



Corporate & Commercial Law Update

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▶ LISTING OF SUKUK AND DEBT SECURITIES UNDER AN EXEMPT REGIME

Currently, only companies whose shares are listed on the Bursa Malaysia Exchange may apply to list their debt securities on the Exchange. In an effort to promote the debt securities markets and to enhance the investment options in the Malaysian capital market, Bursa Malaysia has announced that it is now offering a platform for the listing of Islamic bonds or sukuk and debt securities, issued by either listed or non-listed issuers. The *Listing Requirements* have been amended to introduce an Exempt Regime under which the securities will be listed, but not quoted, for trading on the Exchange. Trading will take place outside the Exchange, ie on an over-the-counter basis. The targeted investors will be sophisticated and not retail investors.

A new *Chapter 4B of the Listing Requirements – Listing of Sukuk and Debt Securities under An Exempt Regime* has been introduced. Among the amendments are:

- The listing application must be made through a corporate finance adviser who may act as a principal adviser under the Securities Commission's Guidelines on Principal Advisers for Corporate Proposals.
- Short term sukuk or debt securities with an original maturity date of less than one year cannot be listed.
- The sukuk or debt securities to be listed may be in Ringgit or foreign currency (except those restricted by the Controller of Foreign Exchange).
- An Information Memorandum/Offering Circular must be issued except for certain issuers in respect of whom a document setting out the principal terms and conditions of the sukuk or debt securities will suffice.
- The issuers must comply with certain disclosure obligations, including submitting financial statements and announcements in English.
- A fixed fee of RM3,000 (for each issuance or program, as the case may be) is payable as initial listing fees whilst a fixed fee of RM2,000 (for each issuance or program, as the case may be) is payable as annual listing fees.

To encourage listing under the Exempt Regime, listing fees for sukuk or debt securities listed before 2010 will be waived.

In connection with the above, the Securities Commission ("SC") issued *Practice Note 5 issued pursuant to the Guidelines on the Offering of Islamic Securities* and *Practice Note 5 issued pursuant to the Guidelines on the Offering of Private Debt Securities* on 4 December 2008. The Practice Notes provide, inter alia, that issuance requirements through the Fully Automated System for Issuing/Tendering ("FAST") and the Real Time Electronic Transfer of Funds and Securities ("RENTAS") system, as provided in paragraph 10 of the Guidelines on the Offering of Islamic Securities and in paragraph 9 of the Guidelines on the Offering of Private Debt Securities, shall still apply.



► CAPITAL MARKETS AND SERVICES (NON-APPLICATION OF DIVISION 5 OF PART VI) (FUND MANAGEMENT) ORDER 2008 and CAPITAL MARKETS AND SERVICES (NON-APPLICATION OF DIVISION 5 OF PART VI) (ISLAMIC BANK) ORDER 2008

The Orders, which came into force on 5 December 2008, provide that the provisions of Division 5 of Part VI of the Capital Markets & Services Act 2007 (“CMSA”) shall not be applicable in respect of any issue of, offer for subscription or purchase of, or invitation to subscribe for or purchase, any unit in relation to a unit trust scheme that is made by a holder of a Capital Markets Services Licence carrying on the business of fund management or an Islamic bank to the following investors:

- (a) an individual whose total net assets exceed RM3 million or its equivalent in foreign currencies;
- (b) a corporation with total net assets exceeding RM10 million or its equivalent in foreign currencies based on the last audited accounts;
- (c) a unit trust scheme or prescribed investment scheme;
- (d) a company registered as a trust company under the Trust Companies Act 1949 which has discretion in the investment of the trust assets of a trust with total net assets exceeding RM10 million or its equivalent in foreign currencies;
- (e) a corporation that is a public company under the Companies Act 1965, or under the laws of any other country, which has been allowed by the SC to be a trustee for the purposes of the CMSA and has discretion in the investment of the trust assets of a trust with total net assets exceeding RM10 million or its equivalent in foreign currencies;
- (f) a pension fund approved by the Director General of Inland Revenue (“DGIR”) under section 150 of the Income Tax Act 1967;
- (g) a holder of a Capital Markets Services Licence carrying on the business of dealing in securities;
- (h) any other holder of a Capital Markets Services Licence carrying on the business of fund management;
- (i) a person who acquires securities pursuant to an offer, as principal, if the aggregate consideration for the acquisition is not less than RM250,000 or its equivalent in foreign currencies for each acquisition whether such amount is paid for in cash or otherwise;
- (j) a licensed institution;
- (k) an Islamic bank; and
- (l) an insurance company licensed under the Insurance Act 1996.

The substantial effect of the above orders is that when a fund management company or Islamic bank offers unit trusts to a sophisticated investor, there is no requirement for a trust deed or a prospectus. However, an information memorandum will still be required.

The Securities Commission (Disapplication of Division 5 of Part IV) Order 2005 has been revoked.



▶ **STAMP DUTY**

Stamp Duty (Remission) (No. 2)(Revocation) Order 2009

The above Order, made on 5 January 2009, has revoked ***Stamp Duty (Remission)(No.2) Order 2006*** which provided that 50% of the stamp duty payable on a loan agreement for an amount not exceeding RM1 million granted or to be granted to a small and medium enterprise was remitted.

▶ **FINANCE ACT 2009**

The ***Finance Act 2009*** brings into force various proposals that were announced during the 2009 Budget. Principally, the changes are effective 1 January, 2009. Some of the salient changes are as follows.

Stamp Duty (Stamp Act, 1949)

- Amendments have been made to introduce electronic payment of stamp duty and to provide for the issuance of a stamp certificate (defined as “a certificate that is issued electronically in respect of any instrument chargeable with duty denoting the amount of duty paid in respect of that instrument”).

We understand that the Inland Revenue Board (IRB) had proposed to use e-stamping initially only in relation to the transfer of property and that e-stamping would apply to other instruments with effect from April 1, 2009. However, we have just been informed that the IRB has encountered a problem with the system, hence implementation has been deferred until further notice.

- The RM10 fee for assessment (adjudication) of stamp duty no longer applies.
- Item 22(1) of the First Schedule to the Stamp Act has been amended by replacing the former item 22(1) with the following :

Item	Description of Instrument	Proper Stamp Duty
22	BOND, COVENANT, LOAN, SERVICES, EQUIPMENT LEASE AGREEMENT OR INSTRUMENT of any kind whatsoever:	
(1)(a)	being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), for the term of life or any other indefinite period	
	for every RM100 and also for any fractional part of RM100 of the annuity or sum periodically payable	RM1.00
(b)	for any sum or sums of money, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.	The same <i>ad valorem</i> duty as a charge or mortgage for such total amount.



Income Tax (Income Tax Act, 1967) – Corporate Tax issues

- Section 44A(1)

In relation to group relief for companies, the maximum amount of adjusted loss that a company may surrender has been increased to 70 %.

- Section 44(6), section 44(11B) and section 44(11C)

Amendments have been made to increase, to 10% of the aggregate income of the company, the total amount deductible for :

- (a) any gift of money made to any institution or organization approved by the DGIR,
- (b) contributions in cash or kind made for any sports activities approved by the Minister of Finance or the Commissioner of Sports; and
- (c) contributions in cash or kind for any project of national interest approved by the Minister of Finance

- Section 15B, section 39(1)(j) & section 109F

A new withholding tax has been introduced to cover income of a non-resident falling under Section 4(f) of the Income Tax Act, 1967.

- Section 15 and section 15A

The scope of withholding tax under section 15 (interest and royalty) and section 15A (special classes of income) has been extended to cover such payments made by local authorities to non-residents.

- Section 77B

This new section allows taxpayers to amend a return furnished in accordance with section 77(1) or section 77A(1) in respect of the amount of tax payable or additional tax payable or on the amount of tax which has been wrongly repaid to them. The amended return must be made within 6 months from the due date for the furnishing of the return, and it may only be made once in every year. The penalties prescribed for such amended returns are lower than the penalties that would otherwise be imposed for incorrect returns under Section 113. No amendment can be made where the DGIR has issued an assessment or additional assessment on a return that has been filed by the statutory due date.

- Section 138C

A new provision has been introduced to enable advance pricing arrangements (“APA”). An APA is a mechanism to predetermine the price of goods and services to be transacted in the future between a company and its related companies for a specified period.

- Section 140A

A specific provision has been introduced to address transfer pricing and thin capitalization issues. The DGIR has been given wide powers to make adjustments to transactions relating to goods or services and financial assistance carried out between related companies, based on arm’s length principles.



- Schedule 1 Paragraphs 2B and 2C

The preferential tax treatment for small and medium enterprises (SME) will now not apply if more than :

- (a) 50% of the paid up capital in respect of ordinary shares of the company is directly or indirectly owned by a related company;
- (b) 50% of the paid up capital in respect of ordinary shares of the related company is directly or indirectly owned by the first mentioned company; or
- (c) 50% of the paid up capital in respect of ordinary shares of the first mentioned company and the related company is directly or indirectly owned by another company.

“related company” is defined as a company which has paid up capital exceeding RM2.5 million in respect of ordinary shares at the beginning of a basis period for a year of assessment.

- Schedule 1 Part X

For Real Estate Investment Trusts (REITS), the final withholding tax rate for foreign institutional investors has been reduced from 20% to 10% and for non-corporate investors, including all individuals and other resident entities, from 15% to 10%.