

## Preventing Money Laundering Through The Know Your Customer Principle by Indonesian Notary in Foundation Establishment

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### Abstract

According to Indonesian law, foundation is a legal entity consisting of segregated assets intended to achieve certain social, religious, and humanitarian goals, which has no members. The establishment of a foundation in Indonesia has three important stages, namely establishment, ratification, and announcement. The first stage, the establishment of the foundation must be based on the deed of establishment made by an Indonesian Notary. The second stage, the ratification of the foundation, is authorized by the Minister of Law and Human Rights of Indonesia. The third stage, namely the foundation, must be immediately announced in the Supplement to the State Gazette of the Republic of Indonesia. The main regulation relating to foundations in Indonesia is Law Number 28 of 2004 concerning Amendments to Law Number 16 of 2001 concerning Foundations. In order to prevent money laundering, preventive measures such as Know Your Customer Principle must be taken in the process of establishing a foundation. Know Your Customer Principle supports the principle of accountability of a foundation in knowing the source of funds used in the foundation. The purpose of this study is to analyze the application of Know Your Customer Principle in the foundation establishment stage in Indonesia and the challenges of Know Your Customer Principle application in the foundation establishment stage in Indonesia. This type of research is normative legal research with a statutory research approach, conceptual approach, and comparative approach that compares foundation establishments in Indonesia and Malaysia. The implication of this problem is that in the foundation establishment stage, if the application of Know Your Customer Principle is not carried out firmly, considering the large number of foundations that are established, it can cause the potential for a foundation not to be optimally supervised such as sources of funds derived from money laundering crimes. There needs to be a superior institution that supervises foundations facilitated by the State, so that foundations in the future can be controlled and do not commit fraudulent acts. Indonesian notary are one of the parties that have an important role in carrying out Know Your Customer Principles, so that the accountability of a Notary in Indonesia will also be involved in the context of establishing a foundation.

**Keywords:** Foundation; Know Your Customer Principle; Money Laundering.

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### Introduction

According to Indonesian law, foundation is non-member legal entities made up of segregated wealth, are meant to accomplish specific social, religious, and humanitarian objectives. This complies with the definition of a foundation as stated in Law Number 16 of 2001 concerning Foundations, Article 1 Number 1 *juncto* Law Number 28 of 2004

concerning Amendments to Law Number 16 of 2001 concerning Foundations. This regulation is the primary foundation law regulation in Indonesia. The Indonesian Foundation in it recognizes the existence of a foundation organ consisting of foundation trustees, foundation administrators, and foundation supervisors. The foundation has become the choice of the community which is widely used as a forum for the vocation of the soul, which solely aims for human welfare.

The history of foundation regulation in Indonesia, before the existence of Law Number 16 of 2001 concerning Foundations, was initially only based on customs in society, Supreme Court jurisprudence, and the validity of foundations is associated and influenced by Article 899, Article 908, Article 1680, Article 365 Burgerlijk Wetboek (BW), and Article 6 paragraph (3), Article 236 Rechts Vordering (RV).<sup>1</sup> This used to be a gap for those who started foundations with the goal of seeking protection under the legal entity status of the foundation, which was used as a platform to develop humanitarian, social, and religious activities as well as a way for founders, administrators, and supervisors to enrich themselves. In 2001, this issue served as the background for this first the creation of the foundation law, as this has been stated in the Explanation to the Law of the Republic of Indonesia Number 16 of 2001 concerning Foundations.

The establishment of the Foundation Law is anticipated to guarantee legal order and clarity while reestablishing the foundation's role as a public organization that pursues social, religious, and humanitarian objectives exclusively for the benefit of the community. The first foundation law was modified over time in a number of article provisions, and the result was Law Number 28 of 2004 concerning Amendments to Law Number 16 of 2001 concerning Foundations, which is now the primary foundation regulation guideline in Indonesia.

Along with the times, many challenges have also become threats related to the existence of foundations. In addition to founders being able to enrich themselves through foundations, other threats that are no less important are money laundering and terrorism financing that infiltrate a group of people who establish foundations only as camouflage.

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<sup>1</sup> Ignatius R. Widyadharma, *Badan Hukum Yayasan (Undang - Undang Nomor 16 Tahun 2001)* (Badan Penerbit Universitas Diponegoro 2001).[1].

One of the high-profile cases in Indonesia is the *Aksi Cepat Tanggap* (ACT) foundation and the Justice For All Foundation (*Yayasan Keadilan Untuk Semua* abbreviated as YKUS) foundation which are money laundering media, due to weak supervision of foundation violations.<sup>2</sup> The facts show that people tend to establish foundations with the intention of taking advantage behind the status of a foundation legal entity, not only used as a forum to develop social, religious, humanitarian activities.<sup>3</sup>

There is a case of the ABA foundation related to terrorist activities based on Court Verdict Number 307/Pid.Sus/2020Pn.Jkt.Tim and this foundation is registered in the List of Suspected Terrorists and Terrorist Organizations based on the National Police Letter of the Republic of Indonesia Number DTTOT/P-10f/15/III/RES.6.1./2022. In this case, terrorists use foundations as a legitimate funding medium to generate revenue, which then the funds are allocated for terrorist operations such as purchasing weapons, training, accommodation, and travel activities solely for terrorist attacks. According to data from the Center for Financial Transaction Reporting and Analysis (Indonesian Financial Action Task Force), approximately 176 philanthropic institutions were found to misuse public donation funds, one of which was the *Aksi Cepat Tanggap* (ACT) foundation in Indonesia. As is known, the case of the *Aksi Cepat Tanggap* (ACT) is an act of enriching the founder of the foundation, because he has misappropriated aid funds to money laundering.<sup>4</sup>

In Malaysia, money laundering regulations are regulated under Act 613 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities (AMLA) Act 2001. The existence of this regulation in Malaysia follows the times related to crime that is increasingly evolving and modern. Malaysia is often a victim of terrorism originating from perpetrators from its own country, as well as perpetrators of terrorism from abroad.<sup>5</sup> Malaysia's anticipatory step is the regulation of Anti-Money Laundering, Anti Terrorism Financing and Proceeds of Unlawful Activities (AMLA) Act 2001 which

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<sup>2</sup> Ningrum N. Sirait and Liza H. Yusuf, 'Organisasi Non-Profit Sebagai Media Tindak Pidana Pencucian Uang' (2023) 1 AML/CFT Journal.[133].

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Olivia Yukadan and Winarno Budyatmojo, 'Studi Komparasi Pengaturan Tindak Pidana Pencucian Uang di Indonesia dan Malaysia' (2014) 3 Recidive.[159].

also regulates Customer Due Diligence. There are 3 forms of charitable organizations in Malaysia, namely:<sup>6</sup>

1. Under Companies Act 2016. This specifies that foundations may be formed under the Company Limited By Guarantee (CLBG) umbrella. CLBG is a publicly traded corporation whose members' major liability is capped by the constitution at the amount they agree to contribute to the company's assets in the event that it is wound up.
2. Trustee (Incorporation) Act 1952. In contrast to the CLBG, which is governed by the Companies Commission of Malaysia, this is under the jurisdiction of the Prime Minister's Department. The fact that TIA 1952 exclusively only covers Peninsular Malaysia.
3. Societies Act 1966. When the applicant is not subjected to any socially prescribed requirements. In contrast to the creation of CLBG, this implies that no particular items are needed from a society. The Federal and State Constitutions' provisions must be followed by all registered societies, though.

Regarding due diligence in Malaysia in the financial sector, there are regulatory guidelines as contained in Act 613 Article 16 (1) AMLA 2001, in essence regulating the conditions of a party/institution in order to estimate indications and prevent money laundering. Paragraph 2 of this regulation also regulates the obligation of parties / institutions to apply Customer Due Diligence to the financial sector.

When reviewing Act 613 AMLA 2001 specifically in Article 16, the content entirely in Article 16 focuses on the application of Customer Due Diligence. Regarding the reporting of money laundering crimes, in Malaysia there is an institution called the Financial Intelligence Unit (FIU) or Authority Intelligence Unit owned by Bank Negara Malaysia.<sup>7</sup> Malaysia does not know a Notary who has the authority to know your customer principle in the establishment of a foundation that has the potential for money laundering crimes, so it is different from the Indonesian Notary. Malaysia does not effectively prevent money laundering, because the potential for unknown money

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<sup>6</sup> Azmilaw, *Ways of Establishing a Foundation in Malaysia*, <<https://www.azmilaw.com/insights/ways-of-establishing-a-foundation-in-malaysia/>>, accessed 30 May 2024.

<sup>7</sup> Rangganata Adhi and R.B Sularto, 'Studi Komparasi Formulasi Tindak Pidana Pencucian Uang di Indonesia dan Malaysia' (2022) 4 Jurnal Pembangunan Hukum Indonesia.[234].

laundering crimes is greater, because foundations can be established first without any precautions such as the process of establishing foundations in Indonesia.

The three previous studies are references. The first research that became a reference was entitled “The Challenge of Customer Due Diligence to Financial Inclusion of Rural Communities in Malaysia”, which essentially discussed the relationship between customer due diligence and financial exclusion. The focus of the subjects studied in the study is rural communities in Malaysia and the challenges of the poor in accessing basic banking services. This study discusses that there is financial exclusion against rural communities in Malaysia. The issues discussed include Financial exclusion of rural communities in Malaysia, Customer Due Diligence (CDD) in Malaysia, The Interplay Between Customer Due Diligence and Financial Exclusion of Rural Communities, CDD of Agent Bank, Deficiencies of the Agent Banking Initiative that Led to Financial Exclusion Among Communities, and Risks in Agent Banking Services. The results of the study state that the central argument of this article of the implementation of CDD in Malaysia, particularly in the context of agent banks contains several deficiencies which have led to challenges in the rural communities to access formal finance. Rural communities face geographical challenges in opening a bank account as the law requires them to travel to a main bank branch to complete the CDD process. This becomes a problem as the main bank branch is usually located far from where they live, and there is an absence of convenient transportation to commute them there. The fundamental difference is that in the study, the object is rural communities who are not given access to money services banking because they do not meet customer due diligence, due to difficulties in accessing locations and potentially can harm money banking services. The similarity of the research is related to customer due diligence, but in the study the focus on customer due diligence is carried out by money banking services, while in the author’s research, it discusses the principle of know your customer by Indonesian Notary in the establishment of the foundation. Know your customer has something in common with customer due diligence.<sup>8</sup>

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<sup>8</sup> Eliya Hamizah Halim, ‘The Challenge of Customer Due Diligence to Financial Inclusion of Rural Communities in Malaysia’ (2022) International Conference on Law and Digitalization.[139-150].

The next research that became a reference was “The Role of Notaries/Land Deed Officials in Combating Money Laundering Crimes with the Know Your Customer Principle”. The research discusses know your customer principle as a solution to several problems faced by notary/land deed officials. The difference with the author’s research is that the focus is on one aspect, namely the establishment of the foundation.<sup>9</sup>

The third research is on “Problems of the Obligation to Keep Information Confidential in Making a Notarial Deed with the Principle of Recognizing Notary Service Users”. The research raises the know your customer principle as one of the efforts to enforce the confidentiality of personal information for clients. The difference in the research by the author is that know your customer principle is used as a prevention of money laundering crimes in the establishment of foundations.<sup>10</sup>

Basically, Know Your Customer Principle with Customer Due Diligence is the same thing, because both are due diligence actions on someone who wants to do a legal act such as applying for credit, waqf process, company establishment, and especially the process of establishing a foundation. Know Your Customer Principle, which can also be called Customer Due Diligence, is often associated with the financial and corporate sectors. Indonesian law when related to finance, an explicit explanation of customer due diligence is contained in Article 11 of the Financial Services Authority Regulation (POJK) Number 12/POJK.01/2017. Customer Due Diligence (CDD) mentioned in the Financial Services Authority Regulation / POJK (*Peraturan Otoritas Jasa Keuangan*) said that in essence CDD is a gradual activity starting from identification, verification, and monitoring conducted by Financial Service Providers.

The capacity of foreigners to become founders of foundations, as well as foreign foundations that can easily carry out their activities, is a potential loophole for money laundering and financializing terrorism crimes that infiltrate through foundations. It is also known that the foundation is not a reporting party mentioned in Article 17 of Law

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<sup>9</sup> Putri Indrawati Utama, et.al, ‘The Role of Notaries/Land Deed Officials in Combating Money Laundering Crimes with the Know Your Customer Principle’ (2024) 5 International Journal of Educational Research & Social Sciences’. [279].

<sup>10</sup> Ni Komang Arini Styawati, et.al, Problems of the Obligation to Keep Information Confidential in Making a Notarial Deed with the Principle of Recognizing Notary Service Users’ (2023) 3rd International Conference on Business Law and Local Wisdom in Tourism’. [678].

Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering, which results in a legal vacuum and becomes a loophole that the foundation's organs are not obliged to submit reports to the Indonesian Financial Action Task Force. The issues discussed were Know Your Customer Principle in the Foundation Establishment Stage in Indonesia and The Challenges of Know Your Customer Principle Application in the Foundation Establishment Stage in Indonesia.

### **Method Research**

This research is a normative legal research, using a statute approach, conceptual approach, and comparative approach that compares the establishment of foundations in Indonesia and Malaysia. The legal material used is primary legal material using existing laws and regulations, legal doctrines. Secondary legal materials that support this writing are scientific papers, journals, and other writings related to the legal issues discussed.

### **Foundation Establishment Stage between Indonesia and Malaysia**

The position of an Indonesia Notary is essential to the establishing of a foundation in Indonesia. A notary is a public official authorized to create authentic deeds, especially deed of foundation establishment. The establishment of a Foundation in the early stages requires a deed of incorporation made by an Indonesia Notary. Notaries in the international arena, known as Public Notary.<sup>11</sup> According to the Oxford Dictionary of Law, public notary is a legal practitioner, usually a solicitor, who attests or certifies deeds and other documents and notes or protests dishonoured and the legal secretaries of bishops, general notaries may practise in a limited area. Diplomatic and consular officials may exercise notarial functions outside the UK.<sup>12</sup>

The civil-law legal system is the one that is followed in Indonesia. Indonesia's civil-law arrangements are generally centered on the Civil Code (*Burgerlijk Wetboek* abbreviated as BW) which is a civil law regulation belonging to the old Netherlands (the

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<sup>11</sup> Oemar Moechthar, *Teknik Pembuatan Akta Badan Hukum dan Badan Usaha di Indonesia* (Airlangga University Press 2019). [22].

<sup>12</sup> Elizabeth A, Martin, *Oxford A Dictionary of Law 5th Edition* (Oxford University Press 2003).[332].

result of the Netherlands' legacy), even though *Burgerlijk Wetboek* in the Netherlands has been renewed to *New Burgerlijk Wetboek* (NBW). As Indonesia adheres to civil law, the Notary plays a very important and exclusive role as the evidence maker from the parties who bind themselves to commit certain legal acts, then the evidence has a perfect burden of proof when faced or assessed by a judge in court, becoming strong evidence of the legal acts of the parties.

Indonesian Notary is a special position, has special authority based on Law Number 2 of 2014 juncto Law Number 30 of 2004 concerning Notary Positions (Notary Position Law), which is a general official authorized to make authentic deeds. According to the Notary position regulation, Article 15 paragraph (1), an Indonesian notary is permitted to create authentic deeds concerning to all acts, agreements, and provisions that are mandated by laws and regulations and/or by interested parties to be included in authentic deeds. They can also ensure that the date of the deed is certain, retain the deed, and provide grosses, copies, and excerpts of the deed, all of which cannot be transferred or excluded to other officials or other legal individuals.

Back to the Foundation issue, considering that the initial stage of the establishment of a Foundation begins with the preparation of a deed of foundation establishment, which is made by an Indonesian Notary and made in Indonesian Language (Article 9 Indonesian Foundation Law), the Indonesian Notary plays a very important role in the foundation establishment in Indonesia. The stages of the foundation establishment in Indonesia until it is legally become a legal entity, are as follows:

1. Establishment Deed Creation Stage:
  - a. One or more people create a foundation by dividing the founder's estate, which serves as the starting wealth.
  - b. Foundation can be established based on a will.
  - c. Allow the foreigner or together with a foreigner to establish a foundation.
  - d. Founder can be represented by another person based on a power of attorney.
  - e. The party who will establish the Foundation, comes to the Indonesian Notary in order to make a deed of foundation establishment.
2. Ratification Stage:
  - a. After the stage of making the deed of incorporation by an Indonesian Notary is completed, the Indonesian Notary submits an application for ratification of the deed of establishment of the Foundation to the Ministry of Law and Human Rights of the Republic of Indonesia.



- b. The Foundation obtained legal entity status after the deed of foundation establishment was ratified by the Republic Indonesia Minister of Law and Human Rights.
3. Announcement Stage:
    - a. The deed of foundation establishment that has been legalized as a legal entity, should be announced in the Republic Indonesia Supplement to the State Gazette.
    - b. After the ratification stage is completed, the application is submitted to the State Printing Office of the Republic of Indonesia within thirty (30) days from the date the deed of foundation establishment is ratified.

In Malaysia, Malaysia legal system based to the common law system, which is known as Public Notary/Notaries Public. In the common law system, A public notary is a legally appointed public official who serves the public in non-contentious affairs, typically pertaining to estates, deeds, powers of attorney, and international and foreign business.<sup>13</sup> The phrase “public notary” solely describes common law notaries, it should not be used to refer to civil law notaries.<sup>14</sup> The Malaysian public notary’s function scope is adapted from Section 4 on Public Notary Privileges in Act 115 on the Public Notary Act 1959. According to Section 4 Article (1), each public notary shall have all the powers and authority that public notaries in England typically possess within the boundaries of his activity. Provided that, except for the purposes of and to the extent necessary to give effect to subsection (2), such powers shall not include power to administer any oath or affirmation in connection with any affidavit or statutory declaration which is executed for the purpose of being used in any court or place within Malaysia, or to take or attest any such affidavit (immigration document) or statutory declaration.

According to the Public Notary Act of 1959, public notary services will witness and attest any official documents intended for use abroad, administer oaths intended for use abroad, affirm statutory declarations and affidavits intended for use abroad in connection with any court matters, prove that any documents were executed properly, and handle matters involving a sea vessel. Public Notary also have right for apostille and legalisation.<sup>15</sup> Public Notaries in Malaysia have at least 15 years of practice as legal

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<sup>13</sup> Thaufiq Deen, *et.al.*, ‘Public Notary Service In Malaysia’ (2018) 5 Jurnal Akta.[1017].

<sup>14</sup> Jeong Chun Hai, *et.al.*, *Principles of Public Administration: An Introduction* (Karisma Publications 2007).[2].

<sup>15</sup> Thaufiq Deen, *et.al.*, *Op.Cit.*[1022].

professionals and are known as the type of advocate known as solicitors who have the right to carry out the function of a public notary. The Public Notary is appointed by the Attorney General's Chambers (AGC) or the Attorney General and is governed by the Notaries Public Act 1959. A public notary can act as an internationally recognized witness whose main functions include authenticating and attesting documents to be used abroad.<sup>16</sup>

Looking at the common law version of public notary in Malaysia, there has been no provision for the establishment of a Foundation involving a public notary, unlike in Indonesia which requires the preparation of a deed of foundation establishment by an Indonesian notary. Company Limited By Guarantee (CLBG) have a rights to form a Charitable foundation, which is a public company incorporated with the principal liability of its members limited by the constitution to such amount as the members undertake to contribute to the assets of the company if the company is wound up. Activities of a CLBG should be in-line with the specified objects, may only hold any land of property if it is issued with a license by the Ministry of Domestic Trade, Cooperatives and Consumerism. There are two types of CLBG such as CLBG without Berhad or Bhd and CLBG with the word Berhad or Bhd.<sup>17</sup>

Malaysia also recognizes Foundations in the form of Incorporation (Trustee) which is based on Act 1952 (Trustee Incorporation Act 1952). The TIA 1952 provides for the establishment of a foundation and falls within the jurisdiction of the Prime Minister's Department. In contrast, the Companies Commission of Malaysia is the regulatory body responsible for the CLBG. The fact that TIA 1952 exclusively covers only for Peninsular Malaysia. The application for incorporation should be submitted to the Legal Affairs Division (*Bahagian Hal Ehwal Undang-Undang*) of the Prime Minister's Department. Malaysia also recognizes foundation as a Societies based under Societies Act 1966.

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<sup>16</sup> Dewatoro Suryaningrat Poetra, *et.al*, *Perbandingan Hukum Tugas dan Kewenangan Notaris di Negara dengan Sistem Hukum Civil Law dan Common Law*, (2024) 6 Jurnal Bimbingan dan Konseling Keluarga As-Syar'i.[1471].

<sup>17</sup> C.A.(M), *How do I Set Up a Charitable Foundation in Malaysia?* <<https://www.bestar-my.com/post/how-to-set-up-a-charity-foundation-in-malaysia>>, accessed 30 May 2024.

**Table 1.** Foundation Establishment Comparative Result between Indonesia and Malaysia

Comparison	Indonesia	Malaysia
Establishment Stages	Establishment Deed Creation, Ratification Stage, Announcement	Registration, Announcement
Authorities related to the establishment of foundations	Indonesian Notary, Law and Human Rights Republic of Indonesia Ministry, Indonesian Financial Authority Services (Otoritas Jasa Keuangan)	Domestic Trade, Cooperatives and Consumerism Ministry (Malaysia). Companies Commission of Malaysia. Prime minister department legal affairs division ( <i>Bahagian Hal Ehwal Undang-Undang</i> )
Regulation of Money Laundering Crimes	Law Number 8 Year 2010 concerning about Prevention and Eradication of Money Laundering Crime	Anti Money Laundering and Anti-Terrorism Financing Act 2001
Money Laundering Crime Reporting Organization	Financial Transaction Reports and Analysis Center (PPATK)	Financial Intelligence Unit (FIU)

**Know Your Customer Principle in the Foundation Establishment Stage in Indonesia**

Based on Article 9 paragraph (2) of Law Number 16 of 2001 concerning Foundations, it explains that the establishment of foundations is carried out by notarial deed and made in Indonesian. It is also strengthened by the provisions of Article 11 paragraph (2) of Law Number 28 of 2004 concerning Amendments to Law Number 16 of 2001 concerning Foundations, which states that to obtain ratification, the founder or his proxy submits an application to the Minister through a Notary who makes the deed of establishment of the foundation. Regarding the technical regulations, the provisions of Article 1 point 3 of the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 2 of 2016 concerning Procedures for Submitting Applications for Legal Entity Endorsement and Approval of Amendments to the Articles of Association and Submission of Notifications of Changes to the Articles of Association and Changes to Foundation Data, states that the applicant is a Notary who is authorized to apply for ratification of the Foundation’s legal entity. Notary in Indonesia are general officials who are authorized to make authentic deeds regarding all deeds, agreements, and

determinations required by laws and regulations and/or desired by the interested party. Notary in Indonesia is a position based on Law Number 30 of 2004 juncto Law Number 2 of 2014 concerning Notary Position.

Foundation establishment in Indonesia as it is known that it must be established by a deed of establishment made by a notary and applied for registration only by a notary. The role of notary in stemming money laundering and terrorism financing can be done from the earliest stage, which is when the applicant wants to establish a foundation. Indonesian notary must apply Know Your Customer Principle to the face carefully to thoroughly where the foundation's funding comes from. Indonesia recognizes the existence of Historical Individual Debtor Information (Bank Indonesia-Checking) which can be a solution to stem founders who establish foundations originating from money laundering or terrorism financing. The banking world in Indonesia also recognizes the Know Your Customer and Anti-Money Laundering Principles, which are anti-money laundering and counter-terrorism financing programs in Indonesia.

The establishment of foundations in Indonesia is regulated in Government Regulation Number 63 of 2008 concerning the Implementation of the Law on Foundations and Government Regulation Number 2 of 2013 concerning Amendments to Government Regulation Number 63 of 2008 concerning the Implementation of the Law on Foundations (hereinafter referred to as Government Regulation on the Implementation of Foundation Law). The establishment of a foundation in Indonesia according to the provisions of the Foundation Law, must be made by notarial deed and must be made in Indonesian. Foundations in Indonesia can also be established based on a will, as stipulated in Article 9 paragraph (1), paragraph (2), and paragraph (3) of the Foundation Law.<sup>18</sup> Foundations in Indonesia do not rule out the possibility that the founders are foreign nationals or together with foreigners, with a record of still following the procedures, procedures, and conditions that must be met.

The stages of the foundation establishment process in Indonesia consist of three main stages, namely establishment, ratification, and announcement. The first stage, the

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<sup>18</sup> *Ibid.*[5].

establishment of the foundation must be based on the deed of establishment made by an Indonesian Notary. The second stage, the ratification of the foundation, is authorized by the Minister of Law and Human Rights of Indonesia. The third stage, namely the foundation, must be immediately announced in the Supplement to State Gazette of the Republic of Indonesia (Lembaran Negara Republik Indonesia). Know Your Customer Principle lies in the first stage, namely establishment, which in practice the Notary will carefully assess the condition of the founder. The facing founder will be assessed by an Indonesian Notary with an in-depth interview on various aspects such as identity, founder's background, founder's ability to understand the law, founder's willingness to comply with all applicable laws and regulations, founder's willingness to transparency over information, source of foundation funding funds, and several other subjective aspects such as the founder's character and appearance. This subjective aspect is a scourge, because a person's character can be deceiving. In practice, one of the samples is taken from a Notary in Surabaya, Indonesia, who chooses his identity is anonymous, notary have two ways to apply Know Your Customer Principle.

The first way is that the Notary has prepared a special form related to due diligence of prospective founders of the foundation such as data on sources of funds, complete data on founders, willingness to transparency of foundation information, ability to make annual reports reported to the Indonesian Financial Transaction Reports and Analysis Center (Indonesian Financial Action Task Force / FATF), willingness to be willing to be examined by the competent authorities in the context of a comprehensive examination of the foundation, willingness to comply with all applicable regulations, especially the ability to participate in tackling money laundering and terrorism financing crimes.

The second way is that the Notary Public conducts interviews with prospective founders of the foundation, which in general the questions asked are similar to due diligence forms. notary here will tend to judge subjectively how the character of the prospective founder, which if from the character and appearance alone according to the Notary is not convincing, then the Notary cannot continue the registration of the foundation. The second method is considered risk-vulnerable, because only based on interviews, there is no black on white. Participating in the role of notary in implementing

Know Your Customer Principle is very desirable, because it can be the first door in the framework of establishing a foundation. If the Notary Public successfully applies the Know Your Customer Principle, the establishment of foundations that violate the provisions will not be allowed to stand, so as to anticipate foundations originating from money laundering and foundations operating as terrorism financing.

Know Your Customer Principle conducted by notary in Indonesia, based on Article 2 letter e of the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 9 of 2017 concerning the Application of the Principle of Recognizing Service Users for notary, explains that the Application of Know Your Customer Principle applies to notary in providing services in the form of preparing and conducting transactions for the benefit of or for and on behalf of Service Users, regarding one of them is the establishment, purchase and sale of legal entities. notary in Indonesia in applying this principle, are required to have policies and procedures to manage and mitigate money laundering and/or terrorism financing risks identified in accordance with the risk assessment. The Notary in the end, in applying the Know Your Customer Principle, will assess the risk to the prospective foundation, whether it is feasible to establish or not, because the Indonesian Notary is authorized to give approval or rejection to prospective foundations that are classified as high risk, as stipulated in Article 17 paragraph (5) of the Regulation of the Minister of Law and Human Rights.

### **The Challenges of Know Your Customer Principle Application in the Foundation Establishment Stage in Indonesia**

Considering that foreigners, foreign legal entities, and foreign foundations can carry out activities in Indonesia, even though they have social, religious, and humanitarian goals, the intervention of foreign parties has the potential to be infiltrated by money laundering and terrorism financing crimes. The provisions of the article that have the potential to become a loophole in the crime of money laundering and terrorism financing in the regulations of Foundations in Indonesia, namely in the implementing regulations of the Foundation Law, namely Article 26 of Government Regulation Number 63 of 2008 concerning the Implementation of the Law on Foundations, which

reads, foreign foundations to carry out their activities in Indonesia must partner with foundations established by Indonesia who have the same purpose and objectives as The foreign foundation. This is where the Know Your Customer Principle must be enforced, which must be verified from the initial stage of foundation establishment. Therefore, the Know Your Customer Principle must be enforced by an Indonesian Notary.

In order to realize good governance, transparency is not only applied by public organs but private organs must also apply the principles of transparency and accountability.<sup>19</sup> Similarly, foundations must uphold the principles of transparency and accountability. A legal expert, Ignatius Ridwan, who himself is also a lawyer in Semarang, Indonesia, said that the regulation of foundations with the first law at that time, due to the fact that legal practice, which uses foundations is only limited to the focus of enriching the founders, not for activities that should only be for social, religious, humanitarian activities.<sup>20</sup> The existence of the foundation should be a forum for activities with social, religious and humanitarian purposes. The establishment of a foundation must also pay attention to certain requirements as stipulated in the Foundation Law. The challenges in implementing Know Your Customer Principle in Indonesia include:

1. The Foundation Law in Indonesia allows the founder of a foundation to be a foreigner not an Indonesian citizen, and allows foundations that are not Indonesian legal entities to carry out activities in Indonesian territory, if their activities do not harm the community, nation, and state (Article 69 of the Foundation Law). This is a challenge for the authorities in tackling money laundering and terrorism financing, because there are no clear restrictions on regulations, procedures for supervision by the authorities on the activities of foundations, because basically foundations for the general public will be seen as organizations that act for community problems, which always look positive in the eyes of the public that do not arouse suspicion.
2. The establishment of a foundation can also be established with a power of attorney, potentially a loophole as well, because the appointed power of attorney is a puppet who will be made the founder of the foundation. The next challenge is regarding the assessment of the intentions / intentions of a prospective founder of the foundation. As it is known that intention is difficult to prove, if there is no visible impact as a result of the foundation's activities.
3. The agreement of the founders of the foundation is weak, the required documents

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<sup>19</sup> Simamora, Y. S, 'Karakteristik, Pengelolaan Dan Pemeriksaan Badan Hukum Yayasan Di Indonesia' (2012) 1 Journal Rechts Vinding.[175-186].

<sup>20</sup> *Ibid.*[2].

are incomplete, and the source of wealth is not transparent.

4. Transparency of prospective founders to all information related to the foundation to be established.
5. Incomprehension of the law and unenthusiastic prospective founders of the foundation in dealing with all legal matters. Aspiring founders feel that legal matters are complicated, considering that due diligence procedures are a difficult thing.

In relation to the prevention and eradication of money laundering in Indonesia, the government issued Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering, and through the Financial Services Authority has also issued a regulation, namely OJK Regulation Number 12 / POJK.01 / 2017 concerning anti-money laundering programs in Indonesia. Indonesia already has several regulations regarding Know Your Customer Principle for parties that are specifically focused such as notary and Land Deed Making Officials. As it is known that the establishment of a foundation must be with the participation of a Notary as the only authorized party in the establishment of the foundation, the discussion of Know Your Customer Principle is specifically addressed to notary who in practice must apply this principle before applying for the establishment of a foundation.

Some solutions that can prevent this problem are the application of Know Your Customer Principle by a Notary, routine reporting obligations to the Indonesian Financial Action Task Force, then more fierce supervisory actions from the authorities are expected to be the answer to the problem. Other solutions that are expected to be the answer include:

1. At the initial stage of foundation establishment, the agreement of the prospective founders of the foundation must have firm provisions such as clarity of the foundation's efforts in carrying out its activities, the source of the foundation's wealth is explained clearly and transparently, who is the party appointed as a trustee / protector, advisors, rights and obligations of foundation organs, prohibitions and legal consequences for those who violate their obligations, board meetings, year of book, and clarity of the consequences that led to the dissolution of the foundation.
2. Elect foundation administrators who are able to take responsibility for the foundation's legal actions after the foundation is established, who are committed to always acting transparently to all authorities to always report regularly on the foundation's actions.
3. External foundation supervisory institutions or foundation supervisory organizations, which are not incorporated in the foundation organs in it, so the possibility of committing fraudulent acts will be minimized. The supervisory body will act regularly to check the foundation, whether the foundation committed acts against the law or



contrary to the Articles of Association, then whether the foundation was negligent in carrying out its duties, then whether the foundation committed actions that harm the foundation or third parties, then whether the foundation committed acts that harm the state.

4. Regulation on the obligation of foundations to report regularly to the Indonesian Financial Action Task Force. This report must be signed by all administrators and supervisors, who, if any board or supervisor is unable to sign, must include a clear reason for the unwillingness to sign. This is in accordance with Article 50 of the Foundation Law.
5. The principle of transparency and accountability through Know Your Customer Principle or due diligence procedure. notary must conduct due diligence procedures on prospective founders of foundations, as an act against financial crime.<sup>21</sup>

As is known that the procedure for examining foundations in Indonesia, has been regulated by Article 53 paragraph (2) of the Foundation Law, which states that examinations of foundations can be carried out based on the determination of court judges, based on the requests of interested parties outside the foundation such as third parties who have legal relationships, prosecutors representing the public interest.

Eventually, foundations should aim for social, religious, and humanitarian causes. The Foundation must not run against the rule of law, public order, or decency.<sup>22</sup> notary in Indonesia are the first pillar in order to anticipate prohibited foundations, as notary must apply Know Your Customer Principle when at the foundation establishment stage. Indonesia has specifically regulated the application of Know Your Customer Principle for notary, namely in the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 9 of 2017 concerning the Application of the Principle of Recognizing Service Users for notary.

## **Conclusion**

The role of notaries in stemming money laundering and terrorism financing can be done from the earliest stage, which is when the applicant wants to establish a foundation. Indonesian notaries must apply Know Your Customer Principle to the face carefully to

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<sup>21</sup> Johannes, E. P, 'Customer Due Diligence Dalam Mencegah Tindak Pidana Pencucian Uang Melalui Lembaga Perbankan', (2019) 19 Law Review.[77-79].

<sup>22</sup> P. A. Cahyono, 'Tinjauan Hukum Terhadap Sistem Pengesahan Yayasan Di Indonesia' (2006) Dissertation Masters Program Diponegoro University.

thoroughly where the foundation's funding comes from. The first way to apply Know Your Customer Principle for Notaries is that Notaries have prepared special forms related to due diligence of prospective founders of foundations such as source of funds data, complete data of founders, willingness to transparency of foundation information, ability to make annual reports reported to the Indonesian Financial Transaction Reports and Analysis Center (Indonesian Financial Action Task Force / FATF), ability to be willing to be examined by the competent authorities In the framework of a comprehensive examination of the Foundation, the willingness to comply with all applicable regulations, especially the ability to participate in tackling money laundering and terrorism financing crimes. The second way is that the Notary Public conducts interviews with prospective founders of the foundation, which in general the questions asked are similar to due diligence forms. Notaries here will tend to judge subjectively how the character of the prospective founder, which if from the character and appearance alone according to the Notary is not convincing, then the Notary cannot continue the registration of the foundation. The second method is considered risk-vulnerable, because only based on interviews, there is no black on white. Community participation in tackling money laundering and terrorism financing is also expected, solely to realize the welfare and peace of fellow humans. The public can assess if they find suspicious activity, they should immediately report it to authorities such as the police for further investigation.

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