

# NOTARY'S RULE AND ANTI - MONEY LAUNDERING UNDER INDONESIAN LAW

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## NOTARY'S RULE AND ANTI-MONEY LAUNDERING UNDER INDONESIAN LAW

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**Abstract:** This study aims to analyze the notaries who do not carry out the obligation to identify the source of funds for their service users and find a criminal law policy regarding the obligation to identify the origin of the source of funds for Notary service users future (*iusconstituendum*). This research uses normative legal research, using statute and conceptual approaches. The results of this study are a notary who does not identify the user and verify the documents and verify the users of the services directly. There is a strong allegation that the clients are suspicious and will make a suspicious transaction, so the notary can be categorized as a person who participates in conducting criminal acts and criminal law policies in the future against the notaries regarding the obligation to identify the origin of the source of funds of Notary service users by reporting to the Regulatory Supervisory Institution (LPP) or Financial Transaction Reports and Analysis Center (PPATK), then to the notary is given a reward and guarantee of legal protection.

**Keywords:** Identification, Notary, Criminal Act, Money Laundry

### 1. Introduction

The Notary is a state official appointed by the Minister of Justice and Human Rights to act as an extension of the government for the benefit of the state. Their role is crucial and essential in people's daily lives. However, in practice, the Notary is required to maintain the confidentiality of the information contained in the notarial deed, unless instructed by law to do otherwise and provide any relevant information related to the deed.<sup>1</sup>

The interest of the part are protected with that deed.<sup>2</sup>The obligation of Notary in carrying out his position, according to Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Position of Notary (UUJN) Article 16 paragraph (1) letter f states that "keep secret anything on deeds he/she draws up and any information he/she receives to draw up the deeds in accordance with oath of office, unless stipulated otherwise by the law".

In Government Regulation Number 43 of 2015 concerning Reporting Party In Prevention and Eradication of Money Laundering Crimes Article 2 paragraph (1) letter a Financial Service Providers, shall include:

1. Bank;
2. Finance company;
3. Insurance company and insurance broker company;
4. Financial institution pension fund;
5. Securities company;

<sup>1</sup>Ramadhani, D., Rodliyah, R., & Djumardin, D. (2020). The Obligation of Notary to Prevent and Eradicate Criminal Acts of Money Laundering. *International Journal of Multicultural and Multireligious Understanding*, 7(5), 367-377.

<sup>2</sup>Soudijn, M. R. (2012). Removing excuses in money laundering. *Trends in Organized Crime*, 15(2-3), 146-163.

6. Investment manager;
7. Custodian;
8. Trustee;
9. Postal service as current account service provider;
10. Trader of foreign currency;
11. Card-based payment device service provider;
12. E-money and/or e-wallet service provider;
13. Saving and loan cooperative;
14. Pawnshop;
15. Company engaging in the field of commodity futures trading;

According to Article 4 Government Regulation No.43 of 2015, Reporting Party should apply the principle of recognizing Service Users. The Head of (PPATK) issued Regulation No. 11 of 2016 concerning Procedures for Submitting Suspicious Financial Transaction Reports for Professionals. Like other professions, notaries are required to apply the principle of 'Know Your Customer' (KYC).

According to Minister of Law and Human Rights Regulation No. 9 of 2018, notaries are required to follow the principle of recognizing service users as outlined in the regulation. This requirement is stated in Article 10 paragraph (1), which mandates that notaries must verify the validity of the service user's identity documents, including the source of funds. The regulation is meant to ensure that notaries fulfill their obligations and maintain integrity in their work.

## 2. Method

This type of research used in legal research is normative. The approach used in this research are the Statue approach and conceptual approach.<sup>3</sup> The criminal law policies regarding the obligation to identify the origin of future sources of funds for Notary services users (*Ius Constituendum*). The primary legal material used is legislation relating to Prevention and Eradication of Money Laundering and Notary Position, then Secondary Legal Material is legal material obtained from textbooks written by legal experts, legal journals, legal cases, jurisprudence and symposium results related to the Research topic. Tertiary legal materials are legal materials that provide clues, or meaningful explanations of primary and secondary legal materials such as legal dictionaries and encyclopedias and others.

## 3. Notaries Obligation to Identify the Source of Funds as a Criminal Offender

If a Notary fails to properly identify the user and verify the documents, and there is a strong suspicion that the person will engage in criminal activity, the Notary can be considered a participant in the crime under Article 55, paragraph 1 of the Criminal Law Code. Additionally, they can be considered an accomplice to the commission of criminal offenses under Article 56 of the Criminal Law Code.

Based on Money Laundering Law Article 17 paragraph (1) letter a, the reporting party in a suspicious transaction is a financial service party. Then Article 17 paragraph (1) letter b is for providers of other goods and / or services. The regulation of who is meant by other goods / or service providers, by Article 17 paragraph (2) will be regulated through Government Regulation. Then the issuance of Government Regulation No.43 of 2015 in the provisions of Article 3 of the Reporting Party other than as referred to in Article 2 also includes point (b) Notary.

Regarding what is meant by suspicious transactions, **the Minister of Law and Human Rights** issued Minister of Law and Human Rights Regulation No. 9 of 2017 as follows:

<sup>3</sup>Irwansyah. 2020. *Penelitian Hukum, Pilihan Metode dan Praktik Penulisan Artikel*. Yogyakarta: MirraBuana Media, p. 164-166

1. Financial Transactions that deviate from the profile, characteristics, or habits of the transaction patterns of the relevant Service Users;
2. Financial Transactions by Service Users that are reasonably suspected of being carried out in order to avoid reporting the relevant transactions which must be carried out by the Reporting Party in accordance with the provisions of the statutory regulations governing the prevention and eradication of money laundering crimes;
3. Financial Transactions conducted or canceled by using assets suspected to originate from proceeds of crime; or
4. Financial Transaction requested by PPAK to be reported by Notary because it involves assets suspected to originate from the proceeds of crime.

In the case of corruption and money laundry in the Driving License Simulator project in the Indonesian Police Traffic Corps (KorlantasPolri) conducted by DS, has been decided and strengthened by the Decision of the Supreme Court of the Republic of Indonesia, Number 537 K / Pid.Sus / 2014 Year 2014 which has permanent legal force (*inkracht*). In the SIM Simulator Corruption case in KorlantasPolri was revealed that the role of a Notary helped a convict DS in carrying out various transactions to purchase property assets in various regions. Then the Corruption Eradication Commission and the Corruption Court proved that it was a modus of money laundering.<sup>4</sup> Based on this case, a Notary / PPAT must be careful and really identify his client who comes to them.

Notaries, as state officials, are community/individual appointed by the government as public officials who has the task of carrying out the legalization for binding of agreements carried out by the public. Notaries are also bound by statutory provisions governing notary management. Provisions governing state officials can be stated in the explanation of the provisions of Article 11 of Law No. 8 of 1974 concerning Principles of Civil Service which states that what is meant as a state official is: (a) President, Members of the Consultative Body / People's Representative, (b) Members of the Audit Board, (c) Chief, Deputy Chief, Deputy Chief and Supreme Court Judge, (d) Members of the Supreme Advisory Council, (e) Minister, (d) ) Heads of Representative Offices of the Republic of Indonesia abroad who are domiciled as extraordinary and sovereign ambassadors, (e) Governors of regional heads, (f) Regents of regional heads / mayors of regional heads, (g) Other officials determined by statutory regulations.<sup>5</sup>

The Office of Notary Public (UJUN) outlines the duties and responsibilities of notaries in Article 15. One example of these regulations can be seen in Article 39, which requires individuals appearing before a notary to have the legal ability to participate in legal actions. This is further strengthened by the "know your customer" principle, where the individual must either be known by the notary or introduced by two witnesses who are at least 18 years old. This introduction must be clearly stated in the document and cannot simply be a formality.

In line with the requirement to establish the identities of the actual parties, the researcher notes that this practice aligns with the national banking system's KYC (know your customer) system. This is consistent with Article 2 of Law No. 10 of 1998 on Banking, which states that Indonesian banks must operate based on the principle of economic democracy using the prudential principle. The implementation of the prudential principle in the banking sector aims to maintain the trust of depositors and promote healthy banking practices. One way to enforce the prudential principle is

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<sup>4</sup> Nelson, F. M. (2022). In Search of a Deferred Prosecution Agreement Model for Effective Anti-Corruption Framework in Indonesia. *Hasanuddin Law Review*, Vol. 8 no. (2), 122-138. DOI: <http://dx.doi.org/10.20956/halrev.v8i2.3292>

<sup>5</sup> Philipus M. Hadjon et al. 1994. *Pengantar Hukum Administrasi Indonesia (Introduction to the Indonesian Administrative Law)*. Gadjah Mada University Press. Surabaya. p. 212

through the "know your customer" principle, which is considered a crucial step in protecting the stability of banks.<sup>6</sup>

Under these regulations, it is anticipated that banks will be able to detect suspicious transactions sooner, reducing risks such as operational risk, legal risk, concentration risk, and reputational risk. Furthermore, by following the principle, banks will have a better understanding of their customers' profiles and transactions performed through banking services.<sup>7</sup>In the event of a suspicious transaction, it must be reported to the Financial Transaction Reports and Analysis Center (PPATK). This means that not only the identity of the customers but also the nature of their transactions will be known. This is because banks provide financial services, whereas notaries offer expertise to clients who come to them for assistance. The provisions of Article 18 paragraph (1) and paragraph (4) of the Law regarding Countermeasure and Eradication of Money Laundering (UUTPPU) which basically states: "The Supervisory and Regulatory Agency stipulates the principle of "know your customer" and the Supervisory and Regulatory Agency shall be obliged to implement the supervision towards the compliance of the Reporting Party in applying the principle of "know your customer".

As result, the Notary is required to identify the profile of his service users in making any deed or using his services. This is in sync with the provisions of Article 38 paragraph (3) of the UUJN which states as follows:

- a. Full name, address, nationality, occupation, position, address of the parties and / or people they represent;
- b. Information regarding the position of the appearer;
- c. The content of the deed which is the will and desire of the parties who may concern, and
- d. The full name, place and date of birth, and occupation, position, address of each identifying witness.

Once the task is completed, the Notary is obligated to verify the information and documents. This is in accordance with Article 19 of Regulation of Minister of Law and Human Right (Permenkumham) Number 9, Year 2017, which allows the Notary to request additional information from their service users to assess the validity of the documents. If there are any doubts about the authenticity of the formal documents, the Notary may also request supporting documentation from the relevant authority.

In accordance with these provisions, Notaries must identify and verify the identity of their service users through direct meetings and examination of relevant formal documents. By analyzing the identity information of the individual appearing and the documentation of the source of funds, the Notary may determine if there are suspicions of illegal funding sources or transactions. If this is the case, the Notary is required to submit a report to the Supervisory and Regulatory Body (LPP) or the PPATK. Notaries have a duty to report any business transactions that involve a large number of clients or have unusual or suspicious indications, such as a Class II-a civil servant purchasing a 2-billion-dollar house.<sup>8</sup>This situation falls under the category of suspicious transactions due to a significant discrepancy with the customer/client profile. The supervision of reporting parties' compliance with reporting obligations is carried out by LPP and PPATK as per Article 31 of UU TPPU. If notaries fail to report a suspicious transaction made by clients, they may put themselves at risk

<sup>6</sup> Abdul Rasyid. 2019. Prinsip Mengenal Nasabah Dalam Perbankan. <http://business-law.binus.ac.id/2016/12/29/prinsip-mengenal-nasabah-dalam-perbankan/>. Accessed on 10 November 2018.

<sup>7</sup>Subiyanto, S., Gunarto, G., & Hafidz, J. (2017). Juridical analysis of the alleged criminal offense to manufacture a notary deed. *The 2nd Proceeding "Indonesia Clean of Corruption in 2020"*.

<sup>8</sup>Diana, S. N., Mispansyah, M., & Syaifi, A. (2020). Kedudukan Akta Berhubungan dengan Pelaksanaan Jabatandari Oknum Notaris yang Berijazah Palsu. *Lambung Mangkurat Law Journal*, 5(2), 230-244

as they can be considered as participants or active facilitators of criminal acts as per Articles 55 and 56 of the Criminal Code, respectively.

Whether notaries who fail to identify a service user can be considered a criminal offender or face conviction depends on the specific circumstances and facts of the case,<sup>9</sup>The role of the Notary is considered important according to the Identification Theory. The Criminal Code, as outlined in Article 55 paragraph (1), divides individuals involved in a crime into different categories, including those who perform the action (*plegen*), those who give the order (*doenplagen*), and those who participate in the action (*medeplegen*).<sup>10</sup>

The individuals who actually carry out the criminal act (*plegen*) are typically considered the primary perpetrators and hold the greatest responsibility for the crime. They are frequently referred to as the ones who commit the offense. The person who gives the order (*doenplegen*) directs someone else to carry out the act, using that person as a means to an end. In this scenario, there are two parties involved: the direct performer (*manus ministra/auctor physicus*) and the indirect controller (*manus domina / auctor intellectualism*). The elements in *doenplegen* are:<sup>11</sup>

- a) the used tools are humans;
- b) the tool used to commit a crime;
- c) the used tool cannot be responsible for, so people who are told to do so cannot be responsible for.

Regarding participation in a crime (*medeplegen*), according to MvT, these individuals intentionally play a role or contribute to the commission of a crime. As a result, all participants in a crime are considered equal in their involvement and desire for the crime to occur. If just one participant were to back out, the crime would not take place. Thus, those who participate are considered to be on the same level as the primary perpetrators. The requirements for participating (*medeplegen*) are:<sup>12</sup>

- a) there is conscious cooperation, cooperation is done intentionally to cooperate and aimed at things that are prohibited by law.
- b) there is a joint physical implementation, which results in the completion of the relevant crime.

<sup>1</sup>The provisions of Article 55 paragraph (2) of the Criminal Code, namely Provokateur (*uitloken*), who is a person who moves others to commit a crime by using the means specified by the Law in a limitative manner, which is giving or promising something, abusing power or dignity, violence, threats, or misleading, by providing opportunities, means, or information. So the provokateur (*uitloken*) material perpetrators can be convicted.

The provisions of Article 56 of the Criminal Code, namely Cooperation to commit criminal acts (*medepllichtige*), on the cooperation of criminal acts, their actions are only to help/ to support, there is no need for conditions as that in the provisions of Article 55 paragraph (2) of the Criminal Code concerning advocates (*uitloken*). Then in the case of cooperation, helper only deliberately provide the help without being required to have to work together and their own interests.

Based on the description, if the Notary does not identify the user and verify the documents and do the direct verification of the users of the services, and there is a strong allegation that the appearer are suspicious and will carry out a suspicious transaction, then if it is known, the Notary can be categorized as a person who participates in a criminal act (*medeplegen*) Article 55

<sup>9</sup>Lucian, R. D. (2010). The concept of money laundering in global economy. *International Journal of Trade, Economics and Finance*, 1(4), 354.

<sup>10</sup>Mispansyah. 2018. *Hukum Pidana Lanjut Slide Bahan Kuliah*. Fakultas Hukum Universitas Lambung Mangkurat Banjarmasin. p. 5.

<sup>11</sup>*ibid.*

<sup>12</sup>*ibid.*p.6

paragraph (1) of the 1st Penal Code. And can also be categorized or imposed as a person whose role is to help carry out criminal acts as referred to in Article 56 of the Criminal Code (*medeplichtige*).

#### 4. The future of Criminal Law Policy on the Obligation to Identify the Sources of Funds for Notary (*IusConstituendum*)

What kind of criminal law policy regarding the obligation to identify the origin of future sources of funds for Notary service users could be? To answer this problem, we must know that the criminal law policy uses the means of criminal law (the means of punishment) and the non-penal means.<sup>13</sup> In the steps to prevent money laundering, the role of the Gatekeeper is very important, because they can prevent it earlier.<sup>14</sup> In order to prevent money laundering in 1989, countries as members of the G-7 group consisted of Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States), formed a group named *Financial Action Task Force on Money Laundering* (FATF), this institution is an intergovernmental body that aims to build international cooperation in dealing with this type of crime.<sup>15</sup>

Notaries who are requested as witnesses can refuse their testimony, and this is contained in several laws and regulations which affirm that the Denial Rights of Notary can be used when the Notary Public acts as a witness in a Civil case (Article 1909 paragraph (3) of the Civil Code, Article 146 paragraph (1) HIR, and the predicate crime Article 170 of the Criminal Procedure Code in court proceedings relating to the deed made before or by the Notary and all information which is obtained in making the deed.<sup>16</sup>

The criminal law policy regarding the obligation to identify the source of funds for Notary services users in the future, there must be a reward, and is categorized as a reporting party that can be given protection as mentioned in Law Number 13 of 2006 concerning Witness and Victim Protection, applies the rights of the reporter in the rules and regulations of the implementing party. Provisions regarding special protection are affirmed in article 2 of Government Regulation Number 57 Year 2003 concerning Procedures for Special Protection for Reporters and Witnesses for Money Laundering, emphasizing that: "Every reporter and Witness in money laundering cases must be given special protection before, during and after the case investigation process. Provisions of Article 5 Government Number 57 Year 2003 The specific form of protection referred to the protection of personal security from physical and mental threats, protection of property, protection in the form of confidentiality and disguising identity, and providing information without meeting face to face (confrontation) with suspects or defendants at each case investigation level.

The Regulation regarding protection for Reporters and Witnesses in Law Number 8 of 2010 concerning Prevention and Money Laundering Eradication are contained in Chapter IX, which are in articles 83-87. UUTPPU emphasizes the legal protection provided to the reporters for their merits reporting suspicious financial transactions related to money laundering. The first form of legal protection provided by the Money Laundering Law (TPPU) is a legal obligation for PPAATK, investigators, public prosecutors and judges to keep the identity of the Money

<sup>13</sup>Hajdú, József, and Rofi Aulia Rahman. "The New European Union Whistleblowing Directive: In Comparison to Indonesia's Practice." *Hasanuddin Law Review*, Vol. 7 no. 3 (2021): 226-240. DOI: <http://dx.doi.org/10.20956/halrev.v7i3.3321>

<sup>14</sup>Ciucă, L. B. (2018). The Notary Public and His Role in The Prevention and Fight Against Money Laundering. In *Communicative Action & Transdisciplinarity in the Ethical Society* (pp. 97-104). Editura Lumen, Asociația Lumen.

<sup>15</sup>MacDonald, R. J. (2010). Money Laundering Regulation-What Can Be Learned from the Canadian Experience. *J. Prof. Law.*, 143.

<sup>16</sup>Maskanah, U., & Oktavia, D. M. (2020). The Power of Authentication of Notary Deed in Justice in Indonesia. *International Journal of Latin Notary*, 1(1), 5-9.

Laundering reporter. It is intended that the reporters feel safe from the Money Laundering offender who can endanger themselves, their family and their property. If the identity of the reporter is open, according to Law on Money Laundering gives the reporters or their heirs the right to demand compensation from the party who leaked the identity of the reporter. The second form of legal protection which is also the most important legal protection is that the reporters are free from all lawsuits, both civil and criminal for all reports that they give to law enforcement.<sup>17</sup>

Regarding future criminal law policies for notaries in regards to identifying the source of funds for their clients, notaries will be incentivized through rewards such as the eradication of corruption crimes, with a reward of 200 million rupiah as outlined in Article 17, Paragraph 2 of Government Regulation Number 43 of 2018, which pertains to implementing societal participation and rewards in preventing and combating corruption. Therefore, the legal profession, including notaries, who report suspicious transactions against their clients to the PPATK, can be incentivized by granting charters and premiums worth 200 million rupiah. Additionally, they will be protected with security measures, their identities will be kept confidential, and they will not face any consequences for the information they provide.

## 5. Conclusion

The notaries do not identify the user and verify the documents and direct verification of the users of the services. Also, there is a strong suspicion that the appearers are suspicious and will carry out a suspicious transaction. If the notaries know it, they can be categorized as participants to commit a crime (*medeplegen*) Article 55 paragraph (1) of the 1st KUHP. Moreover, it can also be categorized or imposed as a person whose role is to help carry out criminal acts referred to in Article 56 of the Criminal Code (*medeplichtige*). Future criminal law policy towards a notary regarding the obligation to identify the source of funds of Notary service users by reporting to the LPP and PPATK, then to the notary: Firstly, they are given a reward such as in the form of a charter and a premium of Rp. 200,000,000.- (two hundred million rupiah) as a reward for providing information/reports on corruption; Secondly, legal guarantees in the form of guarantees of security, the confidentiality of their identities, and guarantees cannot be reported back (criminal and civil proceedings) by any party for the reports they provide.

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