



BANK NEGARA MALAYSIA
CENTRAL BANK OF MALAYSIA

HIBAH

(Shariah Requirements and Optional Practices)

Exposure Draft

Issuance date: 6 December 2013

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft
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Table of Contents

PART A	Overview	1
	1. Objective	1
	2. Applicability	1
	3. Legal provisions	1
	4. Effective date.....	1
	5. Interpretation	2
	6. Related legal and policy documents	2
PART B	Definition and nature of <i>hibah</i>	4
	7. Definition	4
	8. Nature	4
PART C	Components of <i>hibah</i>	5
	9. Contracting parties	5
	10. Asset	6
	11. Requirements of <i>hibah</i>	7
PART D	Arrangement of <i>hibah</i> with other contracts.....	9
	12. Arrangement of <i>hibah</i> with sale contract.....	9
	13. Arrangement of <i>hibah</i> with <i>ijarah</i> contract.....	9
	14. Arrangement of <i>hibah</i> with <i>mudarabah</i> contract	10
	15. Arrangement of <i>hibah</i> with <i>wakalah</i> contract	10
	16. Arrangement of <i>hibah</i> with <i>wadi`ah yad dhamanah</i> involving money (<i>qard</i>)	11
PART E	Revocation (<i>ruju`</i>) and completion (<i>intiha`</i>) of <i>hibah</i> contract	12
	17. Revocation of <i>hibah</i>	12
	18. Completion of <i>hibah</i>	12
APPENDICES.....		13
	19. Appendix 1 Legitimacy of <i>hibah</i>	13
	20. Appendix 2 Glossary	14

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft
-----------------	--	---

As part of the objectives 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 on the Shariah requirements and optional practices relating to *hibah* to facilitate IFIs in developing Islamic financial services and products including the features of *hibah* 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:

Pengarah
Jabatan Perbankan Islam dan Takaful
Bank Negara Malaysia
Jalan Dato' Onn
50480 Kuala Lumpur
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BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 1/16
-----------------	--	--	--------------

PART A OVERVIEW

1. Objective

- 1.1 This policy document outlines the Shariah requirements and optional practices relating to *hibah* to be observed by the IFIs in developing Islamic financial products and services.
- 1.2 This policy document also covers arrangement of *hibah* with other Shariah contracts or concepts.
- 1.3 This policy document aims to facilitate the understanding of the Shariah requirements relating to *hibah* 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.

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 2/16
-----------------	--	--	--------------

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:

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 3/16
-----------------	--	---	-----------

- (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.

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 4/16
-----------------	--	--	--------------

PART B DEFINITION AND NATURE OF *HIBAH*

7. Definition

- S** 7.1 *Hibah* refers to a transfer of ownership of an asset from the donor to the donee during the lifetime of the donor without any consideration or reward.

8. Nature

- S** 8.1 *Hibah* is a benevolent contract whereby the donor (*wahib*) gives the asset at his own discretion.
- S** 8.2 The *hibah* contract is a unilateral contract which is revocable prior to the donee (*mawhub lahu*) taking possession of the *hibah* asset.
- S** 8.3 Notwithstanding paragraph 8.2, the *hibah* contract is irrevocable upon the donee taking possession of the *hibah* asset. At that point, the donor cannot revoke the *hibah* contract unilaterally.
- S** 8.4 The specific inherent nature of the *hibah* contract is the unilateral transfer of ownership of the *hibah* asset from the donor to the donee without any consideration or reward.

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 5/16
-----------------	--	--	--------------

PART C COMPONENTS OF *HIBAH*

9. Contracting parties

- S** 9.1 The contracting parties in a *hibah* contract are the donor and the donee.
- S** 9.2 The donor shall have the legal capacity² to perform a benevolent act (*ahl li al-tabarru*).
- S** 9.3 Pursuant to paragraph 9.2, neither a minor nor his guardian shall dispose of the minor's asset by way of *hibah*.
- G** 9.4 In the event that the donee is a person lacking legal capacity, a parent or legal guardian may receive and possess the *hibah* asset on behalf of the donee.
- G** 9.5 The parties to a *hibah* contract may be a natural person or a legal person.
- G** 9.6 A party to the *hibah* contract may enter into the contract through an agent.
- S** 9.7 A *hibah* contract shall be entered into through an expression by the donor giving *hibah*.

² The legal capacity of a person is defined as capacity to assume rights and responsibilities; and capacity to give 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.

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 6/16
-----------------	--	---	-----------

G 9.8 The expression may be effected through an appropriate documentation or any others method accepted by customary business practice (*`urf tijari*) which do not contravene the Shariah principles.

S 9.9 Any term or condition mutually agreed upon which does not contravene the Shariah shall be binding on the parties.

10. Asset

S 10.1 Asset in a *hibah* contract shall meet the following conditions:

- (a) the asset is recognised by the Shariah, valuable, identifiable and deliverable; and
- (b) the asset is already in existence and owned by the donor.

G 10.2 The *hibah* asset may be a tangible or an intangible asset.

G 10.3 The intangible asset may include receivables.

G 10.4 The *hibah* asset may be a movable or an immovable asset.

G 10.5 The *hibah* asset may be in the form of an undivided asset.

S 10.6 The ownership in the *hibah* asset must be effectively transferred from the donor to the donee.

S 10.7 The transfer of ownership shall take effect by the donor disposing of the right of ownership (*takhliyah*) resulting in the donee having access to the asset (*tamkin*) and assuming its risk through any mechanism permitted by the Shariah and generally accepted by customary business practices (*`urf tijari*).

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 7/16
-----------------	--	--	--------------

- S** 10.8 Possession of the asset shall be either in the form of physical possession (*qabd haqiqi*) or constructive possession (*qabd hukmi*).
- S** 10.9 Upon effective possession of the *hibah* asset by the donee, the donor has no right to revoke or to withdraw the *hibah* contract.

11. Requirements of *hibah*

- S** 11.1 The *hibah* contract shall take an immediate effect at the time of entering into the contract by the parties.
- G** 11.2 Notwithstanding paragraph 11.1, the parties may agree to make the effect of the *hibah* contract contingent upon a certain trigger event in the future.
- G** 11.3 The parties may agree to make the effect of the *hibah* contract contingent upon fulfilment of a certain condition provided that the condition is Shariah compliant.
- G** 11.4 The donor may give a conditional *hibah* which is contingent upon the demise of either of the parties as a condition of ownership for the surviving party (*hibah ruqba*). In such situation, the *hibah* asset will be owned by the donee upon the death of the donor.
- S** 11.5 Notwithstanding paragraph 11.4, in the event that the donee dies before the donor, the *hibah* asset shall return to the donor.
- S** 11.6 The effect of *hibah* contract is permanent. Thus, the donor shall not stipulate a period for the *hibah* contract.
- G** 11.7 Notwithstanding paragraph 11.6, the donor may stipulate that the *hibah* shall be revoked upon the demise of the donee.

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 8/16
-----------------	--	--	--------------

- G** 11.8 A donor undergoing a terminal illness (*maradh al-maut*) may give *hibah* provided that it is not more than one-third of his estate.
- S** 11.9 Pursuant to paragraph 11.8, in the event that the donor gives more than one-third of his estate, the effect of *hibah* is contingent upon the consent of his heirs.

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 9/16
-----------------	--	--	--------------

PART D ARRANGEMENT OF *HIBAH* WITH OTHER CONTRACTS

12. Arrangement of *hibah* with sale contract

- G** 12.1 The *hibah* contract may be arranged together with sale contract.
- G** 12.2 The seller may give *hibah* in the form of discount in the price to the purchaser who pays the instalment on schedule or for early settlement.
- G** 12.3 Under *salam* and *istisna`* contracts, the purchaser may give *hibah* to the seller who delivers the asset on time.

13. Arrangement of *hibah* with *ijarah* contract

- G** 13.1 The *hibah* contract may be arranged together with *ijarah* contract, whereby the lessor may transfer the ownership of the leased asset to the lessee upon settlement of the rental based on the following methods:
 - (a) binding promise (*wa`d mulzim*) to give the asset as *hibah* without any consideration; or
 - (b) conditional *hibah* which is contingent upon the settlement of the remaining installment.
- S** 13.2 Pursuant to paragraph 13.1 (a), the transfer of ownership shall be entered into through a *hibah* contract.
- S** 13.3 Pursuant to paragraph 13.1 (b), the ownership of the leased asset is transferred upon the full settlement of the rental.
- S** 13.4 Notwithstanding paragraph 13.1, the *hibah* contract shall be entered into independently and separately from the *ijarah* contract.

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 10/16
-----------------	--	---	------------

- G** 13.5 The lessor may give *hibah* to the lessee who pays the rental instalment on schedule.
- G** 13.6 The lessor may provide *takaful* coverage to the lessee as *hibah* without any consideration in return.

14. Arrangement of *hibah* with *mudarabah* contract

- G** 14.1 The *mudarib* may give *hibah* to the *rabbul mal* subject to the following conditions:
- (a) The *hibah* is based on the discretion of the *mudarib*;
 - (b) The *hibah* shall not be sourced from the *mudarabah* capital or the *rabbul mal*'s portion of the profit;
 - (c) Provision of *hibah* shall not amount to a guarantee of capital and/or profit by the *mudarib*; and
 - (d) The granting of *hibah* shall not become a customary practice (*`urf*).

15. Arrangement of *hibah* with *wakalah* contract

- G** 15.1 The *hibah* contract may be arranged together with *wakalah* contract.
- S** 15.2 The *hibah* contract shall be independent and separate from the *wakalah* contract.
- G** 15.3 Under this arrangement, the principal may stipulate a conditional *hibah* as a performance incentive fee to the agent/investment agent for performance that exceeds a specified target, such as profit that exceeds the expected profit, in addition to the pre-determined agreed agency fee.

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 11/16
-----------------	--	---	------------

- G** 15.4 The incentive fee based on *hibah* may be based on a percentage of the expected profit or may be an absolute amount.
- G** 15.5 The principal may give the investment agent, as *hibah*, all or part of the amount in excess of the expected profit.
- G** 15.6 The donor may appoint an agent to manage the *hibah* asset prior to its possession by the donee.

16. Arrangement of *hibah* with *wadi`ah yad dhamanah* involving money (*qard*³)

- G** 16.1 The *hibah* contract may be arranged together with the *qard* contract whereby the borrower at his own discretion, may give *hibah*, either in monetary or non-monetary form, to the lender provided that it is not a pre-condition at the time of entering into the *qard* contract and provided that such practice does not become a customary practice (*`urf*).
- S** 16.2 Pursuant to paragraph 16.1, the practice of giving *hibah* is considered customary if the *hibah* is given to a majority of the borrower's lenders.
- S** 16.3 The borrower in the *qard* contract shall not undertake to give *hibah* to the lender.

³ Under *wadi`ah yad dhamanah* involving money, the asset in custody is in monetary form. Money is regarded as a form of fungible asset. Therefore, it is construed as a *qard* contract and shall adhere to the rules related to *qard*.

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 12/16
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PART E REVOCATION (*RUJU*) AND COMPLETION (*INTIHA*) OF *HIBAH* CONTRACT

17. Revocation of *hibah*

- G** 17.1 A *hibah* contract may be revoked under the following circumstances:
- (a) A *hibah* contract that comes with a withdrawal condition;
 - (b) The *hibah* asset is yet to be possessed by the donee; or
 - (c) A *hibah* which is given by a father to his child.
- S** 17.2 Pursuant to paragraph 17.1, the revocation of *hibah* contract shall take either of the following effects:
- (a) prior to the possession of the asset by the donee, the asset remains in the ownership of the donor; or
 - (b) after the possession by the donee, the asset shall be returned to the donor.
- S** 17.3 Pursuant to paragraph 17.2 (b), the asset is a trust (*amanah*) in the hand of the donee before it is returned to the donor.
- S** 17.4 The *hibah* contract shall not be revoked under the following circumstances:
- (a) Increase in value of the *hibah* asset;
 - (b) Total loss of the *hibah* asset; or
 - (c) Disposal of the *hibah* asset by the donee.

18. Completion of *hibah*

- S** 18.1 A *hibah* contract ends upon possession of the *hibah* asset by the donee or by his guardian or agent.

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	Hibah (Shariah Requirements and Optional Practices) Exposure Draft	Page 13/16
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APPENDICES

19. Appendix 1 Legitimacy of *hibah*

19.1 The legitimacy of *hibah* is derived from the Quran and founded on the Sunnah of Prophet Muhammad (peace be upon him), and the consensus of Muslim jurists (*ijma`*).

The Quran

19.2 The following verse of the Quran implies the general permissibility of the *hibah* contract:

فَإِنْ طِبَّ لَكُمْ عَنْ شَيْءٍ مِّنْهُ نَفْسًا فَكُلُوهُ هَنِيئًا مَّرِيئًا.

“...but if they choose of their own accord to make over to you a part of it, then you may enjoy it with pleasure and good cheer.” (*Surah al-Nisa`*, verse 4)

The Sunnah of the Prophet Muhammad (peace be upon him)

19.3 The following *hadith* implies the permissibility of *hibah*:

عن موسى بن وردان عن أبي هريرة عن النبي صلى الله عليه و سلم قال : تهادوا تحابوا.

Abu Hurayrah quoted Allah’s Messenger (peace be upon him) as saying: Exchange gifts (among yourselves); you will love one another” (*Sunan al-Baihaqi, Hadith no. 11726*).

The Consensus of Muslim jurists (*ijma`*)

19.4 Muslim jurists have reached *ijma`* on the permissibility of *hibah*.

20. Appendix 2 Glossary

Terms	Definition
<i>Ahl li al-tabarru`</i>	Legal capacity to perform a benevolent act.
<i>Hibah</i>	Transfer of ownership of an asset from the donor to the donee during the lifetime of the donor without any consideration or reward.
<i>Hibah ruqba</i>	A conditional <i>hibah</i> which contingent upon the demise of either of the parties.
<i>Ijarah</i>	A contract that transfers ownership of a permitted usufruct or service for a specified period in exchange for a specified consideration.
<i>Ijma`</i>	Consensus of Muslim jurists.
<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 pre-determined price of the <i>istisna`</i> asset.
<i>Maradh al-maut</i>	Terminal illness.
<i>Mawhub lahu</i>	Donee.
<i>Mudarabah</i>	A contract between a capital provider (<i>rabbul mal</i>) and an entrepreneur (<i>mudarib</i>) under which the <i>rabbul mal</i> provides capital to be managed by the <i>mudarib</i> and any profit generated from the capital is shared between the <i>rabbul mal</i> and <i>mudarib</i> according to mutually agreed profit-sharing ratio (PSR) whilst financial losses are borne by the <i>rabbul mal</i> provided that such losses are not due to the <i>mudarib's</i> misconduct (<i>ta`addi</i>), negligence (<i>taqsir</i>) or breach of specified terms (<i>mukhalafah al-shurut</i>).

<i>Mudarib</i>	The entrepreneur in a <i>mudarabah</i> venture.
<i>Mukhalafah al-shurut</i>	Breach of terms and conditions.
<i>Qabd haqiqi</i>	Taking physical possession. It refers to a state where a person has taken actual possession and the rights to control an asset.
<i>Qabd hukmi</i>	Taking constructive possession. It refers to a state where a person has not taken actual possession but has the legal right to control an asset.
<i>Qard</i>	A contract of lending a fungible asset to a party who will benefit from it and who will subsequently return an equivalent replacement.
<i>Rabbul mal</i>	Capital provider.
<i>Salam</i>	A contract in which advance payment is made for an asset to be delivered at a future date.
<i>Takaful</i>	An arrangement based on mutual assistance under which <i>takaful</i> participants agree to contribute to a common fund providing for mutual financial benefits payable to the <i>takaful</i> participants or their beneficiaries on the occurrence of pre-agreed events.
<i>Takhliyah</i>	Relinquishing or abandoning the rights of ownership.
<i>Tamkin</i>	Enabling the person who has had the ownership of an asset transferred to him to make full use and assume liability of the asset.
<i>`Urf</i>	Customary practice.
<i>`Urf tijari</i>	Common business practice which is acceptable by the community and does not contradict the Shariah rulings.
<i>Wa`d mulzim</i>	Binding promise.
<i>Wadi`ah yad dhamanah</i>	Safekeeping based on a guarantee.
<i>Wahib</i>	Donor.

BNM/RH/CP 028-3	Islamic Banking and Takaful Department	<i>Hibah</i> (Shariah Requirements and Optional Practices) Exposure Draft	Page 16/16
-----------------	--	--	---------------

<i>Wakalah</i>	A contract in which a party (<i>muwakkil</i>) authorises another party as his agent (<i>wakil</i>) to perform a particular task in matters that may be delegated, either voluntarily or with imposition of fee.
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