

Client Alert



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Indonesian Government Finally Issues New Regulation on Foreigners Owning Property

On 28 December 2015, the Indonesian Government issued Government Regulation Number 103 of 2015 on Ownership of Residence or Tenancy Houses by Foreigners Domiciled in Indonesia ("**Regulation 103**"). Regulation 103 came into force on 28 December 2015, but a copy of the regulation has only recently been made available. Regulation 103 has been discussed for quite some time and replaces Governmental Regulation Number 41 of 1996 on the same matter ("**Regulation 41**").

So long as the Agrarian Law, Law No. 5 of 1960, remains unchanged, the Government cannot take the initiative to allow a foreign national to hold a Right to Build (in Indonesian *Hak Guna Bangunan-HGB*) land title which is a land title that has been commonly granted to property developers. As suspected, Regulation 103 remains essentially the same as Regulation 41, i.e., foreign nationals can only hold title over land under Right to Use (in Indonesian *Hak Pakai*) title, and given this commercially the market is not necessarily more open.

However, Regulation 103 has extended the term of *Hak Pakai* from 25 years to 30 years, which can be extended for 20 years, and so *Hak Pakai* has the same term as *Hak Guna Bangunan*. *Hak Pakai* now also has the same benefits as *Hak Guna Bangunan*, though *Hak Pakai* which can be held by foreign nationals is subject to certain limitations set out in Regulation 103. Consequently, the Government has sought to place *Hak Pakai* on the same footing as *Hak Guna Bangunan* but very few residential developments have *Hak Pakai* so until developers adopt *Hak Pakai* foreigners will find it difficult to buy residential units. Please note that Government Regulation No.40 of 1996 on *Hak Guna Usaha* (Right to Manage for agricultural activities), *Hak Guna Bangunan* and *Hak Pakai* over Land ("**Regulation 40**") must also be amended as Regulation 40 still provides the initial term of *Hak Pakai* is 25 years at maximum.

What Regulation 103 says

1. Regulation 103 defines a foreign national as a non-Indonesian national who contributes benefit, conducts business, works, or invests in Indonesia. Further, to be eligible to hold *Hak Pakai*, the foreign national must have a stay permit in Indonesia in accordance with the applicable regulations, e.g., diplomatic stay permit, temporary stay permit, limited stay permit or permanent stay permit, which means the foreign national needs to reside in Indonesia. This requirement is more restrictive than Regulation 41 (and the current implementing regulations).

2. As with Regulation 41, the type of land title that can be held by a foreign national under Regulation 103 is *Hak Pakai*/Right to Use. That land title can be inherited. However, if the heir is a foreign national, he/she also must have a stay permit.
3. If the foreign national no longer has a stay permit or his/her heir does not have a stay permit, then the property must be sold to an eligible party within 1 year. Failing that, (i) the property will be auctioned by the Government, if the *Hak Pakai* is issued on state land, or (ii) the ownership of the property is automatically transferred to the land owner, if the *Hak Pakai* is issued over plots of land under freehold land title (as explained in point (4) below). An implementing regulation at the ministerial level will be issued to further discuss the procedures.
4. For properties in the form of landed houses, the landed house must be constructed over land under either *Hak Pakai* over state land or *Hak Pakai* over land under freehold land title (*Hak Milik*). *Hak Pakai* over *Hak Milik* must be based on an agreement between the foreign national and the *Hak Milik* holder in which the *Hak Milik* holder grants a right to the foreign national to use the relevant land and to apply for *Hak Pakai* over that land. That agreement must be signed before a land deed official (*Pejabat Pembuat Akta Tanah*).
5. For properties in the form of apartments/condominiums, the apartments/condominiums must be constructed on land under *Hak Pakai* over state land.
6. The maximum initial term of *Hak Pakai* is 30 years. The initial term can be extended for a maximum of 20 years and then renewed for a maximum of 30 years. For *Hak Pakai* over *Hak Milik*, the agreement on the granting of *Hak Pakai* must be extended accordingly.

The foreign national is required to maintain his/her stay permit in order to apply for an extension or renewal of *Hak Pakai*.

7. Regulation 103 provides that foreign nationals are granted *Hak Pakai* for (i) the purchase of a new house and (ii) the purchase of a new apartment/condominium unit. This suggests that a foreign national cannot purchase in a secondary sale and cannot sell the property to another foreign national.
8. Like Regulation 41, Regulation 103 does not stipulate a minimum price and size for properties that can be owned by foreign nationals. It remains to be seen whether the minimum size stipulated under ministerial level regulations will be revised in the near future. Further, it also remains to be seen whether the Government will set a minimum price of property (apartments/landed houses) that can be purchased by foreign nationals. Last year, when the Government increased the thresholds of the purchase price of property and the size of property that would be subject to a super luxury tax, the Government said that the intention was to also impose those thresholds as the minimum requirements for properties that can be sold to foreign nationals.
9. Regulation 103 is also silent on the number of properties a foreign national may own, where Regulation 41 provides that a foreign national may only own 1 property. These issues may be further clarified or addressed under the ministerial level regulations.

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- Further, Regulation 103 clarifies that an Indonesian national who marries a foreign national retains the right to own property in Indonesia like other Indonesian nationals provided there is a prenuptial agreement between the couple in notary deed form. Under Indonesian marital law, a prenuptial agreement must be signed on or before the date of the marriage and legalized by/registered at the relevant citizen civil register.

Implementing Regulations

Regulation 103 stipulates that procedures for the granting, release or transfer of property rights by foreign nationals will be further stipulated in regulations of the relevant government authority in the agrarian sector, i.e., the Minister of Agrarian Affairs and Spatial Planning.

Key Considerations

The following are key considerations:

- The Government has improved the *Hak Pakai* title by extending its term to be the same as *Hak Guna Bangunan* so that the benefits that a holder of *Hak Pakai* can get would be essentially the same as those of a holder of *Hak Guna Bangunan*.
- It remains to be seen whether the Land Office would have any reservation about granting *Hak Pakai* for 30 years, the same initial term as *Hak Guna Bangunan*, in general. If Regulation 40 is not amended, and as a result developers cannot obtain *Hak Pakai* with the same term as *Hak Guna Bangunan*, developers may also be reluctant to apply for *Hak Pakai*, particularly for apartment/condominium developments.
- Further in practice, banks may continue having reservations about accepting *Hak Pakai* as collateral because in current practice, banks generally prefer to have *Hak Guna Bangunan* rather than *Hak Pakai*. Property developers may also consider checking whether the banks still have reservations about accepting *Hak Pakai* as collateral after the issuance of Regulation 103.
- The requirement to reside in Indonesia with a stay permit will clearly limit the pool of potential foreign buyers. Buyers, and indeed developers, may have concerns about the current requirement to get Land Office approval for *Hak Pakai* transfers, and foreign buyers may have concerns about the pool of persons in the resale market if resales can only be to Indonesians (meaning there is no secondary market for foreign sales).

Conclusion

While we appreciate that the above requirements may not meet the expectations of property developers or investors who had hoped the Government would be more liberal in this sector, the provisions of Regulation 103 reflect the maximum changes that the Government can offer without amending the Agrarian Law (which would need to be done through Parliament). The Parliament is considering a new Land Law, and might take the opportunity to amend the Agrarian Law to provide that foreigners can hold *Hak Guna Bangunan* rather than *Hak Pakai*.

Consequently, property developers should consider applying for *Hak Pakai* rather than *Hak Guna Bangunan*, and push the Government to immediately amend Regulation 40 if the intention is to sell property to foreigners.

Foreign buyers will need to wait for the ministerial level regulations to obtain a complete overview of the process and restrictions (e.g., value and size) that may be imposed on sales to foreign buyers.