

▶ New Guidelines Issued by the Securities Commission (“SC”) under the Capital Markets and Services Act (“CMSA”)

▶ Bank Pertanian Malaysia Berhad Act 2008 (“The Act”)

RDL

Corporate & Commercial Law Updates

▶ Guidelines Issued by the Securities Commission (“SC”)

The SC issued 10 new guidelines under the Capital Markets and Services Act (“CMSA”), namely:

<u>GUIDELINES</u>	<u>EFFECTIVE DATE</u>
1. Guidelines on Principal Advisers for Corporate Proposals	1 February 2008
2. Guidelines on Due Diligence Conduct for Corporate Proposals	1 February 2008
3. Guidelines on the Offering of Equity and Equity-Linked Securities	1 February 2008
4. Guidelines on the Offering of Equity and Equity-Linked Securities for the MESDAQ Market	1 February 2008
5. Guidelines on Unit Trust Funds	3 March 2008
6. Guidelines on Marketing and Distribution of Unit Trust Funds	3 March 2008
7. Guidelines on Unit Trust Advertisements and Promotional Materials	3 March 2008
8. Guidelines for the Offering, Marketing and Distribution of Foreign Funds	3 March 2008
9. Prospectus Guidelines for Collective Investment Schemes	January 2008
10. Guidelines for Appointment of Related-Party Trustees	3 March 2008



(1) Guidelines on Principal Advisers for Corporate Proposals (“The Guidelines on Principal Advisers”)

The CMSA provides that any person carrying on the regulated activity of advising on corporate finance must either be a holder of a Capital Markets Services Licence (“CMSL”) or a “registered person”. In addition, the SC adopts a policy of permitting only certain categories of corporate finance advisers to submit applications to the SC in the capacity of principal advisers for certain types of corporate proposals as provided in the CMSA.

The Guidelines on Principal Advisers are issued by the SC for the purpose of:

- (a) providing clarity on the eligibility of corporate finance advisers to act as principal advisers;
- (b) setting out the types of corporate proposals they are permitted to submit to the SC; and
- (c) setting out the additional eligibility criteria that they need to fulfill if they wish to submit specific types of corporate proposals.

The Guidelines on Principal Advisers define ‘principal adviser’ as the corporate finance adviser responsible for making submissions to the SC for corporate proposals and ‘corporate finance adviser’ as a person who is permitted to carry on the regulated activity of advising on corporate finance under the CMSA.

(2) Guidelines on Due Diligence Conduct for Corporate Proposals (“the Guidelines on Due Diligence”)

The SC’s approval of corporate proposals under Part VI of the CMSA, which deals with Issues of Securities and Take-Overs and Mergers, places a high degree of reliance on the information that is disclosed in the submission to the SC and in the offering documents to the investors. Applicants/issuers and their directors, promoters, advisers, experts and other persons involved in a corporate proposal are, therefore, held to high standards of due diligence and accountability in providing investors and their professional advisers with information. There must as such be disclosure of all material information. The information given must be not only adequate, accurate and not misleading, but must also be given in a timely manner.

The purpose of the Guidelines on Due Diligence is to set out the obligations and standards expected of relevant parties in respect of the scope and quality of due diligence undertaken in the preparation and submission of corporate proposals to the SC.

The obligations set out in the Guidelines on Due Diligence are in addition to those under the securities laws and all relevant regulations, rules, orders, notifications, guidelines or other subsidiary legislation pursuant to the securities laws.

‘Corporate proposal’ means any proposal submitted to the SC under Part VI of the CMSA and includes any offering document submitted, deposited or registered with the SC under Part VI of the CMSA.

(3) Guidelines on the Offering of Equity and Equity-Linked Securities

The Guidelines on the Offering of Equity and Equity-Linked Securities are applied by the SC in considering the following proposals under Section 212 of the CMSA:

- (a) Issues and offerings of equity and equity-linked securities;
- (b) Listings of companies and quotations of securities on the Main Board or Second Board of Bursa Malaysia Securities Berhad (Bursa Securities); and
- (c) Acquisitions or disposals of assets which result in a significant change in the business direction or policy of companies listed on the Main Board or Second Board of Bursa Securities.



(3) Guidelines on the Offering of Equity and Equity-Linked Securities (cont'd)

Any proposals falling under the categories above which also involve the issuance of debentures must comply with the Guidelines on the Offering of Private Debt Securities and/or the Guidelines on the Offering of Asset-backed Securities issued separately by the SC, as applicable.

The principles on which these guidelines are based embrace the interests of listed companies, the provision of investor protection and maintenance of investor confidence, as well as the need to protect the reputation and integrity of the market. The principles include the following:

- (a) Issuers must be suitable for listing and have minimum standards of quality, size, operations, and management experience and expertise;
- (b) Issuers and their advisers must make timely disclosure of all such information in which security holders, investors and the SC have legitimate interest and which they would reasonably require for the purpose of making an informed assessment of the issuer, the proposals and the securities being offered;
- (c) Issuers and their advisers should ensure that information disclosed is accurate and complete and, where appropriate, allows for ready comparison with similar information;
- (d) Issuers and their directors, officers and advisers must maintain the highest standards of corporate governance, integrity, accountability and responsibility;
- (e) Directors of an issuer must act in the interests of shareholders as a whole, particularly where a related party has material interest in a transaction entered into by the issuer;
- (f) All holders of securities should be treated fairly and equitably, and must be consulted on matters of significance; and
- (g) Proposals undertaken by issuers should not undermine national interests.

(4) Guidelines on the Offering of Equity and Equity-Linked Securities for the MESDAQ Market

In line with the rational aspiration to promote a science and technology base for Malaysia, the MESDAQ Market was established to provide a platform for technology-based and high growth companies that may not have an established profit track record to raise funds from the capital market. The MESDAQ Market facilitates the intermediation of capital for such companies to fund their business development and realise their business plans.

The Guidelines on the Offering of Equity and Equity-Linked Securities for the MESDAQ Market set out the requirements for the following proposals under Section 212 of the CMSA:

- (a) Listing of companies and quotations of securities on the MESDAQ Market;
- (b) Issues and offerings of equity and equity-linked securities of companies seeking listing on the MESDAQ Market; and
- (c) Acquisitions or disposals of assets which result in a significant change in the business direction or policy of companies listed on the MESDAQ Market.

The SC may approve proposals with revisions and/or subject to terms and conditions as it deems fit, or may reject proposals. If the approval of the SC is conditional, the applicant and the relevant parties involved in the proposals must comply with the conditions. This includes compliance with the Listing Requirements of Bursa Malaysia Securities Berhad for the MESDAQ Market



(5) Guidelines on Unit Trust Funds (“Unit Trust Guidelines”)

The Unit Trust Guidelines set out requirements to be complied with by any person intending to establish a unit trust fund in Malaysia and issue, offer or invite any person to subscribe or purchase units of the unit trust fund.

The Unit Trust Guidelines replace and supersede the Guidelines on Unit Trust Funds issued on 1 April 2003 and all guidance notes and circulars issued pursuant to those guidelines.

A unit trust is created out of a deed, which is essentially a covenant among the management company, the trustee and the unit holders.

Management Company

Sections 288(2) and 289(1) of the CMSA provide that only a management company approved by the SC can act as a management company to a fund.

A management company is a company that:

- (a) establishes a fund;
- (b) Issues, offers for subscription, makes an invitation to subscribe for or purchase units of the funds; and
- (c) operates and administers the fund.

Trustee

Sections 288(1)(a) and 289(1) of the CMSA provide that only a trustee must be appointed for a fund and the appointment must be approved by the SC. A trustee must:

- (a) be a trust company registered under the Trust Companies Act 1949 or incorporated to the Public Trust Corporation Act 1995;
- (b) be registered with the SC; and
- (c) have a minimum issued and paid-up capital of not less than RM500,000.00.

Deed

Section 288(1) of the CMSA provides that a management company should ensure there is in force a deed for a fund. The deed should contain the minimum requirements prescribed in Schedule C of the Unit Trust Guidelines and those specified under securities laws.

A management company and trustee are responsible for maintaining the deed and must make necessary amendments to the deed in accordance with applicable guidelines and securities laws.

(6) Guidelines on Marketing and Distribution of Unit Trust Funds (“The Marketing and Distribution Guidelines”)

The Marketing and Distribution Guidelines set out the requirements to be complied with by any person who carries on the regulated activity of dealing in units of unlisted unit trust funds (including marketing) in Malaysia.

The Marketing and Distribution Guidelines aim to provide a regulatory environment that protects the interests of the investing public. The unit trust industry is premised on the concepts of trust and faith and it is imperative that industry players operate with a high degree of ethics and professionalism



(6) Guidelines on Marketing and Distribution of Unit Trust Funds (“The Marketing and Distribution Guidelines”) (cont’d)

Authorised Person to Deal in Unit Trust Funds

Section 58(1) of the CMSA provides that any person carrying on the activity of dealing in securities (including dealing in units of unit trust schemes) must, whether as principal or agent, be a holder of a CMSL or a registered person in order to carry on the said activity.

The Licensing Handbook issued by the SC, which sets out, among other things, the criteria to be met for applying, renewing or varying a licence, application procedures and ongoing obligations imposed on licensed persons, provides that when the dealing in securities involves units of a unit trust fund, licensed persons and registered persons, whether as principal or agent, are required to be members of a body approved by the SC or a recognised self-regulatory organisation.

Marketing and Distribution of Unit Trust Funds Outside Malaysia

A management company must ensure that only distributors which comply with the following criteria are appointed to market and distribute its funds outside Malaysia:

- (a) A corporation registered, approved, licensed or authorised, as the case may be, to deal in unit trust schemes by the respective home regulatory authorities;
- (b) Have adequate human resources, expertise and experience to market and distribute unit trust schemes in a proper and fit manner; and
- (c) Have in place, adequate policies and procedures for its business practices to meet all relevant legislations and regulations imposed by the home regulatory authorities.

A management company should comply with all relevant laws and rules of the foreign jurisdiction on the distribution of its unit trust funds.

(7) Guidelines on Unit Trust Advertisements and Promotional Materials (“the Guidelines on Unit Trust Advertisements”)

The Guidelines on Unit Trust Advertisements set out the requirements to be complied with by any person who issues advertisements, promotional materials, releases, statements and reports for unlisted unit trust funds in Malaysia.

The Guidelines on Unit Trust Advertisements aim to provide a regulatory environment that protects the interests of the investing public. For the purpose of the Guidelines on Unit Trust Advertisements, ‘advertisement and promotional material’ refers to a notice which:

- (a) issues, offers for subscription or purchase, or makes invitations to subscribe for or purchase, units of a unit trust fund;
- (b) refers, whether directly or indirectly, to a prospectus of any unit trust fund or prescribed investment scheme, as the case may be;
- (c) refers, whether directly or indirectly, to an issue, intended issue, offer, intended offer, invitation or intended invitation for units of a unit trust fund; or
- (d) refers, whether directly or indirectly, to another notice that refers to a prospectus in relation to an issue, intended issue, offer, intended offer, invitation or intended invitation for units of a unit trust fund.



(7) Guidelines on Unit Trust Advertisements and Promotional Materials (“the Guidelines on Unit Trust Advertisements”) (cont’d)

‘Notices’ include any notice published in a document, newspaper or periodical, or on any medium capable of suggesting words and ideas, and any material disseminated, intended or apparently intended, to advertise or promote a unit trust scheme. Examples of publication medium include, but are not limited to, the following:

- (a) published materials (e.g. magazines, journals or periodicals);
- (b) display of posters, notices, signs or billboards;
- (c) sound broadcasting, film or television; and
- (d) telephone, facsimile, telex, computer transmission or other electronic transmission.

(8) Guidelines for the Offering, Marketing and Distribution of Foreign Funds

The Guidelines for the Offering, Marketing and Distribution of Foreign Funds set out the requirements that must be complied with by any person who intends to offer, market, or distribute in Malaysia a collective investment scheme that is incorporated, constituted, or domiciled in a jurisdiction other than Malaysia.

Permitted Foreign Funds

Foreign funds that meet the following criteria are permitted to be offered, marketed and distributed in Malaysia:

- (a) the fund is a Recognised Fund;
- (b) the fund is constituted in a Recognised Jurisdiction;
- (c) the fund is approved, registered or authorised by the relevant regulator in the Recognised Jurisdiction; and
- (d) if the fund is listed, it must be listed and traded on an exchange that is regulated by the relevant regulator in the Recognised Jurisdiction.

‘Recognised Fund’ is a category or type of fund that is allowed for distribution in Malaysia and listed in Appendix 1 of the Guidelines for the Offering, Marketing and Distribution of Foreign Funds, and ‘Recognised Jurisdiction’ is a foreign jurisdiction recognized by the SC and listed in Appendix 1 of the Guidelines for the Offering, Marketing and Distribution of Foreign Funds.

(9) Prospectus Guidelines for Collective Investment Schemes (“The Prospectus Guidelines for CIS”)

The Prospectus Guidelines specifies the minimum information required by the SC in a fund’s prospectus, in addition to the requirements stated in the CMSA.

The Prospectus Guidelines for CIS are general in nature and should not be viewed as the only criteria for disclosure in a fund’s prospectus. Directors, promoters, principal advisers and experts have the primary obligation and liability for the contents of a fund’s prospectus and they should ensure that all information necessary for an assessment of the fund offered by the prospectus is disclosed.

The information to be included in a prospectus must be information within the knowledge of directors, promoters, principal adviser, stockbroker, underwriter, auditor, banker, advocate and other professional advisers/experts or any other person named in the prospectus with their consent.



(10) Guidelines for the Appointment of Related-Party Trustees

The Guidelines for the Appointment of a Related-Party Trustee set out the SC's policy for the approval of persons referred to under Section 290(1) of the CMSA to be appointed or to act as a trustee to a unit trust fund (including real estate investment trusts and exchange-traded funds).

Section 290(1) of the CMSA provides that a person shall not be eligible to be appointed or to act as trustee for unit holders without the approval of the SC, if the person:

- (a) is a person who beneficially holds shares in the management company;
- (b) is beneficially entitled to monies owed by the management company to it; or
- (c) is a related corporation of:
 - (i) the persons referred to in paragraphs (a) and (b); or
 - (ii) the management company.

For the purpose of the Guidelines for the Appointment of a Related-Party Trustee, "related-party trustee" is a person referred to under section 290(1) of the CMSA. A related-party trustee may be eligible to be appointed or to act as trustee to a unit trust fund, if it can satisfy the criteria and requirements specified in the Guidelines or the Appointment of a Related-Party Trustee.

Eligibility Criteria and Requirements

A related-party trustee will be allowed to be appointed or to act as a trustee of a unit trust fund if the following are met:

- (a) The relationship between the trustee and its related corporation (who is a person referred to under Sections 290(1)(a) to (c) of the CMSA) exhibit legal and structural separation;
- (b) The trustee is financially independent of and not reliant on support from the management company;
- (c) The non-financial resources of the trustee are sufficiently independent of the non-financial resources of the management company;
- (d) At least one-third of the trustee's board of directors comprises independent directors (independent of the persons referred to under Sections 290(1)(a) to (c) of the CMSA) and this fact must be specifically stated in the trustee's articles of association;
- (e) No person is a director of both the trustee's board of directors and the management company; and
- (f) Both the trustee and the management company sign an undertaking that they will act independently of each other in their dealings with the fund.

Note: Please feel free to contact any of us or our librarian should you require a copy of any of the abovementioned guidelines.

► Bank Pertanian Malaysia Berhad Act 2008 ("the Act")

The Act provides for the transfer to and for the vesting of property, rights and liabilities of Bank Pertanian Malaysia in a company by the name of Bank Pertanian Malaysia Berhad, and to make provisions for other matters relating thereto.

'Bank Pertanian Malaysia' means the Bank Pertanian Malaysia established under the Bank Pertanian Malaysia Act 1969.

The Act is not in force yet and shall come into operation on a date by notification in a Gazette.