

Response to feedback received

Wakalah

Introduction

The finalised policy document on *Wakalah* for Islamic financial institutions (IFI) incorporates the policy requirements stipulated in the concept paper that was issued on 28 July 2015 and taking into account the feedback received during the consultation period.

The Bank received written responses from 22 respondents, including financial institutions, industry associations and a regulatory authority during the consultation period. A series of engagement sessions were also conducted to allow for a more focused and in-depth discussions on the proposed requirements.

The Bank appreciates the feedback and suggestions received during the consultation process. Key comments received and the Bank's responses are provided in the following sections. Other comments and suggestions for clarification have been incorporated in the final policy where appropriate.

Bank Negara Malaysia

24 Jun 2016

1. Applicability of the policy document on *Wakalah*

- 1.1. A number of respondents enquired whether the policy document on *Wakalah* (PD) will be applicable to:
 - (i) outsourcing arrangements and other fee-based services;
 - (ii) the subsidiary of an IFI acting as agent for the IFI; and
 - (iii) financial holding company.
- 1.2. The Bank wishes to reiterate that the PD covers the application of *wakalah* contract in the financial products and services offered by the IFI as defined under paragraph of 5.2 of the PD. The guidance provided under the PD aims to enable IFI to undertake Islamic financial transaction in conformity with Shariah requirements. Nevertheless, the IFI may also adopt the principles of *wakalah* to ensure relevant operational activities such as marketing, debt collection, accounting or payroll is conducted in Shariah compliant manner.

2. Matters related with *fuduli* (unauthorized agent)

- 2.1. A number of respondents enquired as to the status of a person who executed a financial transaction prior to being properly appointed as an agent of the IFI under *wakalah*. For example, a customer was not an agent of the IFI placed a deposit with the vendor to secure the purchases of an asset and subsequently approached the IFI to enter into *wakalah* agreement to finance the asset acquisition.
- 2.2. The PD outlines the essential requirement for the IFI as the principal to institute proper arrangement to appoint the customer as the agent prior to the customer undertaking any sales or purchase transaction on behalf of the IFI under *wakalah* contract. Otherwise, the customer will be regarded as an unauthorized agent. As to facilitate the appointment process, the IFI has to establish necessary documents, procedures and engage the customer or vendor to execute relevant documentation to evidence the proper appointment of an agent at the initiation of the sales or purchase transaction.

3. Mechanism to transfer asset's ownership of an unauthorized agent

- 3.1. The IFI has also enquired on the acceptable practice to transfer the ownership of an asset that has been acquired by the unauthorized agent in order to enable the execution of *wakalah*.
- 3.2. In the case where a person or an unauthorized agent has acquired an ownership of an asset under the sale and purchase transactions, the ownership of the asset may be subsequently transferred to another person or IFI through the assignment of rights or sales transaction. It is not appropriate for the IFI to appoint the customer or an unauthorized agent who has acquired the ownership of an asset as its agent to purchase the asset.
- 3.3. IFI may only ratify i) the conduct of its agent that may have acted beyond its mandated role, or ii) the transaction entered by the unauthorized agent that disclosed its intention to act on behalf of the IFI. In this regard, the IFI as the

principal may subsequently initiate to execute proper documentary evidence to appoint the customer as an agent to acquire the beneficiary ownership in the underlying asset on its behalf. While this practise is acceptable, the Bank expects the IFI to execute proper *wakalah* arrangement as to mitigate potential adverse implication that may arise following the conduct of an unauthorized agent.

4. Performance fee as part of *wakalah* fee arrangement

- 4.1. A number of respondent enquired whether performance fee for surplus sharing may be construed as part of the whole *wakalah* fee in a takaful arrangement.
- 4.2. The Bank wishes to clarify that the performance fee, which has been clearly provided in Takaful arrangement or documentation can be recognised as part of *wakalah* fee. In this regard, Takaful operator may include an arrangement or scheme to receive a performance fees based on specified terms under the *wakalah* contract. For example, the performance fee may be provided in the form of surplus sharing under the overall fee structure of the Takaful arrangement following the achievement of specific targeted outcome.

5. Disclosure of information relating to financial risks

- 5.1. Some respondent enquired on the disclosure requirements in relation to financial risks associated with the role of an agent in a Takaful operation.
- 5.2. The Bank wishes to clarify that the Takaful operator is expected to observe the policy document issued by the Bank with respect to Financial Reporting for Takaful Operator, in which reiterated (in paragraph 10) the requirements for Takaful operator to disclose financial risks exposure associated with the conduct of Takaful business as specified under the MFRS.