



BANK NEGARA MALAYSIA
CENTRAL BANK OF MALAYSIA

Wa`d
(Shariah Requirements and Optional Practices)
Exposure Draft

Issuance date: 6 December 2013

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As part of the objective to strengthen the Shariah-compliance culture among Islamic financial institutions (IFIs), Bank Negara Malaysia (the Bank) is embarking on an initiative to develop a Shariah-based regulatory framework. The purpose of the framework is to ensure that the IFIs comply with Shariah. In this regard, the Bank is issuing a series of policy documents on Shariah contracts to enhance the end-to-end compliance with Shariah.

This Exposure Draft (ED) outlines the Shariah requirements and optional practices relating to *wa`d* to facilitate IFIs in developing Islamic financial services and products including the features of *wa`d* and its arrangement with other Shariah contracts or concepts.

The Bank invites written comments from your institution on this ED, including suggestions for particular issues, areas to be further clarified/elaborated and any alternative proposal that the Bank should consider. To facilitate the Bank's assessment, please support each comment with clear rationale, accompanying evidence or illustrations, as appropriate.

Written comments in the form of softcopy are preferable and may be submitted to **shariahstandard@bnm.gov.my** by **10 January 2014**. Hardcopy of the written feedback may also be submitted to:

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Jabatan Perbankan Islam dan Takaful
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PART A OVERVIEW

1. Objective

- 1.1 This policy document outlines the Shariah requirements and optional practices relating to *wa`d*. to be observed by IFIs in developing Islamic financial services and products.
- 1.2 This policy document also covers *wa`d* and arrangement of *wa`d* with other Shariah contracts or concepts.
- 1.3 This policy document aims to facilitate the understanding of the Shariah requirements relating to *wa`d* that must be adhered to by IFIs in order to ensure its validity.

2. Applicability

- 2.1 The policy document is applicable to all IFIs as defined in paragraph 5.2.

3. Legal provisions

- 3.1 The requirements in this policy document are specified pursuant to section 29(1) of the Islamic Financial Services Act 2013 (IFSA).

4. Effective date

- 4.1 This policy document comes into effect on XX XX XXXX.

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5. Interpretation

5.1 The terms and expressions used in this policy document shall have the same meanings assigned to them in the Financial Services Act 2013 (FSA), IFSA and DFIA unless otherwise defined in this policy document.

5.2 For the purpose of this policy document:

“**S**” denotes a standard, requirement or specification that must be complied with. Failure to comply may result in one or more enforcement actions;

“**G**” denotes guidance which may consist of such information, advice or recommendation intended to promote common understanding and sound industry practices which are encouraged to be adopted.

“**Islamic financial institutions**” or “**IFIs**” means –

- (a) licensed Islamic banks and licensed takaful operators under the IFSA;
- (b) licensed banks and licensed investment banks under the FSA which are approved under section 15(1)(a) FSA to carry on Islamic banking business; and
- (c) prescribed institutions under the DFIA which are approved under section 129(1) DFIA to carry on Islamic banking business or Islamic financial business;

6. Related legal and policy documents

6.1 This policy document must be read together with the following legal and policy documents:

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- (a) any Shariah Advisory Council (SAC) rulings published by the Bank¹; and
- (b) Shariah Governance Framework for Islamic Financial Institutions.

¹ Including Shariah resolutions in Islamic Finance, standards, circulars or any directive pertaining to Shariah matter issued by the Bank.

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PART B DEFINITION AND NATURE OF *WA`D*

7. Definition

- S** 7.1 *Wa`d*, literally, a promise or undertaking, refers to an expression of commitment given by one party to another to perform certain action(s) in the future.

8. Nature

- S** 8.1 *Wa`d* is neither a contract nor an agreement. It is a unilateral promise which is not binding in nature.
- S** 8.2 Notwithstanding paragraph 8.1, *wa`d* it is binding and enforceable on the promisor if it fulfils certain requirements.
- S** 8.3 The bindingness of *wa`d* shall take effect upon the expression of the *wa`d* by the promisor.

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PART C COMPONENTS OF WA`D

9. Parties involved

- S** 9.1 The parties involved in *wa`d* are the promisor (*wa`id*) and the promisee (*maw`ud lahu*).
- S** 9.2 The parties involved shall have the legal capacity² to execute the subject matter of *wa`d*.
- G** 9.3 The parties involved in *wa`d* may be a natural person or legal entity.
- G** 9.4 A minor may promise to enter into financial-related activities subject to permission from his/her parent or legal guardian. The promise may also be undertaken by the parent or legal guardian on behalf of the minor.
- S** 9.5 A *wa`d* shall be executed by an expression of the promisor to perform certain action(s) in the future.
- G** 9.6 The expression may be done verbally or by appropriate documentation or by any other method accepted by customary business practice (*`urf tijari*) which does not contravene Shariah principles.
- S** 9.7 Any term or condition mutually agreed upon which does not contravene Shariah shall be binding on the parties involved.

² The legal capacity of a person is defined as capacity to have rights and responsibilities; and capacity to have legal effect to his action. Among the important conditions are that the person must possess sound mind and the capacity to distinguish between what is harmful or beneficial to one's interests.

Legal capacity of a legal entity is defined as eligibility of an entity to acquire rights and assume responsibilities.

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10. Subject matter of *wa`d*

- S** 10.1 The subject matter of *wa`d* shall be an action to be fulfilled in the future.
- S** 10.2 The subject matter of *wa`d* shall be an action that is possible to be fulfilled.
- S** 10.3 The subject matter of *wa`d* shall be Shariah-compliant actions and shall not be used as a tool to commit non-Shariah-compliant activities such as gambling.
- G** 10.4 The subject matter of *wa`d* may be in the form of financial or non-financial matters.
- S** 10.5 If the promisor specifies a time for fulfilment of *wa`d*, he shall be bound to the specified time.
- G** 10.6 The promisor and promisee may agree on a certain grace period to fulfil the *wa`d*.

11. Requirements of binding *wa`d*

- S** 11.1 A *wa`d* shall be a binding *wa`d* if it is linked with a specific cause or specified event, and the promisee will incur expenses by action or refraining from action in reliance upon the *wa`d*.
- S** 11.2 A fee shall not be imposed on a *wa`d*.

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12. Implication of binding *wa`d*

- S** 12.1 The promisor shall not unilaterally revoke his *wa`d*.
- S** 12.2 The promisor shall fulfil his *wa`d* upon occurrence of the specified event.
- S** 12.3 The promisor is considered to have breached the *wa`d* if he does not fulfil his *wa`d* upon the occurrence of the specified event at its specified time.
- S** 12.4 Where the promisor has breached his promise, the promisee may claim for compensation for any actual loss suffered and the promisor shall to fulfil the claim by the promisee.
- S** 12.5 The promisee shall not be entitled to claim for fulfilment of the binding *wa`d* in the event of death or insolvency of the promisor.

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PART D APPLICATION OF BINDING WA'D WITH CONTRACTS

13. Application of binding *wa'd* with contracts

- G** 13.1 In a *wa`d* to purchase, a promisor may provide the promisee a security deposit (*hamish jiddiyyah*) to secure the undertaking to purchase the asset. The security deposit may be used to compensate the promisee against actual losses incurred in the event the promisor breaches his binding *wa`d*.
- S** 13.2 Pursuant to paragraph 13.1, any excess of the security deposit after compensation of the promisee against actual losses and/or costs, shall be returned to the promisor.
- S** 13.3 The security deposit amount shall not be construed as consideration for the binding *wa`d*.
- G** 13.4 The promisor may enter into a binding *wa`d* to sell an asset which is yet to be owned by him provided that the promisor possesses the asset or possesses authority to sell the asset at the time of execution of the sale contract.
- G** 13.5 A future foreign exchange transaction may be arranged based on a binding *wa`d* given by one of the parties involved.
- S** 13.6 The application of *wa`d* to execute *bai` sarf* shall not lead to a bilateral binding *wa`d*.
- G** 13.7 The *mudarib* may enter into a binding *wa`d* to purchase the underlying *mudarabah* or *musharakah* business upon maturity, dissolution or in the event of default.

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- S** 13.8 Pursuant to paragraph 13.7, the price shall not be based on face/par value of the underlying *mudarabah* or *musharakah* business.
- G** 13.9 The purchase price referred to in paragraph 13.7 may be based on market value, fair value or based on mutual agreement.
- G** 13.10 A pledgor may give a binding *wa`d* to use an existing *marhun* (collateral) for any future debt obligation.
- G** 13.11 A binding *wa`d* may be used to allow any future asset to be used as *marhun* (collateral or security) for any existing debt obligation.
- G** 13.12 A promisor may give a binding *wa`d* to give a *hibah* to another party.
- S** 13.13 Notwithstanding paragraph 13.12, a borrower in a *qard* contract shall not promise to give *hibah* to the lender.
- G** 13.14 A promisor may give binding *wa`d* to guarantee performance or fulfilment of a person's liability.
- S** 13.15 Pursuant to paragraph 13.14, the guarantee arrangement shall fulfil all the requirements of a *kafalah* contract.
- G** 13.16 Pursuant to paragraph 13.1, 13.4, 13.5, and 13.12, the promisor may give a binding *wa`d* contingent upon occurrence of a specified event or condition.

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PART E FULFILMENT AND WITHDRAWAL OF BINDING WA`D

14. Fulfilment and withdrawal of binding *wa`d*

- S** 14.1 A binding *wa`d* is fulfilled when the promisor or his guarantor has performed the *wa`d* obligation(s).
- S** 14.2 Upon fulfilment of a *wa`d*, the promisor is free from any obligations related to the *wa`d*.
- S** 14.3 A binding *wa`d* is withdrawn under any of the following circumstances:
- (a) The promisee agrees to the promisor's retraction of the binding *wa`d*; or
 - (b) The promisee decides not to claim fulfilment of the *wa`d* by the promisor.
- S** 14.4 Upon withdrawal of the *wa`d*, the promisor is free from any obligations related to the *wa`d*.

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APPENDICES

Appendix 1 Legitimacy of wa`d

- 1.1 The legitimacy of wa`d is derived from the Quran and founded on the Sunnah of Prophet Muhammad (peace be upon him).

The Quran

- 1.2 The following verse of the Quran implies the general permissibility of wa`d and the obligation to fulfil it:

i. وَأَوْفُوا بِالْعَهْدِ إِنَّ الْعَهْدَ كَانَ مَسْئُولًا

And be true to every promise - for, verily, (on Judgment Day) you will be called to account for every promise which you have made (*Surah al-Isra', verse 34*)

ii. وَالَّذِينَ هُمْ لِأَمَانَاتِهِمْ وَعَهْدِهِمْ رَاعُونَ

“Those who are true to their trusts and pledges” (*Surah al-Mu'minin, verse 8*).

iii. يَا أَيُّهَا الَّذِينَ آمَنُوا لِمَ تَقُولُونَ مَا لَا تَفْعَلُونَ. كَبُرَ مَقْتًا عِنْدَ اللَّهِ أَنْ تَقُولُوا مَا لَا تَفْعَلُونَ

“O you who believe! why do you say that which you do not? It is most hateful in the sight of Allah that you say that which you do not.” (*Surah al-Saf, verse 2-3*)

iv. وَادْكُرْ فِي الْكِتَابِ إِسْمَاعِيلَ إِنَّهُ كَانَ صَادِقَ الْوَعْدِ وَكَانَ رَسُولًا نَبِيًّا

“Also mention in the Book (the story of) Ismail: He was (strictly) true to what he promised, and he was an apostle (and) a prophet.” (*Surah Maryam, verse 54*)

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The Sunnah of Prophet Muhammad (peace be upon him)

1.3 The following *hadith* implies the general permissibility of *wa`d* and the obligation to fulfil it.

i. ما أخرجه البخاري ومسلم عن النبي صلى الله عليه وسلم أنه قال : آية المنافق ثلاث إذا حدث كذب وإذا وعد أخلف وإذا ائتمن خان.

Abu Hurairah reported that Prophet Muhammad (peace be upon him) said: There are three signs of a hypocrite; when he speaks, he tells lies; when he makes a promise, he breaks it; and when he is entrusted, he betrays his trust (Narrated by Muslim, *Al-Jami` Al-Sahih*, *Hadith* no. 220)

Appendix 2 Glossary

Terms	Explanation
<i>Hamish jiddiyyah</i>	A deposit placed to secure purchase of an asset before execution of the <i>murabahah</i> contract.
<i>Ibra'</i>	Rebate.
<i>Ijarah</i>	Lease or service contract that involves benefit/usufruct of a certain asset or work for an agreed payment or commission within an agreed period.
<i>Istisna`</i>	An agreement to sell to a purchaser a non-existent asset that is to be constructed, built or manufactured according to the agreed specifications and delivered on a specified future date at a predetermined price of the <i>istisna`</i> asset.
<i>Mudarabah</i>	Profit-sharing contract.
<i>Murabahah</i>	A sale and purchase of an asset where the acquisition cost and the mark-up are disclosed to the purchaser.
<i>Musawamah</i>	Sale contract without the disclosure of the asset cost price and profit margin to the buyer.
<i>Musharakah</i>	Profit and loss sharing.
<i>Musharakah Mutanaqisah</i>	An arrangement entered into by two or more parties on a particular asset or venture which allows one of the partners to gradually acquire the shareholding of the other partner through an agreed redemption method during the tenure of the contract.
<i>Rahn</i>	Pledge/Charge.
<i>Ta`widh</i>	Compensation.
<i>Tawarruq</i>	Purchasing an asset with deferred price, either on the basis of <i>musawamah</i> or <i>murabahah</i> , then selling it to a third party to obtain cash.
<i>Tawliyah</i>	Sale of a good at its cost price.

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Terms	Explanation
<i>`Urbun</i>	Earnest money paid to secure purchase of an asset in an exchange contract which is considered part of the price if the buyer decides to continue the contract and is not refundable.
<i>`Urf tijari</i>	Common business practice which is acceptable by the community and does not contradict the Shariah rulings.
<i>Wa`d</i>	Promise or commitment or pledge or covenant.