ASSEGAF HAMZAH & Partners

CLIENTALERT

BKPM Clarifies Application of Negative List to Portfolio Investments

It has undoubtedly been a year of swings and roundabouts in the foreign direct investment (FDI) sector. In April, the Investment Coordinating Board (BKPM) issued Regulation No. 5 of 2013 which, inter alia, provided that a public company, including one constituted as a domestic direct investment company ("**PMDN**"[1]), would henceforth be treated by the BKPM as a foreign direct investment company ("**PMA**" [2]) if the controlling shareholder of such company was a non-Indonesian investor. This resulted in indirect investments and portfolio investments (i.e., investments made through the stock market) being expressly brought within the ambit of the Negative List, which sets out a range of business lines that are closed or restricted to foreign direct investment.

How the change worked in practice is shown by the following example:

A publicly listed, 100% Indonesian-owned PMDN operates in a sector that is closed to foreign investment based on the Negative List. More than 50 percent of the company's shares are acquired by a non-Indonesian company through their purchase on the stock exchange. In such circumstances, Regulation No. 5 required that the Indonesian company change its status to a PMA, with the result that it would no longer be permitted to engage in its current business as it would be off-limits to FDI under the Negative List.

However, the worsening economic climate quickly resulted in a rethink on the part of the BKPM, which reversed course in September through Regulation No. 12 of 2013, with the apparent intention of excluding indirect and portfolio investments from the Negative List. Nonetheless, doubts persisted as it was not clear whether the changes introduced by Regulation No. 12 were intended to restore the situation to the status quo that prevailed prior to the issuance of Regulation No. 5, when the Negative List was applied somewhat selectively to indirect and portfolio investments from time to time, or alternatively whether it signaled that the BPKM would henceforth treat indirect and portfolio investments as being fully exempt from the Negative List.

Following an inquiry by Assegaf Hamzah & Partners, the issue has now been clarified by the BKPM, which has informed us in writing that the changes introduced by Regulation No. 12 mean that:

1. portfolio investments are governed solely by the Capital Markets Act[3] ;

2. a non-PMA (i.e., PMDN or ordinary limited liability company), in which a controlling stake is acquired by a non-Indonesian through the stock market will no longer be required to covert to PMA status. Thus, it will exempt from the Negative List.

Conclusion

This clarification will be warmly welcomed by businesspeople and practitioners alike as it brings to an end, to some degree at least, a protracted period of uncertainty over the status of investments by foreigners in Indonesian public companies. However, as always, the caveat is that the BKPM may choose to interpret the matter differently in the future, notwithstanding the recent clarification.

[1] Perusahaan Modal Dalam Negeri.
[2] Perusahaan Modal Asing.
[3] Act No. 8 of 1995.