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— LAW PARTNERSHIP —
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Guidance On The Grant of Special Permits For Mineral And Coal Mining (Regulation No. 32 of The Minister of Energy And Mineral Resources of 2013)

The Minister of Energy and Mineral Resources recently issued Regulation No. 32 of 2013, Guidance for the Granting of Special Permits for Mineral and Coal Mining, dated 19 November 2013 ("**Regulation 32**"). Regulation 32 serves to implement Law No. 4 of 2009 concerning Mineral and Coal Mining.

Regulation 32 regulates 4 (four) types of special mineral and coal mining permits, i.e:

A. The Temporary Permit for Hauling and Selling (Izin Sementara Untuk Melakukan Pengangkutan dan Penjualan "**ISPP**");

B. The Mining Production Operation Permit for Selling (Izin Usaha Pertambangan / IUP Untuk Penjualan "**IUPP**");

C. The Special Mining Production Operation Permit for Hauling and Selling (Izin Usaha Pertambangan / IUP Operasi Produksi Khusus Untuk Pengangkutan dan Penjualan "**IUP Pengangkutan dan Penjualan**"); and

D. The Special Mining Production Operation Permit for Processing and/or Refining (Izin Usaha Pertambangan / IUP Khusus Untuk Pengolahan dan/atau Pemurnian "**IUP Pengolahan dan Pemurnian**").

Except for the holder of a permit at A above, company permits as mentioned at B, C and D can only be granted 1 (one) type of special permit for mineral and coal mining.

Temporary Permits for Hauling and Selling

The first type of special permit is a Temporary Permit for Hauling and Selling. An ISPP is granted to the holder of an Exploration Mining Permit (IUP Eksplorasi) or Exploration Special Mineral and Coal Mining Permit (IUPK Eksplorasi) for the purposes of the sale of minerals or coal that has been inadvertently mined during exploration process.

In order to apply for an ISPP, the holder of an IUP Eksplorasi or an IUPK Eksplorasi must submit an application to the relevant authority. The authority who is authorised to issue ISPPs is the Minister of Energy and Mineral Resources, the governor, the regent or the mayor. The application to obtain an ISPP must be accompanied by at least the following documents:

(1) exploration method details;

(2) exploration final report details;

(3) details of the total tonnage of minerals or coal that is mined during the exploration process;

(4) details of the quality of minerals or coal that is mined (together with samples and analyses of minerals and coal from an accredited laboratory);

(5) evidence of 'dead-rent' payment to the issuer of the IUP Eksplorasi or IUPK Eksplorasi; and

(6) the sale and purchase agreement with the buyer(s) of the mined minerals or coal.

An ISPP can only granted once and cannot be extended. The holder of an ISPP has the right to haul and/or sell minerals or coal to destination ports or end user(s) within or across regencies or provinces. The holder of an ISPP is prohibited from selling minerals or coal outside Indonesia, based on the prevailing regulations.

The authority grants an ISPP to the holder of an IUP Eksplorasi or an IUPK Eksplorasi that unintentionally mines minerals or coals during the exploration process. If the minerals or coal are intentionally mined during the exploration process and the holder misrepresents this on the application, such a holder shall be liable for criminal sanctions.

Mining Production Operation Permits for Selling (Izin Usaha Pertambangan / IUP Untuk Penjualan)

An IUPP is granted to certain companies whose main business activity is not mining, but who intend to sell the inadvertently mined mineral metals, mineral non-metals, rocks, and/or coal in the course of its business activities. Regulation 32 defines a "certain company" as a company whose business activities include the following:

(1) the construction of traffic facilities; or

(2) the construction of ports; or

(3) the construction of tunnels; or

(4) the construction of civic buildings.

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An IUPP is only granted once and cannot be extended. The IUPP is only granted for the minerals and coal that can be mined in an area which has yet to be occupied by any party that holds mining rights over such an area. If minerals and coal are found in a mining area, the holder of mining permits for such a mining area has rights over the can be mined minerals or coal.

The holder of an IUPP has similar obligations to a mining company if it wants to mine minerals or coals:

(1) to haul and sell the inadvertently/unintentionally mined minerals or coals based on the prevailing mining regulations;

(2) to pay royalties and taxes based on the prevailing regulations; and

(3) to report minerals or coal sold, or for self- use, to the permit issuer.

An IUPP cannot be transferred. No minerals and coal can be sold outside Indonesia pursuant to the prevailing regulations.

Special Mining Production Operation Permits for Hauling and Selling (Izin Usaha Pertambangan / IUP Operasi Produksi Khusus Untuk Pengangkutan dan Penjualan)

Another special licence is the 'IUP Pengangkutan dan Penjualan'. An IUP Pengangkutan dan Penjualan is granted to a person or company that enters into a cooperation agreement with the holder of a Mining Production Operation Permit (IUP Operasi Produksi) specifically to handle the hauling and selling of the mined minerals or coal.

A person or a company that holds an IUP Pengangkutan dan Penjualan may only haul and sell the mined commodities which are originally from or provided by:

(1) an IUP Operasi Produksi holder; or

(2) an IUPK Operasi Produksi holder; or

(3) an IUP Pengolahan dan Pemurnian holder; and

(4) an Individual Mining Permit (Izin Pertambangan Rakyat).

The IUP Pengangkutan dan Penjualan is issued by the following authority:

(a) By the Minister of Energy and Mineral Resources for a company who has its hauling and selling activities across provinces or for a foreign capital investment company;

(b) By a governor for a company who has its hauling and selling activities across regencies or cities but still within one province;

(c) By a regent / mayor for a company who has its hauling and selling activities within one regency or city.

There are some requirements that must be met in order to apply for an IUP Pengangkutan dan Penjualan. Applicants must satisfy these administrative, technical, environmental and financial requirements before the IUP Pengangkutan dan Penjualan can be granted.

The IUP Pengangkutan dan Penjualan is valid for a minimum of 3 (three) years up to maximum of 5 (five) years. The IUP Pengangkutan dan Penjualan can be extended up to a maximum of 3 (three) years for each extension. Regulation 32 is silent on how many times the holder can extend its IUP Pengangkutan dan Penjualan, and whether or not such an IUP Pengangkutan dan Penjualan can be extended continuously. The extension of an IUP Pengangkutan dan Penjualan must be applied for 2 months before the expiry date.

The holder must apply for any adjustments or changes to the IUP Pengangkutan dan Penjualan. Such changes include but are not limited to the name of the buyer, the name of the supplier, types of commodities and an increase in hauling and selling capacity.

Special Mining Production Operation Permits for Hauling and Selling are not transferable. Prior approval must be obtained from the Minister of Energy and Mineral Resources, governor and regent/mayor (whoever is the issuer) for the transfer of shares by holders of Special Operation/Production Mining Permits for Hauling and Selling.

Special Mining Production Operation Permits for Processing and/or Refining (Izin Usaha Pertambangan / IUP Khusus Untuk Pengolahan dan/atau Pemurnian)

Regulation 32 also governs technical procedures for the granting of an IUP Pengolahan dan Pemurnian. A person or company that enters into a cooperation agreement with the holder of a mining permit specifically to handle the processing and refining of mined minerals or coal must possess an IUP Pengolahan dan Pemurnian.

The IUP Pengolahan dan Permuniaaan is classified into 4 (four) categorizes, as follows:

(1) an IUP Pengolahan dan Pemurnian for metal minerals;

(2) an IUP Pengolahan dan Pemurnian for non-metal minerals;

(3) an IUP Pengolahan dan Pemurnian for rock; and

(4) an IUP Pengolahan dan Pemurnian for coal.

A person or an individual is only permitted to hold an IUP Pengolahan dan Pemurnian for non-metal minerals and an IUP Pengolahan dan Pemurnian for rock.

In order to apply for an IUP Pengolahan dan Pemurnian, the applicant must submit an application (attaching supporting documentation) to the following authority:

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(1) The Minister of Energy and Mineral Resources:
   (a) for mining commodities that will be processed or refined originally by:
      (i) the importing supplier of industry raw materials;
      (ii) the holder of an IUPK Operasi Produksi;
      (iii) the holder of an IUP Operasi Produksi that has been issued by the Minister of Energy and Mineral Resources; and
      (iv) the holder of an IUP Operasi Produksi from any other provinces.
   (b) A foreign investment capital company.

(2) The Governor:
   (a) for mining commodities that will be processed or refined originally by:
      (i) the holder of an IUP Operasi Produksi that is issued by a governor; and/or
      (ii) the holder of an IUP Operasi Produksi in which the mining area and the processing or refining are located within one and the same province.
   (b) for the location of processing and/or refining across regencies/cities (but still in one and the same province).

(3) The Regent/Mayor:
   (a) for mining commodities that are originally processed or refined by the holder of an IUP Operasi Produksi that is issued by a regent / mayor.
   (b) for processing and refining activities within one regency/city.

Before obtaining an IUP Pengolahan dan Pemurnian, the applicant must first obtain a Principle Licence. The Principle Licence will be upgraded into an IUP Pengolahan dan Pemurnian once the applicants have obtained all supporting licences/permits, such as feasibility studies and have prepared cooperation agreements.

A Principle Licence is granted for a maximum of 3 years and can be extended once for a maximum of 1 (one) year. The Principle Licence is not transferable. The Principle Licence extension can only be granted for the following reasons:

(1) a location permit (Izin Lokasi) for a processing and refining facility installation has yet to be obtained.
(2) the company has yet to obtain or complete the environmental impact documentation.
(3) the company has yet to obtain or complete the feasibility study for processing and refining activities.
(4) the company has yet to obtain relevant permits.

The applicant may submit an application for an IUP Pengolahan dan Pemurnian only after the applicant has satisfied all the requirements in respect of the provision of supporting documentation or permits. The IUP Pengolahan dan Pemurnian is not transferable to any third party. The holder of an IUP Pengolahan dan Pemurnian must obtain prior approval from the issuer (i.e the Minister or governor or regent/mayor) in order to transfer shares.

Administrative Penalties

Besides criminal pinalties for misrepresenting an ISPP, Regulation 32 also provides certain administrative sanctions for the holder that does not fulfill its obligations under Regulation 32. Such administrative sanctions include up to a maximum of written 3 (three) warnings (one per month); followed by enforced stoppage of business activities; and finally, revocation of the licence.

Transition Provisions

A Special Permit that has been issued prior to the issuance of Regulation 32 must be adjusted within 2 (two) years from the date of Regulation 32. Any existing contract between the holder of a coal of work contract (CCOW) and the holder of an IUP Pengangkutan dan Penjualan or the holder of an IUP Pengolahan dan Pemurnian that has been entered into before the issuance of Regulation 32, shall remain effective until end of the contract, but must also be adjusted based on the requirements stipulated by Regulation 32 within 2 (two) years. Any application for a Special Permit that has been lodged before the issuance of Regulation 32 must be processed in accordance with this Regulation.

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National Social Security (Jaminan Sosial Nasional)

On 1 January 2014, the government announced the implementation of a national social security program. National social security is a policy to provide new health insurance schemes for all Indonesian citizens without exception. The legal basis for this health policy is Law No. 40 of 2004 concerning National Social Security ("**Law 40**") and Law No. 24 of 2011 ("**Law 24**") concerning the Social Security Operating Body (Badan Penyelenggara Jaminan Sosial "**BPJS**").

BPJS

BPJS is a new governmental entity which was established to replace PT Askes (Persero), and to implement all state health security programs under one umbrella, including those which are currently implemented by PT Jamsostek (Persero), the Ministry of Health and the Ministry of Defence. BPJS commenced operations to implement the integrated national social security program from 1 January 2014. The Law 24 divides BPJS into two categories, i.e BPJS Health (BPJS Kesehatan) and BPJS Manpower (BPJS Ketenagakerjaan). BPJS Health replaces PT Askes (Persero) and PT Jamsostek (Persero) will be liquidated and be replaced by BPJS Manpower.

National Social Security

Participants

This national social security program covers all Indonesians. All employees covered by health care benefits under PT Jamsostek (Persero) will transfer to coverage under BPJS Manpower. Pursuant to article 14, Law 24, this policy also covers expatriates who work and reside in Indonesia for 6 (six) months or more. Employers who do not participate in this national social security program shall be liable for administrative and criminal sanctions.

Contributions

Participation in this program is mandatory and participants will be required to pay mandatory contributions to BPJS. Employers will be required to collect contributions from employees and pay the collected amounts to BPJS. Non-employees will be required to pay the contribution directly to BPJS. Contributions for the poor will be covered by the government. The contribution amount and payment method will be determined by a presidential regulation which to date has yet to be issued.

Facilitators

The benefits of this health care program will be facilitated by state-owned hospitals or private hospitals that enter into an agreement with BPJS. On a strict reading of the Laws 40 and 24, private hospital participation in this program is optional. Pending the issuance of regulations implementing the same, it is not clear how the agreement with BPJS will be implemented, and whether or not the government will issue regulations to guide such cooperation agreements. Although, the participation of private hospitals is optional, in the case of emergencies, a private hospital which has not yet entered into an agreement with BPJS may not refuse claimants and must provide health facilities.

Implementing Regulations

No implementing regulations have been issued under Law 40 or Law 24, nor have any draft implementing regulations been made public to date. Guidance is not yet available as to the details of how this national social security will be implemented and it is too early to determine the full scope of the coverage and how this program would actually work in practice.

BPJS Kesehatan
Badan Penyelenggara Jaminan Sosial

The Existence of Corporate Crime in Law No. 18/2013

Forests in Indonesia have experienced significant damage where the damage is caused by acts of illegal logging, illegal mining, and/or the plantation of sectors which violate the laws and regulations. On August 6, 2013, the Government enacted Law Number 18, 2013 concerning the Prevention and Eradication of Forest Damage ("**Law No. 18/2013**") replacing Law Number 41, 1999 concerning Forestry ("**Law No. 41/1999**"). Law No. 41/1999 is considered to have many flaws; accordingly the enactment of Law No. 18/2013 is hoped to be the solution to the foregoing issue.

The public will eventually wonder what the main difference between Law No. 41/1999 and Law No. 18/2013 is. Pursuant to Law No. 18/2013, a corporation or corporate entity can be convicted of any crimes as stipulated in articles 82 to 103, Law No. 18/2013. This is something new, because Law No. 18/2013 specifically refers to the existence of corporate crime. Corporate crime can be confusing because Indonesian Criminal Law (KUHP) still adheres to the principle of sociates delinquere non potest, whereby a corporation is not considered able to commit criminal acts. There are two principles of corporate responsibility: strict liability and vicarious liability (Muladi and Dwidja, 1991: 88). According to the principle of strict liability, a party is accountable for certain criminal acts even if there is no personal error involved, whereas according to the the principle of vicarious liability, criminal liability can be imposed upon one party for a criminal offence committed by another party, for example, Employer/Corporation A may be liable for an offence committed by employee B.

In the development of criminal law in Indonesia, three levels of corporate responsibility as the perpetrator of a criminal offence have been established (Mardjono Reksodiputro, 1989: 9):

1. In the case of corporate management as the perpetrator, it is the one who should be responsible;
2. In the case of the corporation/company as the perpetrator, corporate management should be responsible;
3. In the case of the corporation/company as the perpetrator, it is the one who should be responsible.

Corporate crime as defined in Law No. 18/2013 can be applied to the above-mentioned. Management will usually be the responsible party who especially if the punishment is imprisonment. If management is sentenced as the proxy or representative of the company, the public will enquire as to

the differences between individual crime and corporate crime, specifically in relation to Law No. 18/2013. As defined in Law No. 18/2013, a corporation is a group of organized people and/or concentration of wealth, either in the form of a legal entity or not. Accordingly, the designated legal subject of crime will be different because corporate crime is usually more organized and structured than individual crime, being committed not by individuals (natural persons) but by legal entities. The punishment for corporate crime is also more severe than for crimes committed by an individual.

Firman Subagyo, Vice Chairman of Comission IV of House of Representatives of Republic of Indonesia, said that Law No. 18/2013 is designed to ensnare corporate perpetrators and not to ensnare individuals per se. Therefore, the existence of indigenous peoples in the forest would not be denied nor can they be liable for the destruction of forests. They may cut timber for their daily needs and social activities but not for commercial purposes. If the timber is for personal usage, they must request permission from the authorities in order that deforestation be more closely controlled.

Law No. 18/2013 also mandated the establishment of a supervisory agency. The agency is a combination of the prosecutor, the police, the government, and the civil society. This is not only at a centralised level, the agency is also able to form task forces in areas of forest that are vulnerability to logging. The agency is expected to prevent forest destruction and provide protection to forests in Indonesia.

Finalisation of The Revised Negative Investment List

When the Government announced in December 2013 that the revision of the Negative Investment List (Daftar Negatif Investasi) will be finalized by this year, the questions now faced by foreign investors are which the sectors currently closed to foreign capital investments will be open, and whether, in the sectors currently open, the maximum ownership cap for foreign capital investments will be loosened. Whilst the revised Negative Investment List is still waiting for approval from the President, we can provide an overview below of the main changes to the current Negative Investment List.

The Negative Investment List was last revised by Presidential Regulation No. 36 of 2010 ("**the 2010 Negative Investment List**"). This details which sectors of business are restricted for local and foreign capital investments and which lines of business are conditionally open to foreign capital investments. The list is further divided into several criteria, i.e. lines of business that are reserved for micro, small, middlesized business and cooperatives; lines of business that are subject to partnership; lines of business that are open only to 100% local capital investment; lines of business with location requirements; and lines of business with specific licensing requirements.

By way of background, the 2010 Negative Investment List determined that the sectors closed to foreign capital investments are business related to marijuana cultivation, the alcoholic beverage industry, forestry (e.g. capturing protected fish species and the removal coral from its natural environment, transportation, telecommunication-tower business, culture and tourism (e.g. casinos) and the film distribution industry. Furthermore, sectors categorized as partially open to foreign capital investments are those such as the pharmaceutical industry, venture capital, tourism and creative industries, network operations, provision of port facilities, terminal and airport supporting business, toll roads, drinking- water management and power plant.

While there are still no official details on the list of sectors that are closed and open for foreign investments with conditions, the government has announced that under the finalized list, there are some businesses now more open to foreign investment. Notably, the establishment and operation of land terminals and the business of periodic motor vehicle testing in the transportation sector will be open to foreign capital investment with the maximum ownership cap of 49%; in the pharmaceutical industry will be raised from the current 75% to 85%; for the venture-capital firms in the economic sector, the limit will be raised from 80% to 85% and the shareholding cap for the tourism and creative industries, particularly advertising, will be opened up to 51%. Furthermore, regulations concerning foreign ownership have been further harmonized, such as network operations in the telecommunication and informatics sectors. This indicates that the revised list will provide greater flexibility for more foreign capital investment; it is undeniably good news for most foreign investors that access to the open sectors in the Indonesian economy will be expanded.

However, not all news is good news; the revised list reduces the permitted limits on foreign capital ownership in other sectors. Currently, no regulations on foreign capital investments are in place for the distribution business. Therefore, foreign investors are free to invest their money in this sector. For the purpose of protecting commercial opportunities for local business, this sector is included in the revised list and foreign capital ownership of distributor business will be limited to 33%. For warehousing and cold storage in Sumatera, Java and Bali, foreign capital ownership will be capped at 33% whereas the warehousing and cold storage in Kalimantan, Sulawesi, Nusa Tenggara, Maluku and Papua will be limited to 67%.

For the purpose of enhancing foreign investment in the strategic infrastructure sectors, the revision also regulates the licensing of foreign parties involved in Public-Private Cooperation (Kerja Sama Pemerintah Swasta or KPS) projects, such as in the provision of port facilities; foreign investors will soon be able to hold 95% ownership, and in the terminal and airport support businesses, foreign investors will be allowed to hold 49% ownership. Meanwhile, the revised list allows the foreign investors to hold a 95% maximum ownership of toll roads and drinking water management plants in the public works sector. Foreign investors are also allowed to hold 100% ownership of power plants (10 MW) for the transmission and distribution of electricity.

While there are some promising features in the revised list, as always in Indonesia, it is a question how these provisions are implemented after approval from the President is granted. Despite the Government's drive to attract foreign investors through revising the Negative Investment List, in practice the appointed body that supervises capital investments, the Capital Investment Coordinating Body (BKPM), has not yet fully implemented the 2010 Negative Investment List, as BKPM also determines matters based on policy. On a couple occasions that the author is aware of, BKPM has rejected proposals for investment by foreign investors even though the relevant lines of business were not listed in the 2010 Negative Investment List. We hope that these situations will no longer occur in the future, and that the revised Negative Investment List will be fully and promptly implemented.

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