

# New Regulation Under Omnibus Law Overhauls Indonesian Foreign Investment Rules

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## Highlights

Following from the Omnibus Law passed in November 2020, the Government has issued Presidential Regulation No.10 of 2021 (PR 10/2021) on Investment Business Activities. This regulation is a long-awaited replacement to the previous so called “negative list” of investment under former Presidential Regulation No.44 of 2016 (PR 44/2016).

PR 10/2021 is one of the implementing regulations to support achieving the objectives of the Omnibus Jobs Creation Law which are, among others, to improve the investment ecosystem while also providing support to business cooperatives, micro, small and medium companies.

Especially during the current economic situation due to the COVID-19 pandemic, attracting more foreign investment has been seen as a high priority to help fuel economic growth and recovery. In line with this goal, PR 10/2021 is generally seen to provide a less restrictive list of business activities that can be undertaken by foreign investors while also “rebranding” the concept from a “negative” list of investment approach to a “positive” supporting business priorities list approach.

In line with this approach to support Indonesian business, PR 10/2021 also aims to provide opportunities for cooperatives, micro, small, and medium enterprises/MSME (*Usaha Mikro, Kecil dan Menengah/UMKM*) to grow by introducing more business activities that are allocated to them or that require large scale businesses to partner with them and provide support in the field of production, processing, marketing, investment, human resources, and technology.

PR 10/2021 was enacted on 2 February 2021 and applies after 30 days from the date of enactment.

## Key Changes in Positive List of Investment

PR 10/2021 stipulates that all business is open for investment (without referring to foreign vs Indonesian source) except for business activities which are determined closed for investment as regulated under the Job Creation Law, and those business activities which can be performed only by the Central Government.

There are only six business activities which are now closed for investment compared to twenty business activities previously regulated under PR 44/2016:

- a. Class 1 narcotics cultivation and industry;
- b. All forms of gambling and/or casino activities;
- c. Fish catching for species listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- d. Coral and sea rock utilization or harvesting as material for building/calcium, aquariums, and souvenirs (applicable for both living and dead coral);
- e. Chemical weapon industries; and
- f. Industrial chemical substances and ozone depleting substances industry.

Business activities which can be performed only by the Central Government are activities that are public service in nature or in the framework of defense and security that are strategic and cannot be carried out by other parties.

Aside from the above restricted activities, PR 10/2021 classifies business activities open for general investment into four categories:

1. Priority business activities;
2. Business activities allocated for or which require partnership with cooperatives and MSME;
3. Business activities that are open with certain requirements; and
4. Business activities that are not included in the above three classifications.

### Priority business activities

PR 10/2021 introduced a new concept of “priority business activities”. These types of business activities are those which are designated with the following criteria:

- a. National strategic project/program;
- b. Capital intensive;
- c. Labour intensive;
- d. High technology;
- e. Pioneer industry;
- f. Export oriented; and/or
- g. Oriented in research, development, and innovation activities.

Investors investing in the priority business activities will be granted fiscal and non-fiscal incentives.

Fiscal incentives can be in the form of tax allowances, tax holidays, or investment allowances by also considering other requirements as stipulated in PR 10/2021 such as location of the business, type of products, transfer of technology, and investment value. Business activities in this list will also be eligible for customs incentives in the form of import duty exemption for import of machinery and goods for industrial development and expansion.

There are 245 business activities listed as priority business, which can be grouped as follows:

- a. 183 business activities which are eligible for tax allowance facility;
- b. 18 business activities which are eligible for tax holiday facility; and
- c. 44 business activities which are eligible for investment allowance facility.

Applications and detailed requirements for each of the above fiscal incentives will have to consider other specific regulations as issued by the Government, including the Ministry of Finance and Capital Investment Coordinating Board.

Non-fiscal facilities that can be granted for business activities in this list consist of ease of obtaining business licenses, provision of supporting infrastructure, guarantees on availability of energy and materials, immigration, manpower, and other non-fiscal supports.

The list does not limit other business activities from also enjoying the fiscal facilities as PR 10/2021 also stipulates that business activities not in the list can still be granted the fiscal and non-fiscal incentives provided that it is stipulated in other relevant regulations.

**Business activities allocated for or requiring partnership with cooperatives and MSMEs**

PR 10/2021 also stipulates business activities which are allocated to cooperatives and MSMEs, and business activities which are open for large scale business with the requirement of partnership with cooperatives and MSMEs.

Business activities that fall under this classification are decided based on the following criteria:

Classification	Criteria
Allocated for Cooperatives and MSME	<ol style="list-style-type: none"> <li>1. Business activities which do not use technology or use simple technology;</li> <li>2. Business activities which have a process specificity, labour intensive and have special and hereditary cultural heritage; and/or</li> <li>3. Capital that shall not exceed IDR 10 billion excluding the land and building.</li> </ol>
Require Partnership with Cooperatives and MSME	<ol style="list-style-type: none"> <li>1. Business activities that are mostly undertaken by cooperatives and MSMEs; and/or</li> <li>2. Business activities with scale-up purpose to enter the supply chain.</li> </ol>

The implementation of this provision will have to also consider provisions under another newly issued regulation i.e. Government Regulation No. 7/2021 on Easiness, Protection and Empowerment of Cooperatives and MSME (GR 7/2021).

Under GR 7/2021, definition of MSMEs is determined based on capital or annual turnover as follows:

	<b>Capital (excluding land and building)</b>	<b>Annual turnover</b>
Micro	Up to IDR 1 billion	Up to IDR 2 billion
Small	> IDR 1 billion to IDR 5 billion	> IDR 2 billion to IDR 15 billion
Medium	> IDR 5 billion to IDR 10 billion	> IDR 15 billion to IDR 50 billion

GR 7/2021 also includes forms of partnership that can be entered into with cooperatives and MSMEs, which include core-plasma, subcontract, franchise, general trade, distribution and agency, supply chain, profit sharing, operational cooperation, joint ventures, and outsourcing.

There are more business activities in this list compared to that under PR 44/2016 which, among others, include the following examples: minimarket business, power plants of 1 MW, and basic medical clinics (Klinik Pratama) which previously were classified as a business reserved for domestic capital investment and, under PR 10/2021, are now allocated to cooperatives and MSMEs.

### **Business activities that are open with certain requirements**

PR 10/2021 in general divides business activities that are open with certain requirements into the following three categories:

- a. Business activities that are reserved for domestic investors;
- b. Business activities with maximum foreign ownership; and
- c. Business activities that require a special license.

Under PR 44/2016, there were 350 business activities listed in this list, whilst PR 10/2021 significantly reduced the number in this list to 46 business activities only. Specifically, PR 10/2021 only put 33 business activities as business activities that are reserved for domestic investors and with maximum foreign ownership. This is the area where PR 10/2021 provides a larger window of opportunities for foreign investment into Indonesia as more business activities will be open for foreign investment.

As of the writing of this article, due to concern raised by the public in relation to the opening of the alcoholic beverages industry in certain areas of Indonesia under this list, on March 2<sup>nd</sup> 2021, the President has decided to revoke this list of business activities that are open with certain requirements.

Due to that, we shall expect there will be a new Presidential Regulation to re-enact this list of business activities that are open with certain requirements. Since the purpose of revocation of the list is mainly to take out the alcoholic beverages industry, as of now we do not expect changes to other business activities in the list.

### **Business activities that are not in the list**

PR 10/2021 stipulates that business activities that are not included in the above three classifications can be undertaken by all investors.

For foreign investment, this provision can be interpreted to mean that such business activities allow 100% foreign ownership, which will have significant impact, especially to the business activities which, in the past, had restricted or limited foreign investment.

However, this may not always be the case since other regulations may still restrict foreign investment due to special licensing rules. As an example,

construction contractor services using high technology and/or high risk and/or work value of more than IDR 50 billion, which previously had maximum foreign investment of 67% or 70% for ASEAN investors, is no longer in the PR 10/2012 list. However, this is still separately regulated under Government Regulation No. 5 of 2021 regarding Risk Based Licensing which still limit foreign investment up to 67% for non-ASEAN investor and 70% for ASEAN investors in this business.

Therefore, to ensure that this interpretation applies to specific business activities that are not in the list, further consultation with the Capital Investment Coordinating Board and relevant technical ministries as well as further monitoring of any other respective sectoral regulation are required.

### **Investment in Special Economic Zone**

To support development of the Special Economic Zone (SEZ), PR 10/2021 also stipulates that the restrictions on business activities that are open with certain requirements does not apply for investment in SEZ.

In addition, particularly for foreign investment in technology-based start-ups in SEZ, PR 10/2021 allows an investment value of less than the normal minimum investment value requirement for foreign investment of IDR 10 billion (excluding land and building).

### **What Business Should Anticipate**

For foreign investors, this is the time to revisit existing investment or investment plans into Indonesia. The less restrictive list may provide foreign investors more opportunities to enter into new business and potential to restructure or expand current business activities in Indonesia.

Proper implementation of PR 10/2021 will also depend on the readiness of the Online Single Submission (OSS) platform for the purpose of business licensing as well as further clarity on foreign investment, particularly for the business activities that are not in the list. Considering this may take some time including until the OSS platform is fully operational to accommodate changes in PR 10/2021, investors may still need to anticipate some obstacles and challenges in the implementation.

There are also other implementing regulations of the Job Creation Law which relate to the implementation of PR 10/2021, including implementing regulation on risk-based licensing and sectoral regulation. To have full understanding of the impact, business will also have to be aware of the provisions under all such other implementing regulations to have the full picture of new opportunities.

We at PwC are constantly monitoring the changing regulatory landscape in Indonesia and stand ready to help your business succeed to realise its full potential from these extremely important ongoing developments.

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