

NEWSLETTER

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NEW DRAFT OF PRESIDENTIAL REGULATION ON INVESTMENT BUSINESS ACTIVITIES: A GAME CHANGER?

An Overview

The enactment of Law No. 11 of 2020 on Job Creation on 2 November 2020 (Omnibus Law) which also amended Law No. 25 of 2007 on Investment (Investment Law), is expected to attract foreign and domestic investment activities and increase the ease of doing business in Indonesia to support the Government of Indonesia's ambitious program of creating a significant number of new jobs. This is especially important given that the Omnibus Law was enacted during an unprecedented pandemic situation that brought a global crisis.

*Whenever one talks about foreign investment activities in Indonesia, the concept of businesses that are opened or closed for foreign investment (or famously known as the **Negative Investment List**) would always be the hot-button issue. And for many years, the entire stakeholders are accustomed to the usual Negative Investment List issued in the form of a Presidential Regulation that sets out a long list of businesses complete with the corresponding maximum amount of allowable foreign ownership (currently, the Negative Investment List is stipulated through Presidential Regulation No. 44 of 2016 (**PR 44/2016**)). While some Laws (Undang-Undang) would stipulate specific restrictions for foreign ownership in certain industries (such as broadcasting and shipping), in most cases, such restriction will be covered by the above Presidential Regulation.*

*The new draft of Presidential Regulation on Investment Business Fields (**PR Draft**) seems to break off from this tradition by significantly reducing the amount of businesses that are subject to certain amount of maximum foreign ownership (focusing such list on businesses whose foreign ownership is*



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regulated by specific laws). As such, it can be considered as the first ever “positive list of investment” in Indonesia (albeit in a softer version). In other words, if the PR Draft is formally issued in its current version, it would probably become a game changer!

Key Changes

Business Activities that are Declared Closed to Investment

Under the PR Draft, the Government has emphasized that all business fields are open to investment activities, except for (i) business fields that are declared closed for investment or (ii) activities that can only be conducted by the Central Government. Under the Omnibus Law, there are only 6 business fields that are completely closed for investment, namely:

- (a) narcotics cultivation and industry class I;
- (b) all forms of gambling and/or casino activities;
- (c) fish catching for the fish species listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- (d) utilization or taking of coral and utilization or taking of corals from nature, which is used for the material building/lime/calcium, aquarium, and souvenirs/jewelry, as well as living coral or death coral (recent death streak) of nature;
- (e) chemical weapons manufacturing industry; and
- (f) industrial chemicals and industry ozone-depleting substances.

Business Fields that are Open to Investment

Article 3 paragraph (1) of PR Draft regulates 4 types of business fields that are open to investment, namely:

- (a) priority business fields;
- (b) allocated business fields or partnerships with cooperatives and Micro, Small, and Medium Enterprises (*Usaha Mikro, Kecil, dan Menengah / UMKM*);
- (c) business fields that are open with certain requirements; and

- (d) business fields that are not included in the three types of business fields above – in which all investors are allowed to invest in.

Priority Business Fields

Under the PR Draft, a business field is declared as a priority business field if it is included in the following criteria: (i) a national strategic program or priority, (ii) capital intensive, (iii) labor-intensive, (iv) high technology, (v) pioneer industry, (vi) export or import substitution oriented, and/or (vii) oriented in research, development, and innovation activities. Investors (apply to domestic and foreign investors), that are investing in the priority business fields will be given fiscal incentives and/or non-fiscal incentives. Fiscal incentives are tax incentives that include tax allowance, tax holidays, or investment allowance, as well as customs and excise incentives in the form of exemption from import duties on imported machinery, goods, and material for industrial development and investment. Non-fiscal incentives include the ease of business licensing and other conveniences following the provisions of laws and implementing regulations.

In the list of priority business fields as stipulated under Attachment I of the PR Draft, there are 246 business fields categorized as priority business fields, i.e.:

- (a) 183 business fields that can get tax allowances;
- (b) 18 business fields that can get tax holiday; and
- (c) 45 business fields that can get investment allowances.

Small and Medium Sized Enterprises

According to the PR Draft, business fields that are open for investment consist of, among others, allocated business fields or partnerships with cooperatives and UMKM. While the previous PR 44/2016 does not mention the criteria for allocated business fields or partnerships with cooperatives and UMKM, the PR Draft fills up the lack of certainty. Also, the term “allocated” is newly used and was previously known as “reserved” business fields.

The allocated business fields or partnerships with cooperatives and UMKM are the business sectors that are fully allocated to cooperatives and UMKM, and business fields that require Big Scale Businesses (*Usaha Besar*) to cooperate with cooperatives and UMKM in regards to investment activities.

The allocated business fields for cooperatives and UMKM are determined based on the following cumulative criteria:

- (a) business activities that do not use technology or use simple technology;
- (b) business activities that have process specificities, are labor-intensive, and have a special and hereditary cultural heritage; and
- (c) the capital of the business activities does not exceed Rp10,000,000,000 (ten billion Rupiah) excluding land and building for business premises.

Referring to Article 7(1) of the PR Draft, foreign investors can only carry out business activities in a Big Scale Business with an investment value of more than Rp10,000,000,000 (ten billion Rupiah), excluding land and building for premises. Hence, it is not possible for foreign investors to be allocated for cooperatives and UMKM, given that the criteria in point (c) above is not satisfied. Instead, foreign investors must partner up with cooperatives and UMKM.

The business fields that require Big Scale Businesses to partner up with cooperatives and UMKM are determined based on two criteria as follows:

- (a) it includes business fields that are mostly undertaken by cooperatives and UMKM; and/or
- (b) a business sector with a scale-up purpose to enter the supply chain.

A Big Scale Business, as defined in Law No. 20 of 2008 on UMKM as amended by Article 87 of Omnibus Law, is a productive economic enterprise carried out by a business entity with a net worth or annual sales proceed greater than a Medium Enterprise, which includes a national state-owned or private enterprises, joint ventures, and **foreign businesses** carrying out economic activities in Indonesia. The above definition emphasized that both domestic and foreign investors are allowed to partner up with cooperatives and UMKM if one or both criteria set out in point (a) and (b) above are satisfied.

There are various business fields that fall into the category of allocated business fields or partnerships with cooperatives and UMKM, for example, Electricity Providers for Power Plants < 1 MW (in energy and mineral resources sector) and *Pratama Clinic* (in health sector). Examples of the business fields that must partner up with cooperatives and UMKM, among others, include Consultation in the field of Electrical

Power Installation (in energy and mineral resources sector) and Class A Medical Device Industry (in health sector).

Business Fields that are Open with Certain Requirements

Under the PR Draft, there is a significant decrease in the number of business fields with foreign investment restrictions from previously 350 business fields (as regulated in PR 44/2016) to only 48 (*as listed in the Attachment below*). Hence, this would open up a big opportunity for foreign investors because many business fields that are previously subject to certain maximum foreign ownership will no longer be subject to such restriction, a true game changer since the enactment of the first foreign investment law back in 1967.

Foreign Investment Value Requirements

The PR Draft scales up the existing stipulation regarding the minimum investment value for foreign investment, which was previously regulated under BKPM Regulation No. 1 of 2020 on Guidelines for the Implementation of Electronic Integrated Business Licensing Services. Foreign investors can only carry out business activities in a Big Scale Business with a minimum investment value of more than Rp10,000,000,000 (ten billion Rupiah), excluding land and building for business premises.

Exception to the above minimum investment requirement is given only to business entities that are domiciled in special economic areas (*kawasan ekonomi khusus*) or technology-based startups. The purpose of this provision is to encourage the strengthening of the ecosystem that includes but not limited to the aspects of funding, infrastructure, mentor networks, technology transfer, and market access.

Closing Remarks

Given the significant change to foreign investment restrictions and the introduction of various investment facilities (particularly the incentives for priority business fields) in the PR Draft, we expect that the regulation would alter the current investment landscape and hopefully bring positive impacts to Indonesian economy by opening up bigger opportunities for foreign investors to conduct investments in Indonesia. Exciting times indeed!

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Attachment

List of Business Activities that are Open with Certain Requirements

No.	Business Field	KBLI	Requirements
1.	Publishing of newspapers, magazines and newsletters (press)	58130	a. Domestic capital: 100% for establishment; b. Foreign capital ownership: Maximum 49% (through the capital market) only for business expansion and development
2.	Private Broadcasting Agency (<i>Lembaga Penyiaran Swasta/LPS</i>)	60102	a. Domestic capital: 100% for establishment; b. Foreign capital ownership: Maximum 20% only for business expansion and development
3.	Subscription Broadcasting Agency (<i>Lembaga Penyiaran Berlangganan/LPB</i>)	60202	a. Domestic capital: 100% for establishment; b. Foreign capital ownership: Maximum 20% only for business expansion and development
4.	Radio community broadcasting agency	60102	a. 100% domestic capital for establishment; b. Foreign capital ownership: Maximum 20% only for business expansion and development
5.	Television community broadcasting agency	60202	a. 100% domestic capital for establishment; b. Foreign capital ownership: Maximum 20% only for business expansion and development
6.	Postal Activities	53100	Foreign capital ownership: Maximum 49%
7.	Domestic Scheduled Commercial Air Transportation	51101	a. Foreign capital ownership: Maximum 49%; b. The national capital must outnumber the whole foreign capital (single majority)
8.	Domestic Non-scheduled Commercial Air Transportation	51102	a. Foreign capital ownership: Maximum 49%; b. The national capital must outnumber the whole foreign capital (single majority)
9.	Air Force Activities	51109	a. Foreign capital ownership: Maximum 49%; b. The national capital must outnumber the whole foreign capital (single majority)
10.	Liner and Trampet Domestic Sea Transportation for Passengers	50111	Foreign capital ownership: Maximum 49%
11.	Domestic Sea Transportation for Tourism	50113	Foreign capital ownership: Maximum 49%
12.	Pioneer Domestic Sea Transportation for Passengers	50114	Foreign capital ownership: Maximum 49%
13.	Liner and Trampet Domestic Sea Freight for Goods	50131	Foreign capital ownership: Maximum 49%
14.	Domestic Sea Transportation for Special Goods	50133	Foreign capital ownership: Maximum 49%

No.	Business Field	KBLI	Requirements
15.	Pioneer Domestic Sea Transportation for Goods	50134	Foreign capital ownership: Maximum 49%
16.	Public Shipping Domestic Sea Transportation	50135	Foreign capital ownership: Maximum 49%
17.	Overseas Liner and Tramper Sea Freight for Goods	50141	Foreign capital ownership: Maximum 49%
18.	Overseas Sea Transportation for Special Goods	50142	Foreign capital ownership: Maximum 49%
19.	Interprovincial general inland water transportation	50214	Foreign capital ownership: Maximum 49%
20.	Interprovincial pioneering inland water transportation	50215	Foreign capital ownership: Maximum 49%
21.	Inter-district/intercity general inland water transportation	50216	Foreign capital ownership: Maximum 49%
22.	Inter-district/intercity pioneering inland water transportation	50217	Foreign capital ownership: Maximum 49%
23.	Inner district/city general inland water transportation	50218	Foreign capital ownership: Maximum 49%
24.	River and Lake Transportation for Passengers with Fixed Schedule and Regular Route	50211	Foreign capital ownership: Maximum 49%
25.	River and Lake Transportation for Passengers with Non-Fixed and Irregular Routes	50212	Foreign capital ownership: Maximum 49%
26.	River and Lake Transportation with Non-Fixed and Irregular Routes for Tourism	50213	Foreign capital ownership: Maximum 49%
27.	River and Lake Transportation for General Goods and/or Animals	50221	Foreign capital ownership: Maximum 49%
28.	River and Lake Transportation for Special Goods	50222	Foreign capital ownership: Maximum 49%
29.	River and Lake Transportation for Dangerous Goods	50223	Foreign capital ownership: Maximum 49%
30.	Main Equipment Industry	25200	Capital ownership based on approval from the Minister of Defense
31.	Industry of Liquor Containing Alcohol	11010	For business expansion, only the Industry of Liquor Containing Alcohol that has a business licensing in the similar business field
32.	Industry of Beverage Containing Alcohol: Wine	11020	For business expansion, only the Industry of Beverage Containing Alcohol: Wine that has a business licensing in the similar business field
33.	Industry of Beverage Containing Malt	11031	For business expansion, only the Industry of Beverage Containing Malt that has a business licensing in the similar business field

No.	Business Field	KBLI	Requirements
34.	Farming Vegetables, Fruits and Other Tubers (Horticulture)	01139	Foreign capital ownership: Maximum 30%
35.	Industry of Traditional Medical Products for Humans	21022	Domestic capital: 100%
36.	Industry of Fish Processing	10214	Domestic capital: 100%
37.	Industry of Wooden Building Products	16221	Domestic capital: 100%
38.	Industry of Coffee Processing That Has Received Geographical Indication	10761	Domestic capital: 100%
39.	Industry of Rendang	10750	Domestic capital: 100%
40.	Industry of Vessels - Outrigger - Vessels from Other Types of Wood with Typical Traditional Design	30111	Domestic capital: 100%
41.	Industry of Wood Carving Craft Not Mebeller: Wood Carvings, Reliefs, Masks, Sculptures, Puppets	16293	Domestic capital: 100%
42.	Industry of Traditional Cosmetics	20232	Domestic capital: 100%
43.	Industry of Raw Materials on Traditional Medicine for Humans	21021	Domestic capital: 100%
44.	Industry of Batik: - Industry of Written Batik - Industry of Stamp Batik - The Combination of Written and Stamp Batik Industry	13134	Domestic capital: 100%
45.	Industry of Crackers, Chips, <i>Peyek</i> and Such (Manufacturers and Non-Manufacturers)	10794	Domestic capital: 100%
46.	Retailer Trade on Liquor or Alcoholic Beverages	47221	Special distribution network and place
47.	Small Retailer Trade on Liquor or Alcoholic Beverages	47826	Special distribution network and place
48.	Activities of the Travel Bureau for Umrah and Special Hajj	79122	Domestic capital: 100% and Muslim