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Financial Services Act 2013 & Islamic Financial Services Act 2013

By Jal Othman, Head, Islamic Finance

Introduction

We have seen so much change in the global economy over the past decade, especially in the post 9/11 era, where efforts to combat money laundering and terrorism financing have intensified in response to new political realities, increasingly sophisticated money laundering techniques and fraudulent activities surrounding the banking sector.

Bankers and financial professionals should take a responsible approach in all investment and lending/financing operations with their customers' money, even in the case of high-risk, high-return type of clients. While clients suffer enormous losses due to risky investments, the financial executives still receive compensation packages and bonuses in millions of dollars. Although it is true that the banking profession traditionally generates huge amounts of wealth for its executives, their excessive bonuses have become an ethical concern when their clients' wealth has been destroyed, due to these forms of speculative investment practices by the financial institutions.

The integrity of the financial system must be preserved, and in an effort to do so, this issue has risen up to the top of the Malaysian Government's "to do" list. The financial brutality that is spreading like wild fire needs to be curbed. The lessons learnt by Malaysian regulators from all these financial crises are reflected in the enactment of the Financial Services Act 2013 (**FSA**) and Islamic Financial Services Act 2013 (**IFSA**).

What are the FSA and IFSA, you may ask. They are unique inventions – a blend of six pieces of legislations, namely the Banking and Financial Institutions Act 1989 (**BAFIA**), the Insurance Act 1996, the Payment Systems Act 2003 and the Exchange Control Act 1953 into the FSA, and the Islamic Banking Act 1983 (**IBA**) and the Takaful Act 1984 into the IFSA, which the Malaysian Parliament has breathed new life into, with exceptional finesse and without dampening any of their legislative efficaciousness. Both Acts were given the Royal Assent on 18 March 2013 and were gazetted on 22 March 2013. Both Acts came into force on 30 June 2013 (with the exception of certain provisions relating to insurance and takaful matters).

In reference to the financial issues alluded to in the preceding paragraphs, both the FSA and IFSA have been designed to curb these issues including fraudulent activities as well as speculative investment practices. Section 21(d) of the FSA provides for deregistration of a registered person if a shareholder, director or any person concerned with the operation or management of the registered person has been convicted of an offence under the FSA or an offence involving fraud or dishonesty under any other written law. Section 59(1)(b) of the FSA and Section 68(1)(b) of the IFSA provide for disqualification of a person from holding any senior office if the person is involved in any fraudulent conduct. On the other hand, Section 72(b) of the FSA and Section 81(b) of the IFSA require an auditor to immediately report to the Central Bank of Malaysia, Bank Negara Malaysia (BNM), any offence involving fraud.

With regards to speculative investment, Part V, Division 1 of the FSA and Part VI, Division 1 of the IFSA provide for prudential standards that are aimed at deterring these unethical practices. For example, under Section 48 of the FSA and Section 58 of the IFSA, every director and officer of an institution shall comply with internal policies and procedures to ensure integrity, professionalism and expertise in the conduct of business affairs.

Under the FSA and IFSA, in order to address urgently the issue of unscrupulous individuals being appointed as the top-most persons in a financial institution, "fit and proper" requirements were imposed on these key personnel. Such requirements include requirements relating to probity, personal integrity and reputation, competency and capability, and financial integrity.[1]

The FSA and IFSA are also designed in line with BNM's Financial Sector Blueprint 2011-2020 (**FSBP**)[2] and the Economic Transformation Programme[3]. The FSBP, themed "Strengthening Our Future - Strong, Stable, Sustainable", sets an ambitious path for the country's economic development and entrenches the financial sector not as an enabler of growth but "as a key driver and catalyst for economic growth".[4] The implementation of the FSBP is on track; as at 20 March 2013, 76 initiatives representing 35% of the total number of initiatives have been completed or are being implemented on an ongoing basis.[5] This includes the enactment of the FSA and IFSA.

The Economic Transformation Programme (**ETP**) is a comprehensive effort that will transform Malaysia into a high-income nation by 2020. The ETP reflects the objectives of the FSBP and both the FSA and IFSA. Key recommendations made by the ETP will be addressed within the effective legal framework provided by both the FSA and IFSA.

The legislations are engineered as across the board legislative framework and supervisory regime for financial institutions in Malaysia which also double as a financial safety net. The FSA and IFSA are said to share about 75% similar provisions. The IFSA stresses more on Shariah compliance and governance of key Islamic financial institutions aiming to promote financial stability.

Impact of the FSA and IFSA

BNM's Powers

So, how do the Acts refine Malaysia's modern financial sector? There are some fresh and significant features of both these Acts which might smoothen the creases of the financial sector.

For a start, it is noteworthy that both the FSA and IFSA provide for a broader and more extensive power to BNM and Malaysia's Ministry of Finance (MOF).

[1] S 60 of the FSA, S 69 of the IFSA.

[2] Bank Negara Malaysia Press Release. <http://www.bnm.gov.my/index.php?ch=8&pg=14&ac=2373>

[3] Performance Management and Delivery Unit. "Overview of ETP." Pemandu, 2012 <http://etp.pemandu.gov.my/About_ETP-@-Overview_of_ETP.aspx>

[4] Parker, Mushtak. "Bank Negara's new master plan charts future direction of financial system." ArabNews 1 Jan. 2012. <http://www.arabnews.com/node/402698>

[5] Bank Negara Malaysia, "Financial Stability and Payment Systems Report 2012.", 20 Mar. 2013. <http://www.bnm.gov.my/files/publication/fsps/en/2012/fs2012_en.pdf>

To illustrate, BNM is now empowered through these Acts to specify standards on business conduct relating to transparency and disclosure requirements, promotion of financial services or products, provision of recommendations or advice including assessments of suitability and affordability of financial services or products.[6] The aim is simple – to ensure financial service providers are fair, responsible and professional when dealing with financial consumers.[7]

An extension of BNM's powers is reflected in the power of BNM to assume control over a business, in situations where it considers that the financial stability of the financial institution is at risk.[8] To curtail the downfall of the financial institution, the MOF on the recommendation of BNM may designate a bridge institution, as an alternative to winding-up, in which the business, assets and liabilities of the distressed financial institution will be vested.[9] Where required, BNM is also authorised to provide financial assistance to the bridge institution.[10]

Financial Holding Companies (FHC)

Financial holding companies are also given recognition under the Acts, which give BNM a broader oversight over Financial Holding Companies (**FHC**), making the FHC subject to the same regulatory requirements as the banks they hold. This in effect strengthens risk governance over the activities of financial groups to prevent undue risks to the safety and soundness of financial institutions.[11] Prior to the introduction of both these Acts, the BAFIA and IBA only regulate individual banking entities and not FHC.

Financial Ombudsman Scheme

Without doubt the financial sector is a risky business. Financial players and investors will want legal recourse should their financial dealings or investments face difficulties. In this context, the FSA and IFSA have introduced the Financial Ombudsman Scheme (**FOS**).[12]

The FOS is a scheme approved by BNM, for the resolution of disputes between an eligible complainant and a financial service provider in respect of financial services or products. It ensures effective and fair handling of complaints and for the resolution of disputes.[13]

Acquisitions and Disposals of Interests

Prior to the enforcement of the Acts, approval of the MOF must be obtained in acquiring or disposing of 5% or more of the issued share capital of a financial institution or its controller[14]. The FSA introduces a lighter and more efficient regulatory approval process whereby applications to acquire or dispose of 5% or more interest in shares of a licensed person can just be made to BNM.[15] There is a similar provision under the IFSA.[16] The approval of the MOF is only required if the proposed acquisition results in the acquirer obtaining control or holding more than 50% of the equity interest in the licensed person.[17] For individual[18] shareholding, the Acts only permit up to 10% holding of interest in shares.[19] These provisions in relation to the acquisition and disposal of interest in shares extend to foreign entities.

Both the FSA and IFSA now permit any increase in shareholding of the licensed person as long as such increase does not exceed a multiple of 5%.[20] The same rule applies to subsequent agreements for acquisition of shares. Approval by the MOF is only required if a shareholder who has an aggregate interest in shares of a licensed

[6] S 123 of the FSA, S 135 of the IFSA.
[7] S 123 of the FSA, S 135 of the IFSA.
[8] S 167 of the FSA, S 179 of the IFSA.
[9] S 176(1) of the FSA, S 188(1) of the IFSA.
[10] S 184 of the FSA, S 196 of the IFSA.
[11] Part VII of the FSA, Part VIII of the IFSA.
[12] S 126 of the FSA, S 138 of the IFSA.
[13] Ibid.
[14] S 45 of BAFIA.
[15] S 87(1) of the FSA.
[16] S 99(1) of the IFSA.
[17] S 87(2) of the FSA, S 99(2) of the IFSA.
[18] Defined as natural person under S 2 of the FSA and IFSA.
[19] S 92 of the FSA, S 104 of the IFSA.
[20] S 87(3)(a)(i)(B) of the FSA, S 99(3)(a)(i)(B) of the IFSA.

person of more than 50%, or who has an aggregate interest in shares of a licensed person of less than 50% but has control over the licensed person, proposes to dispose of any interest in shares and the disposal will result in the shareholder holding an interest in shares of less than 50% or in the shareholder ceasing to have control over the licensed person.[21]

[21] S 89 of the FSA, S 101 of the IFSA.

The FSA also provides clarity on the definition of "interests in shares", which would include a direct interest in shares, effective interest in shares and also aggregates legal, beneficial, direct and effective interests.[22]

[22] Sch. 3 of the FSA and IFSA.

Conclusion

As we know, the financial sector is developing at a much speedier pace now, and to cope with it, the FSA and IFSA are designed specifically to preserve financial stability and to further support the growth of the robust Malaysian financial system and the real economy. The canvas of the financial sector is now painted to express a principles-based approach, which combines greater supervisory judgment and intensity with high-level principles of sound practice. The bigger picture is to cater for the much more sophisticated and interconnected financial system as the financial sector revolutionises. The changes introduced will revamp the architecture under which the financial players and investors operated for the last 20 years. Time will tell whether the efforts will pay off.

An Overview of the Limited Liability Partnerships Act 2012 ("LLPA")

By Ng King Hoe, Partner

Introduction

A. The LLPA is an Act to provide for the registration, administration and dissolution of limited liability partnerships (**"LLP"**) and to provide for related matters.

B. The LLPA has come into force with effect from 26 December 2012.

Fundamentals Of A LLP

A. A LLP is a body corporate and has legal personality separate from that of its partners.[1]

B. A LLP has perpetual succession.[2]

[1] Section 3(1)

[2] Section 3(2)