



THE NEW INDONESIA INVESTMENT NEGATIVE LIST

IS IT REALLY POSITIVE AND HOW WILL IT AFFECT MARITIME, MINING AND ENERGY BUSINESSES?

At the end of April¹, the Indonesian Government enacted the new investment Negative List (also known as Daftar Negatif Investasi) specifying business activities which are either entirely closed or conditionally open to foreign investment. This follows a year of comprehensive discussions at parliamentary level and revises the previous 2010 Negative List.

The enactment of the new Negative List was one of the Indonesian Government's commitments to the ASEAN Economic Community (AEC) to boost both foreign and domestic investment activities in the largest economy in the ASEAN region. Whilst it was hoped that the new Negative List could provide more opportunities to foreign investors, the list is conversely viewed as a stricter regulation to foreign investment.

The business sectors which are affected by the changes introduced by the new Negative List are:

- Power
- Oil and gas
- Transportation
- Trading
- Pharmaceutical

Liberalised sectors for foreign investment

The new Negative List increases foreign investment opportunities in the energy sector for power plant business with generation capacity that is greater than ten megawatts. The new Negative List enables departure from the previous list's 95% cap on foreign ownership of high capacity power plants by permitting foreign investors to fully control a plant during a concession period under a Public Private Partnership (PPP) scheme. Likewise, similar liberalisation of restrictions on foreign investment has been afforded to companies involved in power transmission and power distribution.

¹ Presidential Regulation No. 39 of 2014 was enacted on 29 April 2014 (Regulation 39).



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Outside of a PPP's concession period, foreign investment in either high capacity plants, power transmission or power distribution may still amount to 95% ownership under the new regime.

Another significant sector which now enjoys higher foreign investment opportunities under the new regime is transportation. Notably, the new Negative List permits an increase in foreign investment for seaport companies, which provide harbour facilities², to 95% foreign ownership (increased from 49% under the 2010 negative list) during a concession period under a PPP scheme. Construction of terminals (which includes passenger land transport terminals and general cargo terminals) are now 49% open to foreign investment, after being entirely closed to foreign investment under the previous regime. Furthermore, the new Negative List now allows foreign investors to hold up to 49% share capital in the operating company undertaking testing of motor vehicles and land transportation public facilities. These activities were closed to foreign investment under the previous regime. Finally, multimode transportation business is also now 49% open to foreign investment. This business was not regulated under the 2010 Negative List.

Further, the new Negative List provides greater opportunity for foreign investment in the pharmaceutical

sector (which includes the manufacture/production of raw drug materials and medicines) by increasing the maximum foreign ownership from 75% to 85%. In the financial sector, foreign investors' portion in the venture capital business has also been increased to 85% after being opened 80% to foreign investment under the previous regime.

Nationalised sectors

Notwithstanding the above, the new Negative List introduces a considerable number of further restrictions on future foreign investment for many of the key areas in the energy and mineral resources sector, with oil and gas drilling and support services in particular being dealt with increased regulatory approvals. Where 95% of investments made under the 2010 Negative List in onshore drilling, well operation, design and maintenance services could be foreign, the new regime closes off foreign investment in these activities. Additionally, the limit on foreign capital in offshore drilling services has been significantly reduced from 95% to 75%.

Whilst structures may exist to enter the space, the new list goes further in limiting foreign investment in several key activities in the oil and gas sectors. Owing to a maturing marketplace and greater opportunities, the business activities, where foreign investment was not limited under the previous regimes, but which now face

such limitations, include oil and gas construction services for platforms (up to 75% foreign investment), spherical tanks (up to 49% foreign investment), offshore pipeline installation (up to 49% foreign investment), oil and gas, geothermal and geologic/geophysical surveying (up to 49% foreign investment), and geothermal surveying (up to 95% foreign investment). Additionally, investment in construction for onshore oil and natural gas upstream production installations, onshore pipe installations, horizontal or vertical tanks, and onshore oil and natural gas storage and marketing installations is now also closed to foreign investors, despite never having previously been restricted.

In addition to the oil and gas sector, the new Negative List also introduces tighter restrictions on foreign investment in low to mid-capacity power plants (maximum of 49% foreign investment for 1-10 MW) and entirely closes off foreign investment in electrical installations. Additionally, foreign investment in the management and disposal of hazardous waste has been restricted to 95% and distributor, warehousing and cold storage services in Sumatra, Bali and Java have been limited to 33%, while foreign ownership of cold storage services in Kalimantan, Sulawesi, Nusa Tenggara, Maluku and Papua can now only amount to 67%.

Foreign investment limitation in the mining and mineral resources sectors remains unchanged at 75% (subject to the divestment obligation of a maximum of 49% of foreign ownership at the tenth year of production phase) for acquisition of mining exploration companies and 49% for acquisition of mining producing companies³.

² These include jetties, buildings, tugs at cargo container terminals, at liquid-bulk terminals, at dry-bulk terminals and at Roll-on – Roll-off (Ro-Ro) terminals.

³ Pursuant to Government Regulation 27 of 2013 on procedures for divestment and share pricing and changes to investment in mineral and coal mining business activities.



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Implications

As the Indonesian economy matures and with greater opportunities continuing to be made available to outside investment, the regulators have sought to maximise their bargaining strength. As shown above, the content and restrictions contained in the new Negative List are an attempt to balance competing interests and priorities. The upcoming presidential election may also impact upon the future direction of the new Negative List. Despite the uncertainty, foreign investors may be able to take comfort in the fact that foreign investment companies (PMA companies) which already have obtained the Capital Investment Coordinating Board (or BKPM) approval are not affected by the changes in the new Negative List (unless the changes are favorable), and it seems likely this would still be the case in the event of a sale of the whole of a current foreign investor's interest to another investor or a merger and acquisition (but not a consolidation).

How can HFW help?

It is apparent from the various shipping, energy and natural resources regulations that the Indonesian Government continues to endeavor to protect state assets and interests by monitoring the market share of foreign investors'. As with any new regulatory environment, the devil will be in the detail, and careful structural planning will be required to invest in the country as a new participant.

As such, foreign investors are strongly advised to seek further clarification from the BKPM or professional advice from legal advisers with familiarity in structuring such transactions. HFW has Indonesian qualified lawyers and lawyers who have worked on Indonesian transactions (including new entry investments for over 20 years) who can advise and direct you further on how the new Negative List may impact both your existing business and future business opportunities in Indonesia. HFW is also able to assist you in structuring foreign investment models, should you be interested in restructuring or starting your business in Indonesia, in compliance with all the regulatory conditions and requirements under Indonesian foreign investment legislation.

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