

## New Negative List Fails to Excite

### Overview

The latest edition of the Negative Investment List (“**NIL**”) was released to the public on 2 May 2014 (although the presidential regulation incorporating the NIL was issued and entered into effect on 24 April 2014<sup>i</sup>). In line with the treaties on the ASEAN Economic Community, the revised NIL allows higher caps for foreign direct investment (“**FDI**”) from ASEAN-based investors in certain sectors, this time including a number of business lines in the healthcare sector.

As with previous incarnations of the NIL, the latest version stipulates that certain sectors are fully closed to FDI, while others are partly or conditionally open based on a system of permitted ownership limits, reserved sectors and licensing requirements. Significantly, the NIL expressly provides that any sector not stated to be closed or partly closed will in fact be 100% open to FDI (Article 3). While this needs to be taken with a pinch of salt (as explained below), it is nevertheless an important step forward as this question was the subject of much debate and conjecture in the past.

The NIL expressly repeals the previous version of the NIL, as incorporated in Presidential Regulation No. 36 of 2010, but its ancillary regulations remain in effect in so far as they do not conflict with the revised NIL, which entered into effect on the date of its issuance, namely, 24 April 2014.

### Negative List Caveats

#### i. Lack of Definition

The NIL sets out a long list of business sectors that are either completely closed, completely open or conditionally open to foreign investment. This list of business sectors is based on the comprehensive classification of sectors set out in the 2009 Indonesian Business Sector Classification (“**KBLI**”), drawn up by the Central Statistics Bureau. However, the classifications are very general in nature, with no definitions being given. This leaves the BKPM with a significant discretion in determining what exactly is covered by each business sector. Thus, even where a particular sector is not specifically mentioned in the NIL (which, having regard to Article 3, would lead one to believe that it is 100% open to foreign investment, as explained in the Overview above), the BKPM may still decide that that sector in question comes within the ambit of another sector. For example, Engineering Procurement (EPC) Services were regulated in the previous NIL<sup>ii</sup> but are not mentioned in the new one, and should therefore, at first sight, be 100% open to FDI. However this is not necessarily the case as there is nothing to stop the BKPM from deciding that they fall under, say, construction services (67% FDI cap) or construction consultancy services (55% FDI cap). Thus, potential investors will need to test the waters first by consulting with the BKPM before taking the plunge.

#### ii. Portfolio Investments

The revised NIL once again specifically confirms (Article 5) the exemption from foreign ownership restrictions in the case of portfolio investments (i.e., indirect investments made through share purchases). In doing so, it is merely reiterating the same exemption in the previous incarnation of the NIL and in the Elucidation on Article 2 of the Investment Act (No. 25 of 2007). However, it should be borne in mind that future changes in the political or economic climate could result in corresponding policy changes on the portfolio investment issue, as has happened in the past.

## General Provisions

Article 6 of the revised NIL echoes Article 5 of the previous NIL, but is worth repeating here given its importance. It addresses changes in foreign ownership resulting from a merger, takeover or consolidation involving foreign direct investment companies (“PMA”) operating in the same sector, and provides as follows:

- (a) Maximum foreign ownership of the surviving PMA after its merger with another PMA must not exceed the limit stated in its FDI license.
- (b) Maximum foreign ownership of a PMA that acquires another PMA must not exceed the limit stated in its FDI license.
- (c) Maximum foreign ownership of a new company created as the result of a consolidation must be in accordance with the regulations prevailing at the time of the new company’s establishment.

Similarly, Article 7 repeats the provisions of Article 6 of the previous NIL. Once again, it is an important provision and is worth reiterating here. It provides that if a PMA wishes to expand in the same sector as it currently operates and conducts a rights issue to fund such expansion, and local investors subsequently fail to exercise their rights, then the foreign investor will have a pre-emptive right in accordance with normal company law rules.

Should the increase in capital resulting from the rights issue result in the FDI component of the venture exceeding the maximum permitted under the approval issued by the BPKM, then the excess must be divested within a period of 2 years. Such divestment may be carried out in the following ways:

- (a) Sale to a local investor
- (b) Public offering by the PMA
- (c) The PMA repurchases the excess shares from the foreign investor and treats them as treasury stock in accordance with Article 37 of the Companies Act.

## Sector by Sector

- ASEAN Provisions – The NIL relaxes the FDI caps on a number of sectors for ASEAN investors. However, these are primarily confined to the tourism, cultural/media and healthcare arenas. For example, motion picture advertising (including the production of such things as posters, stills, banners, etc) was previously closed to FDI, but is now 51% open if the investor is a natural or legal person from another ASEAN country. While there are rules in place for determining what exactly is an ASEAN investor, the question inevitably arises as to precisely how far the BKPM will, or even has to capacity to, enquire into the bona fides of ASEAN ownership.
- Power Sector Public Private Partnerships (“PPP”) – as with the previous NIL, the latest version takes cognizance of Indonesia’s chronic infrastructure deficit by allowing up to 95% foreign ownership in certain key infrastructure sectors, such as power generation (more than 10MW), transmission and distribution. In a further positive move, the ownership restrictions have now been abolished for PPP schemes. Of course, if the investor wishes to maintain an interest after the end of the PPP period, it will be subject to the normal ownership caps.
- Port Infrastructure PPPs – In an effort to improve the country’s port infrastructure (wharfs, port buildings, container terminals, bulk terminals, dry bulk terminals and Ro-Ro terminals) – the foreign ownership limit has been raised to 95% for PPP projects, compared with 49% for non-PPP projects.

Given the abysmal state of the country’s highway infrastructure and the snail’s pace of development over the last decade, one may well question why the PPP relaxation has not been applied to this sector also. Or indeed the sanitation sector, were the situation is even worse.

## One Step Forward, One Back

While a number of sectors have been liberalized, the revised NIL also contains many regressive moves, including:

- Distribution, warehousing – previously regulated for a few specific business lines, but generally open to 100% foreign ownership; now subject to 33% FDI limit.
- Cold storage – previously unregulated, now subject to 33% FDI limit in Sumatra, Java and Bali, and 67% in other provinces.
- Online retailing - previously unregulated, now 100% closed.
- Operation of a telecommunications network integrated with a telecommunications service – previously not regulated, now subject to 65% FDI cap.
- Horticulture – previously unregulated, now subject to 30% cap.
- Alternative trading, including alternative trading system providers and members – previously unregulated, now 100% closed.
- Electrical installations and testing and analysis thereof – previously 95% FDI cap, now 100% closed.
- Certain oil and gas construction and support services – previously unregulated, now 100% closed.
- Futures brokerages – previously unregulated, now subject to 95% cap.

*(For more detailed information on the key changes under the 2014 NIL, see matrix at the end of this Client Alert)*

## Conclusion

The reaction of business leaders to the revised NIL, as reported in the media the following morning, pretty much sums up the situation – Indonesian business leaders reacted favorably, while those from the multinational sector reacted negatively. In other words, the revised NIL continues to provide the protection demanded by Indonesian firms in their home market against the perceived threats to their interests posed by FDI. As would be expected, the revised NIL has come as a disappointment to many foreign investors and potential investors as it had been widely expected that it would do more to boost FDI flows and so shield the economy against the current economic headwinds. That these hopes were in vain would seem to indicate that once again the pressure from domestic business outweighed macroeconomic interests.

### Key Changes in 2014 Revised NIL

No.	Business Lines	KBLI No.	2010 NIL	2014 NIL	Remarks
<b>Agriculture</b>					
1.	Horticultural seed production	01139	Unregulated	30%	Revised in compliance with Law No. 13 of 2010 on Horticulture
	– Seasonal fruit crops				
	– Grapes	01210			
	– Tropical fruits	01220			
	– Oranges	01230			
	– Apple, pome and stone fruit seed production	01240			

	– Berries	01251			
	– Seasonal vegetables	01139			
	– Annual vegetables	01253			
	– Medicinal plants	01285 01286			
	– Mushrooms	01139			
	– Floriculture crops	01194 01302			
2.	Growing of horticultural crops		Unregulated	30%	Revised in compliance with Law No. 13 of 2010 on Horticulture
	– Annual fruits	01132			
	– Grapes	01210			
	– Tropical fruits	01220			
	– Oranges	01230			
	– Apples, pome and stone fruits	01240			
	– Berries	01251			
	– Leafy vegetables (i.e., cabbages, collard, scallion, celery)	01131			
	– Root vegetables (i.e., onion, garlic, potatoes, carrots)	01134			
	– Fruit vegetables (i.e., tomatoes, cucumbers)	01133			
	– Chili peppers, paprika	01283			
	– Mushrooms	01136			
	– Ornamental plants	01193			
	– Non-flower ornamental plants	01301			

3.	Horticultural processing industry (post-harvest of fruits and vegetables)	10311 10320 10313 10314 10330	Unregulated	30%	Revised in compliance with Law No. 13 of 2010 on Horticulture
4.	Horticultural research and quality testing laboratories	72102	Unregulated	30%	Revised in compliance with Law No. 13 of 2010 on Horticulture
5.	Horticultural agrotourism	93231	Unregulated	30%	Revised in compliance with Law No. 13 of 2010 on Horticulture
6.	Other horticultural services: – Post-harvest services – Flower arrangement florists /decorators – Horticultural development consultants – Landscaping  – Horticulture courses	01630 47761 70209 43305 71100 81300 85499	Unregulated	30%	Revised in compliance with Law No. 13 of 2010 on Horticulture

#### Marine Affairs and Fisheries

1.	Capture fisheries using vessels of 100 GT and/or more in capture areas on high seas.	03111	Unregulated	100% but subject to conditions set by the Minister of Marine Affairs and Fisheries	
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#### Energy and Mineral Resources

1.	Power plants < 1 MW	35101	Reserved for micro, small, medium businesses and cooperative	Closed	
2.	Small Scale Power plants 1 - 10 MW	35101	100% open subject to partnership requirement	49%	
3.	Power plants > 10 MW	35101	95%	100% for PPPs during period of concession, otherwise 95%	

4.	Power transmission	35102	95%	100% for PPPs during period of concession, otherwise 95%	
5.	Electricity distribution	35103	95%	100% for PPPs during period of concession, otherwise 95%	
6.	Oil and gas construction services:		Unregulated		
	– Platforms	09100		75%	
	– Spherical Tanks	09100		49%	
	– Onshore oil and natural gas upstream production installations	09100		Closed	
	– Onshore pipeline Installations	42219		Closed	
	– Offshore pipeline installations	42219		49%	
	– Horizontal / vertikal tanks	42914		Closed	
	– Onshore oil and natural gas storage and marketing installations	42914		Closed	
7.	Surveying services:		Unregulated		
	– Oil and gas surveying	71100		49%	
	– Geologic and geophysical surveying	71100		49%	
	– Geothermal surveying	71100		95%	
8.	Drilling services:				
	– Onshore oil and gas drilling	09100	95%	Closed	
	– Offshore oil and gas drilling	09100		75%	
	– Geothermal drilling	09900		95%	
9.	Oil and gas supporting services:		Unregulated	Closed.	
		09100			

	<ul style="list-style-type: none"> <li>– Well operation and maintenance services;</li> <li>– Oil and gas design and engineering services;</li> <li>– Technical inspection services</li> </ul>	71100			
		71204			
10.	Manufacture of biomass pellets for energy	16295	Unregulated	100% with partnership requirement	
11.	Technology development for electric power supply equipment	72102	95%	100%	Deleted from 2014 Negative Investment List.
12.	Radioactive mineral mining	07210	Open with recommendation from BATAN	100%	Deleted from 2014 Negative Investment List.
13.	Electrical installations	43211	95%	Closed	
14.	Testing and analysis of electrical installations	71204	95%	Closed	
<b>Industry</b>					
1.	Manufacture of crumb rubber	22123	95%	Closed	
<b>Trade</b>					
1.	Retail sales via mail order houses or internet	47911 47912 47913 47914 47919	Unregulated	Closed	This restriction on online retailing may affect the operations of the web portal industry in Indonesia. Web portal companies will need to ensure that their businesses cannot be categorized as retailing in order to comply with the revised NIL
2.	Retail sale of motorcycles and commercial vehicles	45103 45104 45403 45404	Unregulated (but in practice closed)	Closed	
3.	Trade: <ul style="list-style-type: none"> <li>– Distribution</li> <li>– Warehousing</li> <li>– Cold Storage</li> </ul>	00000 52101 52102	Unregulated	33% 33% 33% for investments in Sumatra, Java and Bali or 67% for investments in other provinces	<ul style="list-style-type: none"> <li>– Distribution was previously 100% open to FDI and was categorized as “Large Scale Trade”.</li> <li>– Warehousing was previously closed to FDI.</li> </ul>

4.	Alternative trading: 1. Alternative trading system 2. Alternative trading system members	00000	Unregulated	Closed	Adjusted to comply with PERKA BAPPEBTI No. 103/BAPPEBTI/PER/03/2013
5.	Futures brokerages	00000	Unregulated	95%	Adjusted to comply with PERKA BAPPEBTI No. 74/BAPPEBTI/PER/12/2009
6.	Public opinion polling and market research	73200	Unregulated (but in practice closed)	51%	
<b>Tourism and Creative Economy</b>					
1.	Motion picture advertising, advertisements, posters, stills, photographs, slides, negatives, banners, pamphlets, folders, etc.	73100	Unregulated (but in practice closed)	51%	Only if the shareholders are from ASEAN member state
2.	Restaurants	56101	49% or 51% with partnership	51%	
3.	Motel and lodging services	55199	49% or 51% if in collaboration with Indonesian SME  51% for ASEAN investors if located in eastern Indonesia (Sulawesi, Nusa Tenggara, Maluku and Papua).	70% for ASEAN investors if located in Java or Bali. For other regions, 49%, or 51% if in collaboration with Indonesian SME	
4.	Golf courses	93112	49%, or 51% if in collaboration with Indonesian SME	100% for ASEAN investors if located outside Java and Bali. 70% for ASEAN investors in Java and Bali. For other regions, 49%, or 51% if in collaboration	



with an Indonesian SME

**Transportation**

1.	Construction of terminals:  – Passenger land transport terminals (public facilities only) – General cargo terminal	52211	Closed	49%	Requires recommendation from Minister of Transportation.
2.	Multimode transport terminals	00000	Unregulated	49%	
3.	Port facilities (wharfs, port buildings, container terminals, bulk terminals, dry bulk terminals and Ro-Ro terminals)	52221 52222 52223	49%	49% or 95% for PPP during the concession period.	
4.	Periodic testing of motor vehicles	71203	Closed	49%	Requires recommendation from Minister of Transportation.

**Communications and Information**

1.	Telecommunications network services:  – Fixed network operation – Movable network operation	61100  61200 61300	49% for fixed network operation by: – Local cable basis, with circuit switched technology or packet switched – Radio basis with circuit switched technology or packed switched  65% for closed fixed network operation 65% for movable network operation by cellular and satellite.	65%	The rules have been simplified.
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2.	Telecommunications network operation integrated with telecommunications services	61100 61200 61300 61921 61922 61923 61929	Unregulated	65%	
3.	Telecommunications services operation:  – Content services (ringtone, SMS premium, etc)  – Call centers and other added value telephony services  – Internet access services  – Data communications system services  – Telephony internet services for public  – Internet interconnection (NAP) services and other multimedia services	61911  61919  61921  61922  61923  61929	100% open with partnership requirement  100% open with partnership requirement  49%  95%  49%  65% for internet interconnection services and 49% for other multimedia services	49%	
4.	Broadcasting	60102	Closed	Maximum 20%, only for business expansion and development.	
5.	Subscription broadcasting	60202	Closed	Maximum 20%, only for business expansion and development.	
<b>Public Works</b>					
1.	Treatment and disposal of non-hazardous waste	38211	Unregulated	95%	

**Finance**

1.	Venture Capital	64991	80%	85%	Adjusted to comply with Presidential Regulation No. 9 of 2009 on Financial Institutions
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**Health**

1.	Manufacture of pharmaceuticals – Manufacture of drug raw materials – Manufacture of medical products	21011 21012	75%	85%	
2.	– Specialist/ subspecialist hospital services – Medical specialist clinics – Dental clinics	86103 86104 86203	67%	67% in all regions.  70% for ASEAN investors if located in eastern Indonesia, except Makassar and Manado.	For specialist/ subspecialist hospital services, the requirement that the facility have at least 200 beds has been deleted.
3.	Specialist nursing services	86901	49% in all Indonesian regions.  51% for ASEAN investors in Medan and Surabaya.	51% for ASEAN investors if located in Makassar and Manado  70% for ASEAN investors if located in capitals of provinces in eastern Indonesia.  49% for Non ASEAN investors in all Indonesian provinces.	

**Defense and Security**

1.	Security services: – Security consulting; – Security guard provision;	74909 80100 80100	100%	49%, subject to an operations permit from	
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– Cash and valuables escort;	80100		the national police.
– Provision of security services with animals;	80200		
– Security system devices;			
– Security education and training.	85499		

i Presidential Regulation No. 39 of 2014

ii As incorporated in Presidential Regulation No. 36 of 2010

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