

# NEW REGULATION ON CAPITAL INVESTMENT LICENSING AND FACILITIES

## **Introduction**

The Head of the Investment Coordinating Board (Badan Koordinasi Penanaman Modal/"BKPM") issued two new sets of regulations on investment, i.e. Regulation No. 13 of 2017 on The Guidelines and Procedure for Capital Investment Licensing and Facilities ("Reg 13/2017") and Regulation No. 14 of 2017 on The Guidelines and Procedure for Capital Investment Supervision ("Reg 14/2017").

These regulations became effective at the Central One Stop Services Office of BKPM on 2 January 2018 and will be effective at provincial and regional levels on 2 July 2018. Reg 13/2017 revokes the following regulations which will no longer be in effect:

- Head of BKPM Regulation No. 8 of 2015 on The Procedure for Applying for an Income Tax Facility for Capital Investment in Certain Business Lines and/or Certain Locations (as amended);
- Head of BKPM Regulation No. 13 of 2015 on The Procedure for Applying for a Reduction in Corporate Income Tax Facility (as amended);
- Head of BKPM Regulation No. 14 of 2015 on The Guidelines and Procedure for Investment In-Principle Licensing (as amended);
- Head of BKPM Regulation No. 15 of 2015 on The Guidelines and Procedure for Investment Licensing and Non-Licensing; and
- Head of BKPM Regulation No. 16 of 2015 on The Guidelines and Procedure for Investment Facilities Services.

Both Reg 13/2017 and Reg 14/2017 are implementing regulations of Government Regulation No. 91 of 2017 on the Acceleration of Business Implementation, issued in September 2017. In brief, Reg. 14/2017 provides regarding reporting obligations and procedures for monitoring investment activities conducted under Reg 13/2017. However, in this advisory we will only discuss Reg 13/2017.

## **Investment Registration and Business License**

Under the previous regulations, any person wishing to start a corporate investment in Indonesia first had to obtain an initial investment approval in the form of an In-Principle License (Izin Prinsip) from BKPM. The newly-issued Reg 13/2017 changes the term for the initial investment approval to become the Investment Registration (Pendaftaran Penanaman Modal), similar with the term used back in the 2009 regime. The requirements to obtain the Investment Registration from BKPM is only applicable if the business activity meets the following criteria:

- requires time to complete construction;
  - may obtain investment facilities;- might cause mid-level or major environmental damage;
  - is related to state defense, or the management of natural resources, energy and infrastructure;
- or

- requires the initial investment approval pursuant to sectoral regulations.

Business lines which do not require any construction or capital goods/machinery import duty facilities are exempt from the requirement to obtain Investment Registration. For these business lines, a Business License (Izin Usaha) can be applied for directly as long as the following requirements have been met:

- has the status of an Indonesian business entity whose share ownership complies with the prevailing laws and regulations;
- holds a Taxpayer Registration Number (Nomor Pokok Wajib Pajak/NPWP);
- occupies an office / place of business.

However, Regulation 13/2017 is silent on the procedure for the granting of a Business License for investors which are not required to obtain an Investment Registration, but at the same time fail to meet the criteria which allows them to directly apply for a Business License. It is expected that BKPM will develop an unwritten policy regarding this matter

### **Exemption from the Requirement to Divest**

Under Article 16 of Reg 13/2017, a Foreign Investment (**"PMA"**) company may have the requirement to divest shares to

Indonesian entities or individuals waived if there is a GMS resolution stating that:

- for joint venture companies, its Indonesian shareholders do not wish to own the share(s) to comply with the divestment requirement under the investment approval and/or Business License; or
- for 100% foreign owned companies, its shareholders state that they do not have any commitment/agreement with any Indonesian party for the sale of any of their shares.

These companies must apply for an amendment to the Investment Registration cancelling this requirement.

### **Minimum Investment Amount Requirement**

Under the previous regulations, BKPM required investment capital of at least IDR10 billion, excluding the value of any land or building(s). However, an exemption to this is provided under Reg 13/2017 which allows PMA property development and management companies, upon meeting certain requirements, to include the value of their land and building(s) in their total investment capital.

On a separate but related matter, Reg 13/2017 requires the investment value under any approved Expansion In-Principle License which is less than IDR10 billion to be adjusted to more than IDR10 billion for realization, exclusive of the value of the land and building(s).

Moreover, as also provided under previous regulations, BKPM prohibits investors from entering into an agreement or

making a statement that it owns shares in the company for and on behalf any other party. Under Reg 13/2017, if required, the investor must submit a notarized written statement declaring the non-existence of such an arrangement. This provision refers to so-called 'nominee arrangements' which have been popular for many years.

### **Venture Capital Companies**

Under the previous regulations, Venture Capital Companies could hold shares in Investment Companies for up to 10 years. This remains the same under Regulation 13/2017. However, the permitted extension period has been increased from 5 years to 10 years.

### **Business Licenses**

Reg 13/2017 requires investments with more than one business line to apply for a separate Business License for each business line. Any business lines for which no business license has been applied for will be regarded as cancelled.

A business license is valid for as long as the company continues operating, except for:

- large scale PMA companies which according to their latest financial statement have net assets of more than IDR10 billion and/or annual sales of more than IDR50 billion (whose business licenses are valid for one year); or
- business lines regulated otherwise under the relevant regulations.

### **Subsequent Conversion of Subsidiaries of Companies Converted into PMA Companies**

Under Reg 13/2017, it is now clearly stated that the subsidiaries of a company converted into PMA companies must also be converted into PT PMAs. This must be conducted before the subsidiaries carry out any corporate action. However, the regulation is silent on whether the requirement applies if they do not plan to carry out any corporate action.

### **Representative Offices**

- Trade Representative Offices may have branches in other Provinces / Regencies.
- BKPM is authorized to issue approvals for construction, as well as oil and gas, representative offices.
- Licenses for General Representative Offices are valid for 3 years and can be extended. However, there is no limitation on the number of extensions.

### **Investment Facilities**

Investment Facilities, including among others, Income Tax allowances, VAT allowances and the BKPM Master List were

previously covered by separate regulations. Now Reg 13/2017 contains provisions on these facilities. There are no major changes to the provisions. However, references to In-Principle Licenses in the previous regulations are adjusted to accommodate the introduction of Investment Registration under Reg 13/2017.

The following are some changes regarding Investment Facilities:

- a provision on the period during which a Master List can be applied for (ie 3 years as of the issuance of the Investment Registration/Investment License/In-Principle License/Expansion In-Principle License);
- clarification that import duty allowances cover imports of goods and materials used for production using imported machinery purchased domestically;
- upon the issuance of a receipt declaring the correctness and completeness of Tax Holiday proposal documents, a decision approving or rejecting the proposal must be issued within 25 days, while in the previous regulation, the time limit was 65 days.

### **Transitional Provisions**

Holders of Investment Registrations issued under Head of BKPM Regulation No. 12 of 2009 on The Guidelines and Procedure for Capital Investment Licensing, must apply for a Business License to the authorized investment board within 6 months of the relevant effective date of Reg 13/2017. Failure to do so may result in the revocation of the investment registration.

In-Principle Licenses issued before the effective date of Reg 13/2017 remain valid for the term stated in them. In-Principle License applications declared complete by BKPM before the effective date of Reg 13/2017 which are still being finalized will be completed according to Reg 13/2017.

PMA companies holding a Business License which do not comply with the large-scale business requirement, must apply for a new Investment Registration and comply with the large scale requirement if they wish to start a business.

### **Conclusion**

Both prospective new investors and all existing investment companies should carefully study the provisions of Reg 13/2017 to see if they need to take any actions which must be taken in respect of either their existing investment applications or their existing business licenses. This includes a change of status, an addition to or amendment of their business activities, business lines, location, expansion etc.

In addition, any existing PMA company which has a divestment requirement according to its license should ideally take the opportunity now, whilst it is still available, to try to release itself from its future divestment obligation.

Moreover, it is yet to be seen how, just to take one example, BKPM will apply in practice such provisions as those requiring the subsidiaries of a company converted into a PMA company to also be converted.

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