

NEW REGULATION ON CAPITAL INVESTMENT LICENSING AND FACILITIES

Introduction

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

Line of Business

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/PP*), 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

Makarim & Taira S.

Summitmas I, 16th & 17th Fls.
Jl. Jend. Sudirman Kav. 61-62
Jakarta 12190
Indonesia

P: (62-21) 5080 8300, 252 1272
F: (62-21) 252 2750, 252 2751
www.makarim.com

M&T Advisory is an email publication prepared by the Indonesian law firm, Makarim & Taira S. It is only intended to inform generally on the topics covered and should not be treated as legal advice or relied upon when making investment or business decisions. Should you have any questions on any matter contained in M&T Advisory, or other comments generally, please contact advisories@makarim.com

- 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.

Business Location

If the investment is in a Special Economic Zone (*Kawasan Ekonomi Khusus/KEK*), Free-Trade Area or Free Port (*Kawasan Pelabuhan Bebas dan Perdagangan Bebas/KPBPB*), Industrial Zone or National Strategic Tourism Area (*Kawasan Strategis Pariwisata Nasional /KSPN*), the investors can apply for an Investment Registration and 7 other licenses/permits/approvals (ie the company's Deed of Establishment and its approval from the Ministry of Law and Human Rights, its NPWP, approval for its Foreign Manpower Utilization Plan (*Rencana Penggunaan Tenaga Kerja Asing/RPTKA*), Work Permits (*Izin Mempekerjakan Tenaga Kerja Asing/IMTA*), Company Registration Certificate (*Tanda Daftar Perusahaan/TDP*), Import Identification Number (*Angka Pengenal Importir/API*) and Customs Access all at once. To do so, the investors must sign a written statement to the effect that the company has complied with the licensing requirements (*Surat Pernyataan Pemenuhan Persyaratan Perizinan*).

For a business that requires a facility and infrastructure (eg a plant, installed machinery etc.), a Regional License and Technical License can be applied for in parallel during the construction period.

Meanwhile, if the investment is not located in a KEK, KPBPB, or KSPN, the investors can only apply for an investment registration and 3 other licenses/permits/approvals (ie the company's Deed of Establishment and its approval from the Ministry of Law and Human Rights, its NPWP, and TDP) at the same time.

According to Reg 13/2017, specifically for investment located in an area of industrial zone or KSPN, the above facility could only be obtained if the total investment value is at least IDR 100 million or at least 1,000 Indonesian workers will be employed. However, these requirements do not apply to an investment in a KEK or KPBPB area. The investors can still obtain an Investment Registration and 7 other licenses/permits/approvals at the same time without the total value of the investment being IDR 100 million or more or the requirement to employ of at least 1,000 Indonesian workers.

The current BKPM regulation is silent on the licensing facility of the investment located outside the above areas. However, according to the BKPM official we discussed it with, BKPM is currently working with the relevant ministries on the provision of this licensing facility outside those areas.

We have been informed however that the facility to obtain an investment registration and 3 other licenses/permits/approvals for an investment located outside a KEK, KPBPB, industrial zone, or KSPN could also be obtained, but most likely it will have similar requirements as applied for a 3-hour investment licensing process under the previous Head of BKPM Regulation No. 13 of 2015, such as having a total investment value of IDR 100 million or more or employing at least 1,000 Indonesian workers.

Survey for a business license in the Industrial Sector

In addition to the above, if the investors carry out a business in industrial sector, BKPM will conduct a survey before issuing a Business License for any investment above IDR100 billion. For investment below IDR100billion, BKPM will only require the company to provide a presentation on the company's investment plan.

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; and
- the shareholders of the company waive the divestment obligation.

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

According to BKPM Officials while socializing Reg. 13/2017, divestment obligation under the sectoral regulation must still be complied with.

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

BKPM issues 4 (four) types of Representative Office license:

- (i) The Representative Office of a Foreign Company (*Kantor Perwakilan Perusahaan Asing* (KPPA))
- (ii) The Representative Office of a Foreign Trading Company (*Kantor Perwakilan Perusahaan Perdagangan Asing* (KPPPA))
- (iii) The Representative Office of a Foreign Construction Services Enterprise (*Badan Usaha Jasa Konstruksi Asing* (BUJKA))
- (iv) The Representative Office of a Foreign Oil-and-Gas Company (*Kantor Perwakilan Perusahaan Migas* (KPPA Migas))

Under Reg 13/2017, the following apply:

- Trade Representative Offices may have branches in other Provinces / Regencies.
- Licenses for the above Representative Offices are valid for 3 years and can be extended indefinitely.

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 for machinery and 2 years as of the issuance of Business License for raw materials);
- 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.

BKPM also introduced a new facility under which the cargo handling for exempted machinery can be handled in several ports as long as they are under the same Customs and Excise Supervisory and Service Office (*Kantor Pengawasan dan Pelayanan Bea dan Cukai/KPPBC*).

LKPM and Validity of Licenses

According to Regulation 14/2017, the following provisions will apply:

1. **LKPM** – Investors are required to submit regular Investment Activities Reports (LKPM) online through the NSWI system. BKPM emphasized that investors must comply with this obligation. For failing to submit LKPMs three times in a row, the investment licenses and/or facility may be revoked.
2. **Cancellation of BKPM Licenses** – Under the new regulation, BKPM licenses will not be cancelled or revoked. If a license expires, it automatically ceases to be valid.
3. **Revocation of BKPM Licenses** –BKPM licenses that remain valid may be cancelled by their holder for one of the following reasons: (i) the applicant voluntarily cancels the license; (ii) due to a court ruling; (iii) due to the closing of the representative office; (iv) the imposition of a sanction. An application to revoke the BKPM license currently, can be submitted manually. However, as of July 2018, the application to cancel a BKPM license must be submitted online through SPIPISE.

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.

Additional information

1. **Manual Submission of Applications for a Business License** – Some applications for a business license to certain ministries are still submitted manually. However, BKPM did not provide any further clarification of to which ministries they are still submitted manually.
2. **Online Applications for a BKPM License** – BKPM license applications are submitted online through the NSWI system and the licenses are issued in a digital format.
3. **Consultation service mechanism at PTSP Pusat BKPM** – According to the BKPM spokesperson, to consult with a BKPM front office official, the company must make an appointment one day before by submitting the relevant questions or requests for clarification through www.investindonesia.go.id. A BKPM front office official will then respond with the date and time when the consultation will be held. BKPM further explained that these consultations are limited to 110 per day.

Through its Circular Letter No. 3/A.8/2018 dated 2 February 2018, the trials were conducted from 8 February to 15 February 2018 and the above new consultation service mechanism will be effective from 20 February 2018.

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 the 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.

* * * * *

M&T Advisory is an email publication prepared by the Indonesian law firm, Makarim & Taira S. It is only intended to inform generally on the topics covered and should not be treated as a legal advice or relied upon when making investment or business decisions. Should you have any questions on any matter contained in M&T Advisory, or other comments generally, please contact your usual M&T contact or advisories@makarim.com.

Contacts:

Teddy Achmad Suprijadi teddy.suprijadi@makarim.com
Mira Ayu Lestari mira.ayu@makarim.com
Tesalonika Barus tesalonika.barus@makarim.com