

INDONESIA



Keeping up with shifting foreign investment rules



By Wynne Prasetyo and Mohammad Irham

Less than six months after issuing new investment guidelines and procedures, Indonesia’s Capital Investment Coordinating Board (BKPM) has released an amendment that introduces new processes and requirements and, more importantly, revokes some of the more contentious articles in the earlier regulation affecting publicly listed companies.

BKPM Chairman Regulation No. 12 of 2013 (BKPM Reg. 12/2013) was issued in September to amend BKPM Chairman Regulation No. 5 of 2013 regarding Guidelines and Procedures for Licensing and Non-licensing in the Field of Capital Investment (BKPM Reg. 5/2013).

Publicly listed companies (Tbk companies)

BKPM Reg. 5/2013 contained two articles governing public companies. Article 49 classified Tbk companies as either domestic investment (PMDN) or foreign investment (PMA) companies, depending on the status of the controlling shareholder (the holder of more than 50 percent of the company’s paid-up shares or the party with the ability to determine, directly or indirectly, the management and/or policies of the company).

Being classified as a PMA company would have potentially subjected these companies to Indonesia’s Negative List, which determines those business sectors that are closed to foreign investment or that otherwise contain restrictions on such investment.

Article 49 and Article 50 also provided that, in the event of a change in controlling shareholder of a PMA public company, the company must obtain a Principle License/Principle License Amendment by submitting a letter from the shareholder concerned to the Financial Services Authority (OJK) stating its status as controlling shareholder.

These provisions have been deleted in the new regulation. However, the BKPM has conveyed on several occasions that the spirit of the two articles is the ideal legal regime for investment and public companies, as intended in Indonesia’s investment laws and regulations. Bearing this in mind, we would anticipate the issuance of a separate BKPM regulation regarding Tbk companies that would similarly subject these companies to the authority of the BKPM, in addition to the OJK, and put them under a licensing regime.

Subsidiary companies

BKPM Reg. 5/2013 required a company that was converted into a PMA to ensure that its subsidiaries likewise were converted to PMAs within one year. This obligation has been removed by BKPM Reg. 12/2013.

This is not, however, necessarily all good news for PMA companies. Essentially what this change means is a return to the situation prior to the issuance of BKPM Reg. 5/2013, when the obligation for subsidiaries of PMAs to be converted to PMAs was not found in a law but rather was an unwritten policy of the BKPM. It remains to be seen whether the BKPM will issue a new regulation on this issue to provide legal certainty to investors.

Venture capital companies

BKPM Reg. 5/2013 restricted venture capital companies from owning shares in PMA companies and large-scale PMDN companies. BKPM Reg. 12/2013 has removed these restrictions and instead refers to the relevant laws and regulations, such as Minister of Finance Regulation No. 18/PMK.010/2012 regarding Venture Capital Companies (MoF Reg 18), to govern such share participation.

Article 24, paragraphs (3) and (3a) of BKPM Reg. 12/2013 further affirms that the share participation of a venture capital company is temporary in nature (up to 10 years, extendable for up to an additional five years) and is considered a domestic investment.

Principle license time extension

If a company fails to complete a project within the initial period provided in its Principle License (usually three years), it is possible to secure a time extension under BKPM Reg. 12/2013. Article 24, paragraph (12b) provides that an extension must be applied for before the initial period expires. If the application is submitted after the initial period has elapsed, the BKPM will conduct a field investigation as part of its determination whether a Replacement of Principle License (*Izin Prinsip Pengganti*) should be issued or if it should revoke the current Principle License.

The Principle License or Replacement of Principle License will be revoked if the project remains incomplete after the extension expires. These same rules apply for the Principle License for Business Expansion.

Conclusion

This new amendment to the capital investment guidelines should be seen as a welcome response to some of the criticisms of BKPM Reg. 5/2013, but there are still a number of issues that investors will want to see addressed. We will have to wait and see how the BKPM responds to these concerns about legal certainty.

Soewito Suhardiman Eddymurthy Kardono (SSEK)

14th Floor Mayapada Tower, Jl. Jend. Sudirman Kav.28, Jakarta 12920, Indonesia

Tel: (62) 21 304 16700 / 521 2038

Fax: (62) 21 521 2039

Email: wynneprasetyo@ssek.com

mohammadirham@ssek.com

www.ssek.com