INDONESIA

Indonesia's New Negative Investment List

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The Indonesian Government has issued a New Negative List that determines which business fields are open, fully or partially with conditions, to investment, including foreign investment. The New Negative List, issued under Presidential Regulation No. 39 of 2014 regarding List of Business Fields that Are Closed and Conditionally Open for Investment, revokes Presidential Regulation No. 36 of 2010 (Previous Negative List). Applications submitted to the Indonesia Investment Coordinating Board (BKPM) on or after April 24th, 2014, to engage in any line of business in Indonesia are subject to the provisions of the New Negative List.

What does the Negative List cover? – The New Negative List covers business fields that are:

- closed for investment, meaning closed for both domestic and foreign investment, as set forth in Attachment I; and
- open for domestic and foreign investment, with certain conditions, as set forth in Attachment II. Business fields that are open to investment are further divided as: (a) reserved for micro-, small-, and mid-scale businesses and cooperatives; (b) with partnerships; (c) open for foreign investment; (d) open in certain geographic locations; (e) requiring a special license; (f) open for 100 percent domestic investment; (g) open for foreign investment in certain geographic locations; (h) requiring a special license and open for foreign investment; (i) open for 100 percent domestic investment and requiring a special license; and (j) open for foreign investment and/or in certain geographic locations only for investors from Association of Southeast Asian Nations member countries.

The New Negative List expressly states that business fields not listed in Attachments I and II are open to investment with no conditions. This was not expressly stated in the Previous Negative List though it was generally understood to be the case. It was sometimes still necessary to submit a Letter of Intent to the BKPM to confirm whether a business field not set out in the Previous Negative List was open for 100 percent foreign investment without any conditions. It remains to be seen whether this will still be the case, despite the express statement.

Foreign investment restrictions – The New Negative List reduces foreign investment restrictions for some business fields, such as pharmaceutical manufacturing, which is now open for a maximum 85 percent foreign investment (previously 75 percent). Restrictions are also eased in certain business fields for public-private partnerships (PPP), including power transmission, which is now open for 100 percent foreign investment in the context of a PPP project during the concession period.

The New Negative List increases foreign ownership restrictions for certain business fields, including onshore and offshore oil and gas drilling, which are now open for 100 percent domestic investment and a maximum 75 percent foreign investment, respectively (previously 95 percent foreign investment for both).

The New Negative List includes certain business fields not listed in the Previous Negative List, including distribution, which is now open for a maximum 33 percent foreign ownership (previously open for 100 percent foreign investment). According to the BKPM, the restriction on the distribution business does not apply to the import business, but this must be further discussed with the Ministry of Trade. Also, we understand that such restriction applies only to companies engaging purely in the distribution business and does not apply to manufacturing companies that distribute their own products.

Investment in publicly listed companies – The New Negative List provisions on business fields that are closed for investment and open for investment with certain conditions do not apply to indirect investments or portfolio investments made through the Indonesian Stock Exchange. This was also the case with the Previous Negative List.

Foreign investment restrictions on mergers, acquisition, and consolidations – When companies in the same line of business merge, the foreign ownership restriction stated in the BKPM approval letter of the surviving company will apply. In the case of an acquisition, the foreign ownership restriction in the BKPM approval letter of the company whose shares are acquired will apply. For consolidations, the foreign ownership restriction under the Negative List effective at the time the new company resulting from the consolidation is formed will apply.

Grandfather clause – As with the Previous Negative List, the New Negative List does not apply retroactively. Companies that have been duly established and have obtained approval from the BKPM to engage in their business activities before the effective date of the New Negative List need not adjust their shareholding composition to be in line with the New Negative List. However, we understand from current practice that established companies will need to comply with the requirements in the New Negative List if they expand their current business or undertake certain corporate actions that will affect their current shareholding composition.

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