

## Financial Services

### Principles-based sustainable and responsible investment (“SRI”) taxonomy for Malaysian capital market

The Securities Commission Malaysia (“SC”) has released a Principles-based SRI Taxonomy for Malaysian Capital Market (“SRI Taxonomy”) on 12 December 2022. The SRI Taxonomy sets out the universal guiding principles for the classification of economic activities that qualify for sustainable investment.

The SRI Taxonomy also seeks to address concerns on the need to mitigate and manage the risks of greenwashing and to define sustainable investments.

In addition to the SRI Taxonomy, the SC also issued a public response paper in response to the feedback it received pursuant to the Public Consultation No. 1/2021 on Principles-based SRI Taxonomy for Malaysian Capital Market that was issued on 17 December 2021.

### 9<sup>th</sup> Meeting of Joint Committee on Climate Change (JC3) Meeting

Following the 9<sup>th</sup> meeting of JC3 on 2 December 2022:

- JC3 will publish a Data Catalogue and Accompanying Report, that is intended to serve as a source of reference on the availability and accessibility of climate and environmental data based on a priority list of financial sector use cases as well as recommendations to bridge data gaps.
- there were discussions on plans to launch several pilot programmes in 2023 to scale up green and sustainable finance.
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# Legal Update

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- there were discussions on plans to launch several pilot programmes in 2023 to scale up green and sustainable finance.
- it will align the TCF Application Guide for Malaysian Financial Institutions with the International Sustainability Standards Board's disclosure requirements upon its finalisation.
- JC3 will support the development of an ESG Disclosure Guide tailored to small and medium enterprises in Malaysia.
- JC3 will develop climate change curriculum for financial institutions which is intended to facilitate the development of structured training pathways for financial institutions to build technical capabilities across all levels in climate-related topics and developments.

## Revision to Guidelines on the Registration of Venture Capital and Private Equity Corporations and Management Corporations

The Securities Commission Malaysia revised its Guidelines on the Registration of Venture Capital and Private Equity Corporations and Management Corporations (the Guidelines) on 28 November 2022.

The revisions made to the Guidelines include:

- expansion on the type of investors eligible to participate in venture capital and private equity funds.
- a venture capital corporation (VCC), private equity corporation (PEC), venture capital management corporation (VCMC) or private equity corporation (PEMC) is now required to be registered with the Securities Commission Malaysia only where it is acting or offering to act as an investment manager or co-investment manager of a venture capital or private equity fund.
- provides guidance on the types of incidental activities which such registered entities may conduct.
- streamlining the financial requirements whereby a registered corporation must now maintain at all times a minimum net asset of RM100,000.

## Bank Negara Malaysia issues exposure draft on Capital Adequacy Framework (Basel III — Risk Weighted Assets) — Operational Risk

BNM has on 30 November 2022 issued an exposure draft on capital adequacy framework (Basel III — risk-weighted assets) for public feedback by 31 March 2023. This exposure draft sets out the proposed requirements and guidance on the calculation of the capital

charge for operational risk under the Basel III capital adequacy framework, which is expected to come into effect in 2025.

Once in effect, these requirements will supersede Part C of the Capital Adequacy Framework (Basel II — Risk-Weighted Assets) and the Capital Adequacy Framework for Islamic Banks (Risk-Weighted Assets), both issued on 3 May 2019.

## Bank Negara Malaysia issues policy document on climate risk management and scenario analysis

On 2 December 2022, Bank Negara Malaysia announced the issuance of its policy document on Climate Risk Management and Scenario Analysis (the “PD”).

The PD:

- came into effect on 30 November 2022, subject to the following transitional specifications:
  - paragraphs 7 to 11 on governance, strategy, risk appetite and risk management which will come into effect on 31 December 2023;
  - paragraphs 9 to 14 on scenario analysis, metrics and targets and disclosure which will come into effect on 31 December 2024.
- Notwithstanding the foregoing, the following paragraphs will come into effect on 31 December 2024:
  - Strategy – paragraphs 9.2 and 9.4
  - Risk appetite – paragraph 10.3
  - Risk management – paragraphs 11.9(a) to (c).
- applies to entities licensed under the **Financial Services Act 2013** and **Islamic Financial Services Act 2013**, the financial holding companies of the foregoing mentioned entities, development financial institutions prescribed under the **Development Financial Institutions Act 2002**.
- sets out the principles and specific requirements on the management of climate related risks by financial institutions with the aim to enhance the resilience of the financial sector against climate-related risks.

## Bank Negara Malaysia has issues policy document on financial reporting for development financial institutions

Bank Negara Malaysia has issued a policy document on financial reporting which is applicable to development financial institutions prescribed under the **Development Financial Institutions Act 2002**.

The policy document:

- supersedes the Guidelines on Financial Reporting for Development Financial Institutions issued on 28 July 2020.
- clarifies and sets minimum expectations for the application of the Malaysian Financial Reporting Standards to a development financial institution.
- sets out the information to be disclosed in the financial statements including those arising from the *Shariah* contracts applied in Islamic banking transactions, the application requirements for approval of a dividend payment and the requirements on submission and publication of the financial statements.

## Relaxation of Regulatory and Operational Requirements for Labuan International Trading Companies, Labuan Digital Banks and Labuan Protected Cell Companies

On 28 November 2022, Labuan Financial Services Authority issued a circular on the relaxation of regulatory and operational requirements for Labuan international trading companies, Labuan digital banks and Labuan protected cell companies.

Such regulatory relaxation is extended until 31 December 2023. The table below sets out the affected guidelines/framework and type of reliefs offered by the Labuan Financial Services Authority:

Affected Guidelines / Framework	Type of Labuan entity affected	Regulatory reliefs
Guidelines on the Establishment of Labuan International Commodity Trading Company under the Global Incentives for Trading Programme	Labuan international trading companies	Reduction of minimum annual turnover: <ul style="list-style-type: none"> <li>• USD25 million for petroleum and petroleum-related products including liquefied natural gas</li> <li>• USD10 million for other than petroleum and petroleum-related products including liquefied natural gas</li> </ul>
Labuan Digital Banking Framework	Labuan banks intending to carry out digital banking business	Reduction of: <ul style="list-style-type: none"> <li>• minimum capital requirement from RM200 million to</li> </ul>

		<p>RM50 million or its equivalent in any foreign currency unimpaired by losses.</p> <ul style="list-style-type: none"> <li>the amount of non-interest bearing security deposit to be placed with Labuan Financial Services Authority from RM5 million or its equivalent in any foreign currency to RM2.5 million.</li> </ul>
Guidelines on the Establishment of Labuan Protected Cell Companies	Labuan protected cell companies	The requirement to obtain approval for the establishment of cell for protective cell companies captive as set out in paragraph 10.2 of the guidelines is waived.

## Labuan Financial Services Authority issues Guidelines on Technology Management

The Labuan Financial Services Authority (“LFSA”) has on 14 December 2022 issued a Guidelines on Technology Management (“Guidelines”) which will come into effect on 1 January 2024. The Guidelines provides the minimum requirements to be adhered by financial intermediaries that undertake digital financial services (“DFS”) in Labuan International Business and Financial Centre (“DFI”).

The Guidelines is applicable to any DFI licensed and approved by the LFSA as follows: Labuan money-broking business and Islamic money-broking business licensed under Part VI of the **Labuan Financial Services and Securities Act 2010** (“LFSSA”) and Part VI of the **Labuan Islamic Financial Services and Securities Act 2010** (“LIFSSA”), respectively;

- Labuan fund managers licensed under Part III of the LFSSA and Part IV of the LIFSSA;
- Labuan securities licensees and Islamic securities licensees licensed under Part IV of the LFSSA and Part V of the LIFSSA, respectively;

- Labuan credit token business and Islamic credit token business licensed under Part VI of the LFSSA and Part VI of the LIFSSA, respectively;
- Labuan exchanges established under Part IX of the LFSSA; and
- Labuan payment system established under Part XI of the LFSSA.

The application and observance of the principles specified under the Guidelines is to be achieved by a DFI through the minimum requirements and to be complemented by the recommended best practices:

- minimum requirements must be complied with by all DFIs. For completeness, these applications may refer to relevant regulatory requirements that have been issued by Labuan FSA as set out in Appendix I of the Guidelines; and
- the best practices are broad guidance on other more advanced technology management practices observed in international markets. Although these best practices are not made mandatory, DFIs are encouraged to adopt them as their digital financial business operations grow and mature over time.

## Amendment to the Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework

The Securities Commission Malaysia (“SC”) has revised the Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework (“LOLA Guidelines”) with effect from 28 November 2022. The LOLA Guidelines was revised to reflect changes consequent upon issuance of Guidelines on Islamic Capital Market Products and Services (“ICMPS Guidelines”). The key amendments relate to the removal of the relevant *Shariah* requirements as these are now provided under the ICMPS Guidelines.

Some of the key amendments to the revised LOLA Guidelines are as follows:

- Deleted definitions on “Islamic Structured Product”, “SAC”, “*sukuk bai’ bithaman ajil*”, “*sukuk ijarah*”, “*sukuk istisna*”, “*sukuk mudharabah*”, “*sukuk murabahah*”, “*sukuk musharakah*”, and “*sukuk wakalah bi alistithmar*” pursuant to incorporation into ICMPS Guidelines.
- Inserted a new definition of “*Shariah* Adviser”.
- Deleted Section C (Additional Requirements for Shariah-Compliant Unlisted Capital Market Products under the Lodge and Launch Framework) pursuant to incorporation into the ICMPS Guidelines.

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# Immigration

## Overstaying in Malaysia: A Strict Liability Immigration Offence

When a foreigner remains in Malaysia beyond the time, limit or duration of his/her Pass without authorisation, this results in overstaying. There are several types of Passes in Malaysia that can be issued to the foreign nationals subject to their eligibility, *inter alia*, the Social Visit Pass, Employment Pass, Long Term Social Visit Pass, Professional Visit Pass, etc. Regardless of the type of pass issued, there is a prescribed duration/period of stay for the said Pass which the Pass holders must adhere to and should not remain in Malaysia upon its expiry.

### Social Visit Pass

A foreign national may enter Malaysia by way of a Social Visit Pass and is permitted to stay in Malaysia for a prescribed period. The activities that are legally permissible to be undertaken under the Social Visit Pass are strictly limited to the following<sup>1</sup>:

- Social visit;
- Visiting relatives;
- Tourism;
- Journalism/Reporting;
- Meeting/Conference;
- Business Discussion;
- Factory Inspection;
- Auditing Company Accounts;
- Signing Agreement;
- Carrying out a survey on investment opportunities/setting up factory;
- Attending Seminars;
- Students on goodwill missions or taking examinations at a university;
- Taking part in sports competitions;
- Other activities approved by the Director General of Immigration.

The duration of stay is entirely discretionary and is decided by the immigration officers at the point of entry into the country. The factors considered in granting the duration of stay, include, *inter alia*, the nationality of the individual, the purpose of visit, the frequency of visit and the travel history. The extension of a Social Visit Pass is generally only given in extraordinary circumstances such as illness, accident, or war in the home country.

A Social Visitor must adhere strictly to the duration of stay reflected on the entry stamp to ensure that he does not exceed the stipulated period granted. It is pertinent to note that section 15(1)(c) of the **Immigration Act 1959/63** strictly prohibits a person from remaining in Malaysia after the expiration of the period of any Pass relating to or issued to him, and overstay is an offence under section 15(4) of the **Immigration Act 1959/63**<sup>2</sup>. For those who have overstayed, there is a risk of being prohibited from entering the country for a prescribed period of one to five years dependent on the length of the overstay.

Under the **Immigration Act 1959/63**, the immigration officers are conferred with wide powers similar to that exercised by police officers, including the power to arrest, detain or remove a person if he has reason to believe that there is any offence against the Act. Generally, the Court is reluctant to interfere with their decisions.

The Court's reticence approach in adjudicating overstaying matters is well reflected in the case of **Re Meenal W/O Muniyandi**<sup>3</sup>, where, a female Indian national was married to a Malaysian citizen and lived with him in Malaysia. She was given the status of a permanent resident and issued with a red identity card in 1960. However, in 1970, she surrendered her red identity card and returned to India. In 1979, she returned to Malaysia and was issued with a social visit pass. On expiry of the pass, the immigration authority issued her a special pass to enable her to make the necessary arrangements to leave Malaysia in September 1979. However, she continued to remain in Malaysia and was arrested in October 1979 for overstaying beyond the duration of her pass. She then applied for habeas corpus to secure her release.

One of the questions that arose was whether she was lawfully detained. The Court held that the Order of Removal under section 33(1) of the **Immigration Act 1959/63** and Order of Detention issued against her were not illegal. The detention was therefore lawful. In this regard, the Court stated as follows:

*"It is trite observation to say that the function of the court is merely to interpret and enforce the law however sad or unfortunate the consequences may be to an individual. The plea of the applicant in this case should therefore be addressed not to the court but to the appropriate authority."*

The same view was echoed by the Federal Court in **Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur**<sup>4</sup>. The Federal Court in its judgment dealt with the approach to be adopted in dealing with immigrants as follows:

*" ... the duty of the court is quite clear; the court should simply apply the law, no matter how harsh its effect may be on the immigrant. His remedy is then not judicial, but political and administrative."*

As such, any Pass holder must always ensure compliance with the direction or order given by the immigration officers as it is very unlikely that an overstayer can seek for recourse



in the courts given the immigration related problem is a matter of public policy which will be strictly regulated and enforced by the immigration authority.

## Employment Pass

Similarly, an Employment Pass holder is prohibited to remain and/or continue to work in Malaysia after the expiry of his/her Pass. In the event the employer permits an individual whose Employment Pass has lapsed to remain in his employ without any form of extension, this could potentially amount to a breach of section 55B (1) of the Immigration Act 1959/63 and employing a person without a valid Pass is an offence under the same section<sup>5</sup>. As such, an employer should always exercise due diligence to ensure that the Employment Pass of its foreign employee is valid at all times. A renewal can be effected as early as three months before the expiry of the Pass should the employer intend to continue the engagement.

Notwithstanding the above, the presence of any overstayer in a company's premises albeit being supplied by third parties or contractors of a company engaged to render any form of services would also impose a corresponding obligation on a company to ensure that all such individuals have the requisite authorisation to remain.

This is provided for under section 55E(1) of the **Immigration Act 1959/63**, which stipulates that no occupier shall permit any illegal immigrant to enter or remain at any premises. Under the Act, an occupier refers to any person having the charge, management or control of the premises.

As such, the presumption under the law is that a company is correspondingly responsible for the foreign workers supplied by the third parties to ensure the legitimacy and validity of their work permits. The case of **Pendakwa Raya v Wong Haur Wei**<sup>6</sup> further buttresses this point, where the accused contended that he was not familiar with the rule and procedure in the employment of foreign workers, as they were handled by the agents. It was however held that his ignorance of the laws and procedures was not a mistake of fact but a mistake of law which rendered him guilty of the offence.

Hence, as the occupier of the premises, or as an employer, a company is shouldered with the duty to ensure that all foreign workers located at its premises possess valid work permits and/authorisations at all material times.

## Conclusion

The liability and responsibility is ongoing and hence, as an employer, the responsibility continues to subsist as long as such individuals remain either in the employer's employ or are found at s vompany's premises. Similarly, the obligation is also vested in an individual to ensure that he or she does not remain in the country beyond the period

granted. To do so would amount to a strict liability offence. As such, vigilance is key on dual fronts upon the individual as well as the employer.

*Endnotes:*

<sup>1</sup> <https://www.imi.gov.my/index.php/en/main-services/pass/visitor-pass/social-visit-pass/short-term-social-visit-pass/>.

<sup>2</sup> Any person who unlawfully remains in Malaysia will be subject to a fine of not less than RM10,000 or to imprisonment for a term not exceeding 5 years or to both upon conviction.

<sup>3</sup> [1980] 2 MLJ 299.

<sup>4</sup> [1976] 2 MLJ 156.

<sup>5</sup> Any person who employs a person who is not in possession of a valid pass will be subject to a maximum fine of RM50,000 or to imprisonment of up to 12 months or to both upon conviction.

<sup>6</sup> [2008] 7 CLJ 200.

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