guarantee agreement cannot stand alone without a main agreement.

Another consequence of the nature of the assessor in the Fiduciary Guarantee agreement is that when the principal receivables are transferred or transferred to another party either by cessie or subrogation, the Fiduciary Collateral for these receivables is also transferred to the new receivable holder.

The implementation of credit at Financing Companies with Fiduciary Guarantees is based on the theory of legal certainty because Financing Companies as creditors need legal certainty for the payment of debts by debtors and with the existence of a Fiduciary Guarantee Deed and Fiduciary Guarantee Certificate which have executorial titles will provide legal certainty as one of the legal objectives.

#### **4. Conclusion**

The Fiduciary Guarantee Deed is drawn up in the form of a notarial deed in Indonesian and is a partij deed. Fiduciary Guarantee is an assesoir agreement of the debt agreement as the principal agreement. The Fiduciary Guarantee Deed must be registered to provide legal certainty to the fiduciary recipient and giver as well as interested third parties, because with this registration a Fiduciary Guarantee Certificate will be obtained which has the right of executive power which is equated with a court decision with permanent legal force. Granting the right of access to the fiduciary registration system to corporations provides an opportunity for corporations to register their own fiduciary guarantees and not do it by a Notary and if there is a Deed of Fiduciary Guarantee that is registered too late.

#### **5. References**

*Books:*

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*Regulation:*

- [1] Act No. 42 of 1999 concerning Fiduciary Guarantees
- [2] Government Regulation Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making a Fiduciary Guarantee Deed
- [3] Government Regulation Number 86 of 2000 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making a Fiduciary Guarantee Deed
- [4] Regulation of the Minister of Law and Human Rights Number 10 of 2013 concerning Procedures for Electronic Registration of Fiduciary Guarantees
- [5] Regulation of the Minister of Law and Human Rights Number 25 of 2021 concerning Procedures for Registration, Amendment, and Abolition of Fiduciary Guarantees.