



## Regulatory Reconstruction for Creditors of Fiduciary Guarantee Holders Who Are Late INI Registering Fiduciary Guarantees

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### Abstract

The notary as the recipient of the power of attorney to register the fiduciary guarantee experiences delays in registering the fiduciary guarantee to the Fiduciary Registration Office where the time limit has been determined in Government Regulation Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees and Fees for Making Fiduciary Guarantee Deeds as stated in Article 4 which states that submission of applications for fiduciary guarantee registration is submitted within 30 days from the date of making the Fiduciary Guarantee Deed. This results in the loss of the creditor's preferential rights. This results in the phenomenon of a legal vacuum due to the absence of regulations governing how late registration of fiduciary guarantees that have exceeded the 30-day time limit.

**Keywords:** Fiduciary, Notary, Registration

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### Introduction

The financing industry in Indonesia continues to grow and many use fiduciary guarantees as collateral for debts and receivables because of their efficient and practical nature. In fiduciary guarantees, the debtor retains control of the pledged goods, while the creditor obtains legal protection for the receivables through a juridical transfer of title. The validity of the right of preference for creditors when the Fiduciary Guarantee Deed has been registered is marked by the issuance of a Fiduciary Guarantee Certificate issued by the Ministry of Law and Human Rights system as proof that the creditor is a holder of the Fiduciary Guarantee Certificate who has the rights of priority from other creditors <sup>[1]</sup>.

Government Regulation Number 21 of 2015 stipulates that fiduciary registration must be carried out within 30 days from the time the deed is made. This provision must be complied with and is an official deadline that must be met by creditors or authorized parties, such as Notaries. Thus, registration is not only an administrative formality, but a valid condition for the establishment of fiduciary rights themselves. However, in practice, there are still often delays in the registration of fiduciary guarantees, both by creditors and Notaries as authorized parties. This delay poses serious problems because registration is a legal condition for the birth of fiduciary property rights and is the basis for the enactment of creditors' preference rights. However, there are no firm rules regarding the legal consequences if registration is late. This gives rise to the phenomenon of legal vacuum which has an impact on the loss of creditors' rights and potential material losses.

Theoretically, this problem is related to the principle of legal certainty and legal responsibility. The absence of a clear mechanism regarding the delay in the registration of fiduciary guarantees indicates the weak protection of preventive and repressive laws. In addition, it reduces the effectiveness of legal protection and creates uncertainty about the status of the guarantee. Therefore, it is necessary to reconstruct regulations to provide legal certainty and better protection for creditors who experience delays in fiduciary registration. A clear example of this problem can be seen in several court rulings, where delays in registration are the cause of adverse legal disputes Lender.

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<sup>1</sup> Haryanto Nasution, Tanggung Jawab Perdata Notaris Berdasarkan UUJN No. 30 Tahun 2004 Jo UUJN No. 2 Tahun 2014, (Jakarta : Pustaka Ilmu, 2011) h. 19.

Based on the above description of the background and problems, the author tries to identify several issues, namely: (1) What are the characteristics of fiduciary guarantee registration by a Notary? (2) What is the form of legal protection for fiduciary guarantee holders who are late in registering fiduciary guarantees? (3) How is the regulatory reconstruction for creditors of fiduciary guarantee holders who are late in registering fiduciary guarantees?

### Methodology

The approaches used in this thesis research are the Statute Approach, the Conceptual Approach, the Case Approach

### Discussion

#### 1. Characteristics of Fiduciary Guarantee Registration by Notaries

The position of the Notary in the registration of fiduciary guarantees is an important aspect that is not only administrative, but also contains deep legal and ethical responsibilities of the profession. Based on Article 15 paragraph (3) of the Law on the Notary Position (UUJN) and Government Regulation Number 21 of 2015, Notaries have the authority to register fiduciary guarantees electronically through the AHU *Online system*. This authority is strengthened through the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 9 of 2013 concerning Electronic Fiduciary Registration and Government Regulation Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees, which sets a registration deadline of 30 (thirty) days from the time the deed is made. This places the Notary as the administrative technical executor, who works based on the special power of attorney granted by the creditor to take care of the fiduciary registration process. This power of attorney is generally contained in an authentic deed or special power of attorney that is the basis for the Notary's authority to act. Substantially, the involvement of the Notary is expected to provide certainty and legal legitimacy for creditors, considering that registration is a constitutive condition for the birth of material rights to the object of fiduciary guarantee. The purpose of the mandatory registration of fiduciary guarantees is to provide legal certainty to interested parties and provide preferential rights to the fiduciary over other fiduciaries, this is based on fiduciary guarantees giving the right to the fiduciary to retain control of the objects that are the object of fiduciary guarantees based on trust.<sup>[2]</sup> This registration also reflects the implementation of the principle of publicity, which provides legal protection to creditors so that their material rights are recognized and binding on third parties.

Notaries in the implementation of these duties are required to apply the principle of high prudence, in accordance with the principles of meticulousness and professionalism. The notary is obliged to ensure that the Fiduciary Guarantee Deed is made legally, contains complete and accurate data.<sup>[3]</sup> The granting of fiduciary guarantees that are not carried out in the form of a notarial deed in the form of a Fiduciary Guarantee Deed has serious legal consequences. The guarantee does not qualify formally as a fiduciary guarantee because it does not conform to the form that has been determined by the law that

makes the agreement legally defective in terms of formality. Guarantees cannot be registered in the fiduciary system because the system only accepts authentic deeds made by a Notary. Then the guarantee does not have executory power where the creditor cannot immediately execute the object of the guarantee if the debtor defaults, and causes the creditor to lose legal protection for the object of the guarantee and is registered within a period of 30 (thirty) days as stipulated in Article 4 of Government Regulation No. 21 of 2015. Failure of the Notary to meet this time limit, without valid reasons, may raise the risk of loss of creditors' preferential rights and executory power over the object of the guarantee, ultimately giving rise to potential disputes and material losses. However, in the practice of fiduciary guarantee registration, there are still often delays in registration that can be caused by the negligence of the Notary or lack of supervision from the creditor. This delay has serious consequences, namely the loss of the creditor's preferential rights and executory power over the object of fiduciary guarantee. This is an important issue, because the object of fiduciary guarantees can be transferred to a third party in good faith before the registration is completed, so that creditors lose their legal protection. This condition not only harms the interests of creditors as fiduciaries, but also weakens public trust in the Notary profession as a public official who is supposed to ensure legal certainty and security.

Furthermore, this delay in registration shows that there is a legal vacuum in the regulation—that is, it has not been clearly regulated regarding the legal consequences and remedy mechanisms for late registration. This situation creates legal uncertainty for creditors, which is in line with Humberto Ávila's analysis of Legal Certainty Theory emphasizing that legal certainty includes clarity of norms, facts, values, and principles.<sup>[4]</sup> When regulations do not provide a clear mechanism or provision about the consequences of late registration, then the principle of legal certainty becomes harmed. This also has an impact on public confidence in the property guarantee system as a whole, considering that creditors cannot ensure legal protection of their property rights in the event of a failure to register. Meanwhile, in the perspective of Hans Kelsen's Theory of Legal Responsibility, the delay in registration by Notaries is a form of violation of applicable administrative law norms. The norm expressly requires fiduciary registration to give birth to property rights. Failure to implement this norm is the basis for the emergence of legal responsibility for Notaries, both in the form of a default lawsuit (Article 1239 of the Civil Code) if it is based on the exercise of power, or unlawful acts (PMH) (Article 1365 of the Civil Code) if the delay causes losses to creditors. In addition, Notaries can also be subject to administrative sanctions and a code of ethics by the Notary Supervisory Council, in accordance with the provisions in the UUJN. In the context of legal protection, Philipus M. Hadjon's analysis is relevant to show that legal protection is not only repressive (dispute resolution after a violation occurs), but also preventive (prevention so that violations do not occur) to be weak due to the lack of strict legal norms in handling delays. Preventive protection that should be obtained through registration is not optimal, and repressive protection can only

<sup>2</sup> H. Salim HS, *The Development of Guarantee Law in Indonesia*, (Jakarta: Raja Grafindo Persada, 2004) p. 82.

<sup>3</sup> Habib Adjie, *Hukum Notaris Indonesia (Tafsir Tematik terhadap UU No 30 Tahun 2004 tentang Jabatan Notaris)*, (Bandung : Refika Aditama. 2008), h.183.

<sup>4</sup> A'an Efendi and Dyah Octarina Susanti, *Legal Sciences*, (Jakarta: Kencana, 2024) p. 147

be pursued through time-consuming and costly dispute channels. This ultimately creates uncertainty in the legal status and worsens the position of creditors. The legal vacuum raises the potential for repeated legal disputes, as each case will be interpreted based on general principles and court decisions that are not necessarily consistent.

## 2. Legal Protection for Fiduciary Guarantee Holders Who Are Late In Registering Fiduciary Guarantees

Notaries can be said to be late in registering a Fiduciary Guarantee Deed if the Notary has passed the period stipulated in Article 4 of Government Regulation No. 21 of 2015 concerning Procedures for Fiduciary Guarantee Registration and the Cost of Making Fiduciary Guarantee Deeds which states that the application for registration of Fiduciary Guarantee can be submitted within a period of no later than 30 (thirty) days from the date of making the Fiduciary Guarantee Deed before the Notary, not submitting an application for registration through the AHU system until the deadline expires and without a valid and provable reason (for example, *the down* system is not the fault of the Notary, or the debtor's documents are incomplete nor are there any reasons that can justify the delay if the deed has been signed). The Notary's immediacy in uploading documents into the online AHU system when all administrative prerequisites are available reflects a lack of professionalism and a violation of the principles of meticulousness and rigor in the Notary office. Notaries do not provide sufficient information or warnings to creditors regarding the importance of the deadline for registration of fiduciary guarantees, even though Notaries have a moral and legal obligation to explain the consequences of such delays. The provisions of the term are strict and inflexible, unless there is a valid legal basis, such as a system disruption that can be objectively proven. The Notary's delay in registering without any legally justifiable reason can be categorized as administrative negligence, although the delay does not result in the legal nullity of the guarantee agreement, as long as the fiduciary agreement meets the valid conditions of the agreement as stipulated in Article 1320 of the Civil Code. The guarantee is only binding and does not have executory force, so that in the event that the debtor defaults, the creditor cannot directly execute the object of the guarantee without going through a long and complex judicial process. The delay results in the loss of the material aspects of the guarantee, including the preferential right and the right to execute the object of the guarantee directly without going through the judicial process. This lowers the position of creditors to concurrent creditors who only rely on the power of civil engagement, not material rights.

This condition is exacerbated if creditors are passive in monitoring the registration process. In some cases, creditors overly leave administrative tasks to the Notary, without setting a clear deadline in the power of attorney or without actively requesting proof of registration. In fact, *the online* AHU system has provided access and transparency for parties, including creditors, to monitor the status of registration. This administrative negligence on the part of creditors also contributes to the weak legal protection obtained. Based on the classification in the property guarantee law, fiduciary creditors are classified as separatist

creditors who have the right to execute the object of the guarantee directly and get repayment first compared to other creditors. However, if the registration is not made or is done late, the creditor no longer has a separatist position, and is legally only seen as a concurrent creditor. In bankruptcy conditions, concurrent creditors are in the last position to obtain repayment of receivables, after all preferred creditors and other separatists have been fulfilled.

In the context of liability, a Notary can be sued civilly by a creditor on the basis of default if there is a power of registration that is agreed in writing but is not executed on time. Another alternative is through a lawsuit for unlawful acts (PMH), if the delay in registration is caused by negligence or procedural errors on the part of the Notary. Creditors can also report Notaries to the Notary Supervisory Council, both at the regional, regional, and central levels, to obtain administrative sanctions regulated in the Law on Notary Positions (UUJN), such as reprimands, temporary suspensions, or permanent dismissals. This means that the Law and the Notary Code of Ethics require Notaries in carrying out their duties, in addition to having to comply with the Law of Conduct, must also obey the professional code of ethics and must be responsible for the community they serve, professional organizations (INI) and the State.<sup>[5]</sup>

Normatively, several clauses in the fiduciary guarantee deed drafted by the Notary have provided protection to creditors, such as the prohibition of re-fiduciary, the power to sell the object directly, the guarantee of legal ownership by the debtor, and the insurance obligation of the collateral object. However, these clauses apply only within the framework of a contractual relationship, and cannot replace the legal force born of the formal registration process. Thus, legal protection for fiduciary guarantee holders who are late in registering the guarantee is not absolute. Although creditors can still file civil lawsuits as a form of repressive legal protection, the existence of fiduciary as an effective guarantee instrument is highly dependent on compliance with applicable legal procedures, especially registration in the AHU system. Therefore, it is necessary to strengthen the supervisory mechanism of both creditors and Notary supervisory authorities so that legal protection can be carried out optimally.

## 3. Regulation Reconstruction for Creditors Holding Fiduciary Guarantees Who Are Late in Registering Fiduciary Guarantees

The mechanism for registering fiduciary guarantees should be a legal instrument that guarantees protection for creditors. However, the absence of clear arrangements regarding the deadline and the legal consequences of late registration causes creditors' rights to become vulnerable and lose legal certainty. The absence of legal provisions that explicitly govern the consequences of late registration of fiduciary guarantees creates a serious legal vacuum. This is problematic because it has a direct impact on the legal position of creditors who depend on the validity of registration to obtain executory rights.

Current regulations do not explicitly and comprehensively regulate the legal consequences of late registration of fiduciary guarantees. The provisions in Government Regulation Number 21 of 2015 do set an administrative

<sup>5</sup> Abdul Ghofur, Lembaga Kenoatriatan Indonesia (Yogyakarta : UII Press, 2009) h. 16.

deadline of 30 days from the date of making a fiduciary deed by a Notary for the submission of registration. However, the regulation does not explain whether the delay results in the legal cancellation of the guarantee, the loss of material rights, or the possibility of remedial mechanisms such as follow-up registration. Even in the latest regulation, namely Government Regulation No. 25 of 2021 which emphasizes more on the aspect of changes and abolition of guarantees, there is no regulation that clarifies the legal fate of fiduciary guarantees if registration is carried out after the deadline has passed.

The absence of norms that clearly and firmly regulate the legal consequences of the delay creates a legal vacuum (*rechtsvacuum*) which has direct implications for weak legal certainty and legal protection for creditors, especially those who have had good faith but suffered losses due to the negligence of other parties, such as Notaries. The insynchronization between the UUJF and Government Regulation No. 21 of 2015 shows the weak integration between laws and regulations that are supposed to complement each other. This becomes even more complex when the Directorate General of AHU as a technical implementer rejects late registration applications without an adequate normative basis, thus giving rise to systemic legal uncertainty.

From a juridical perspective, this uncertainty poses a serious risk to the creditor's legal position. In the event of a delay in registration, the preferential right to the fiduciary object cannot be enforced, and the right to execute the object of the guarantee directly through the execution *parate* cannot be exercised, since the fiduciary guarantee certificate as an executory condition is not issued. This forces creditors to take the usual civil route through a default lawsuit to the courts, which not only takes time and costs, but also carries additional legal risks. An unregistered fiduciary agreement only has the force of obligation, which is to be legally binding between creditors and debtors without binding third parties. Thus, if the fiduciary object is transferred to another party in good faith, then the creditor cannot defend his rights.

This problem is exacerbated if the delay in registration occurs due to the negligence of the Notary, who in most cases acts as a power of attorney from the creditor to carry out the registration process. Negligent notaries can be held civilly liable through a lawsuit for default or unlawful acts (PMH), and may be subject to administrative sanctions by the Notary Supervisory Council. However, the burden of risk still tends to be borne by creditors, who are the parties most interested in obtaining legal protection for their guarantees.

This legal uncertainty is also reflected in judicial practice. Some court rulings show inconsistencies in interpreting the legal consequences of late registration. For example, Decision No. 20/Pdt/2019/PT. TTE states that the delay in registration leads to the loss of the creditor's material rights and legal protection. Meanwhile, Decision No. 4/Pdt.G.S/2021/PN Bitung emphasizes that fiduciary deeds that are not registered on time remain valid civilly, but lose their executory effectiveness. This diversity of interpretations suggests that without explicit normative arrangements, judges tend to use a caustic approach, which reduces the consistency and predictability of legal decisions.

Within the framework of legal theory, this condition shows the weak application of the principle of legal certainty as put forward by Humberto Avila, who emphasizes that law must be predictable, applied consistently, and guarantee the

stability of legal relations. In addition, the lack of optimal legal protection for creditors reflects the failure to apply the principle of legal protection according to Philipus M. Hadjon, who states that the law should provide protection both preventively (preventing disputes) and repressive (protecting when disputes have occurred). Meanwhile, Hans Kelsen in his theory of legal responsibility states that every violation of legal norms, including those of an administrative nature, must have logical and proportionate consequences, not absolute sanctions that burden the innocent.

Based on these various analyses, there is an urgent need to carry out a regulatory reconstruction that is not only technical-procedural, but also normative-substantive. New regulations need to be designed to accommodate the following fundamental principles:

1. **Legal certainty**, by clarifying the legal status of fiduciary guarantees that are registered late and providing an administrative correction mechanism.
2. **Legal protection**, by recognizing the rights of creditors who have acted in good faith despite administrative obstacles beyond their control.
3. **Proportionality**, so that the legal consequences are adjusted to the degree of error, and do not absolutely remove the right to minor administrative errors.
4. **Good faith**, as the main basis in assessing the eligibility of the provision of legal protection, especially for innocent parties.
5. **Accountability**, by affirming the Notary's negligent liability, including administrative, civil, and ethical sanctions.
6. **Efficiency and accessibility**, through the optimization of the online AHU system and the implementation of a decent grace period to avoid absolute penalties for administrative delays.

The reconstruction of this regulation must also consider a progressive and restorative approach, as conveyed by Moch. Isnaeni, that the law must guarantee substantive justice, provide solutions to the void of norms, and provide a mechanism for the restoration of rights for the aggrieved parties. For example, by introducing a mechanism for recognizing limited legal protection or delaying administrative sanctions in the event that delays occur for legitimate and provable reasons.

By strengthening the principle of the rule of law as reflected in Article 28D paragraph (1) of the 1945 Constitution, which guarantees fair legal recognition, protection, and certainty for every citizen, new regulations must be designed to guarantee not only legality, but also fairness and proportionality. Within that framework, the fiduciary guarantee legal system will not only be an administrative tool, but a means that protects the rights and interests of the parties comprehensively and fairly.

## Conclusion

1. The characteristics of fiduciary guarantee registration by Notaries reflect the dual role of Notaries as the maker of Fiduciary Guarantee Deeds and at the same time the power of attorney of creditors to register guarantees to the Ministry of Law and Human Rights' Online AHU system. This registration must be done no later than 30 days from the date of making the deed. These activities are the embodiment of the principles of publicity, specialty, and accessories in property guarantee law, and are an absolute requirement to obtain a fiduciary



- certificate that gives preferential rights and executory power to creditors. Creditors holding fiduciary guarantees have a position as legally protected separatist creditors, but such protection only applies if the fiduciary guarantee has been registered. The delay in registration causes the loss of legal force as a material right and lowers the position of creditors to concurrent creditors. In such conditions, legal protection can still be pursued through civil channels, the principle of good faith, and consideration of judicial practice, although it is limited.
2. Legal protection for fiduciary guarantee holders who register late has not been adequately regulated in the positive legal system in Indonesia. Creditors who have been in good faith and give power of attorney to the Notary are still at risk of losing the legal protection of their guarantee in the event of delay. Legal protection measures that can be taken are limited to civil remedies against negligent parties (usually Notaries), and cannot recover the material power of fiduciaries who do not have a certificate. The court's ruling also shows that legal recognition of late fiduciary registration is very weak without a clear normative basis.
  3. Regulatory reconstruction is urgently needed to address the legal vacuum and provide limited protection for creditors in good faith. The new regulations need to include provisions on the grace *period*, legal protection mechanisms if delays are caused by a third party (Notary), and strengthening legal responsibilities for Notaries. In addition, it is necessary to integrate a technology-based supervision system so that creditors can directly monitor the registration status through AHU accounts.
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