Client Alert

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Changes to Foreign Exchange Policy

On 30 April 2020, Bank Negara Malaysia ("**BNM**") released the refinement to the Malaysia foreign exchange policies. The objective of the refinement is to provide greater flexibility for corporates to improve business efficiency and enhance Malaysia's foreign exchange risk management.

All of the seven existing Notices (and a notice setting out relevant definitions) on Foreign Exchange Administration Rules issued by BNM on 28 June 2013 together with all supplementary notices issued between December 2016 to 30 August 2019 (collectively, the "**Existing FEA Notices**") were revoked. In replacement, seven new notices and a comprehensive interpretation notice were issued (collectively be referred to as the "**Foreign Exchange Notices**" or "**FE Notices**") and came into force on 30 April 2020.

Summary of the FE Notices

(1) The FE Notices set out:

- (i) approvals of BNM for transactions which otherwise are prohibited under section 214(2) read together with Schedule 14 of the Financial Services Act 2013 ("**FSA**") and section 225(2) read together with Schedule 14 of the Islamic Financial Services Act 2013 ("**IFSA**");
- (ii) requirements, restrictions and conditions of the approvals of BNM; and
- (iii) directions of BNM.

(2) Similar to the mechanics and concepts under the Existing FEA Notices, a person shall obtain written approval of BNM to undertake or engage in any transaction listed in Schedule 14 of the FSA or IFSA that is not permitted by BNM under the FE Notices.

(3) The FE Notices are listed below:

- (i) Preamble and Interpretation
- (ii) Notice 1: Dealings in Currency, Gold and Other Precious Metals;
- (iii) Notice 2: Borrowing, Lending and Guarantee;
- (iv) Notice 3: Investment in Foreign Currency Asset;
- (v) Notice 4: Payment and Receipt;
- (vi) Notice 5: Security and Financial Instrument;
- (vii) Notice 6: Import and Export of Currency; and
- (viii) Notice 7: Export of Goods

(4) The existing notice titled "Definitions on Entities Created, Incorporated, etc., in Labuan" issued on 28 June 2013 remains in force.

(5) A new notice titled "Dealings with Specified Persons and Restricted Companies" that sets out, amongst others, conditions and restrictions relating to payments and dealings with Specified Person and Restricted Currency was also introduced.

Preamble and Interpretation Notice

(1) The Preamble and Interpretation notice provides a more comprehensive set of definitions and interpretations for the relevant terms and expressions used in the FE Notices. This notice has not only adopted the definitions in the Existing FEA Notices but also included some commonly used definitions from the FSA or IFSA (e.g. 'foreign currency', 'Resident' and 'Non-Resident').

(2) Some of the revised[1] definitions include:

(i) "**Borrowing**" means any utilised or unutilised credit facility or financing facility, redeemable preference share, Islamic redeemable preference share, Corporate Bond or Sukuk, excluding, amongst others, a Financial Guarantee or Non-Financial Guarantee;

(ii) "**Direct Shareholder**" means a shareholder with at least 10% effective shareholding in a Resident Entity;

(iii) "**Financial Guarantee**" means any guarantee, indemnity or undertaking to secure repayment of a Borrowing;

(iv) "Investment Abroad" is now termed as "**Foreign Currency Asset Offshore**" which means, amongst others:

- Foreign Currency loan to a Non-Resident;
- working capital arising from the set up of any business arrangement, including a joint venture project outside Malaysia where no Entity is created or established;
- deposit in a Foreign Currency Account outside Malaysia excluding for education, employment or migration outside Malaysia; and
- Foreign Currency-denominated asset offered by a Non-Resident or any person whose residency cannot be determined. Without prejudice to the generality of the term "asset", this shall include tangible and intangible asset; and

[1] Underlined words are our emphasis on the changes.

(v) "**Non-Financial Guarantee**" means any guarantee, indemnity or undertaking (excluding a Financial Guarantee) issued or obtained not for purposes of securing a Borrowing, and includes a performance bond, tender bond, guarantee for supply of goods or services, or shipping guarantee.

(3) The Preamble and Interpretation notice also seeks to clarify certain expressions, for instance:

(i) "**Foreign Currency Account**" or "**FCA**" means any account, document or device where Foreign Currency is being maintained including (a) Trade Foreign Currency Account, formerly known as 'Foreign Currency Account I'; and (b) Investment Foreign Currency Account, formerly known as 'Foreign Currency Account II'; and

(ii) "**Special Purpose Vehicle**" means an Entity set up solely for the purpose of Borrowing and is not an operating business unit.

Examples of key changes in foreign exchange rules

The FE Notices have substantially adopted (and consolidated) the approvals, requirements, restrictions and conditions provided in the Existing FEA Notices but in a more structured and streamlined manner. Some of the refinement or new measures provided in the FE Notices are set out below:

Old position in the Existing FEA Notices	New measures in the FE Notices
Notice 2: Borrowing, Lending and Guarantee	
A resident entity is allowed to borrow in Ringgit up to RM1 million in aggregate for use in Malaysia from any unrelated non-resident other than a non-resident financial institution.	A resident entity is allowed to issue Ringgit-denominated redeemable preference shares: (a) to a non-resident which is not an entity within its group of entities; (b) to a non-resident which is not its direct shareholder; or (c) to a non-resident financial institution, all provided that the proceeds are for use in Malaysia only. However, it remains that a resident entity is only allowed to borrow (not by way of issuance of redeemable preference shares or bonds/sukuk) in Ringgit of up to RM1 million in aggregate for use in Malaysia from an unrelated non-resident but excluding non-resident financial institutions.

A resident (i.e. borrower) is permitted to obtain financial guarantee(s) of up to RM100 million equivalent in aggregate from a non-resident which is not part of its group of entities or not its non-resident direct shareholder. A financial guarantee with amounts (or aggregated amounts) in excess of the threshold requires the prior approval of BNM.	No prior approval from or registration with BNM is required for a resident to obtain a financial guarantee in any amount from any non-resident guarantor (whether related or unrelated), including a non-resident financial institution.
A resident (i.e. guarantor) is permitted to give financial guarantee(s) of up to RM50 million equivalent in aggregate to secure a non-resident's loan granted by a non-resident which is not within the guarantor's group of entities or not the guarantor's direct shareholder. A financial guarantee with amounts (or aggregated amounts) in excess of the threshold requires the prior approval of BNM.	No prior approval from or registration with BNM is required for a resident to give a financial guarantee in any amount on behalf of or in favour of a non-resident except for: (i) any financial guarantee issued by a resident guarantor to secure foreign currency borrowing obtained by a non-resident Special Purpose Vehicle, whereby such financial guarantee will be deemed as 'Borrowing' obtained by such resident guarantor and accordingly, such resident guarantor must comply with the external borrowing requirements specified in Notice 2; and (ii) any financial guarantee issued by a resident guarantor to secure a foreign currency borrowing where the repayment of such borrowing will be paid by the resident guarantor (as compared to situations where the financial guarantee is called upon when an event of default occurs under the foreign currency borrowing), whereby such financial guarantee (and repayment arrangement thereof) will be deemed as an investment abroad by such resident guarantor and accordingly, such resident guarantor must comply with the investment in foreign currency asset requirements specified in Notice 3.

Notice 7: Export of Goods	
A resident exporter of goods can receive trade proceeds either in Ringgit or foreign currency and upon its receipt, such exporter shall repatriate the export proceeds to Malaysia in full value within 6 months from the date of shipment.	A resident exporter with export proceeds of RM200,000 equivalent or less per invoice may repatriate such proceeds within 24 months (instead of 6 months) from the date of shipment under prescribed conditions. The term 'prescribed conditions' broadly refers to conditions which are beyond the control of the exporter, which include, buyer in financial difficulties, cancellation of order by the buyer, restriction on foreign exchange transactions in the buyer's country, quality and/or quantity claims or incidence of fraud.
A resident exporter can retain up to 25% of the export proceeds received in foreign currency in its Trade Foreign Currency Account (**Trade FCA**) maintained with a licensed onshore bank with the balance to be converted into Ringgit. Note that for an exporter with foreign currency obligations (e.g. import payment, foreign currency loan obligation and foreign currency payable to resident SME net importer), such exporter can retain foreign currency in its Trade FCA of up to (a) 25% of the export proceeds; or (b) its 6 months foreign currency obligations, whichever is higher.	• A resident exporter can freely retain export proceeds in foreign currency of up to RM200,000 equivalent per transaction in its Trade FCA. • Export proceeds exceeding RM200,000 per transaction continue to be subjected to the existing conversion requirements.
Notice 1: Dealings in Currency, Gold and Other Precious Metals	
For hedging of foreign currency obligations, a resident is allowed to hedge for a tenure of up to the aggregate of its 12 months foreign currency obligations.	A resident is allowed to hedge on a forward basis its Foreign Currency Obligations up to the tenure of such underlying Foreign Currency Obligations.

Residents and non-residents require the prior approval from BNM to unwind their hedging positions.	• Residents and non-residents can freely cancel or unwind their respective forward contracts involving Ringgit for their underlying commitment (except 'portfolio investment') with any licensed onshore bank. • Portfolio Investment consists of (a) tradable debt securities and (b) tradeable equities securities (less than 10% of ownership in an investee company), including a collective investment scheme. • Notwithstanding the above relaxation, residents and non-residents shall not use the above flexibility to speculate on Ringgit.
Notice 3: Investment in Foreign Currency Assets by Resident Individuals	
A resident individual with domestic ringgit borrowing is allowed to undertake an investment abroad (which include purchase of real properties overseas) of up to RM1 million equivalent in aggregate per calendar year if that resident individual uses his/her foreign currency funds by converting his/her Ringgit funds.	• A resident individual with domestic ringgit borrowing is allowed to purchase real properties outside Malaysia for own accommodation or the accommodation of his/her immediate family members for purposes of education, employment or migration. • However, a resident individual is not allowed to buy real properties abroad for his/her child as part of a long term education plan for his/her child over a 10-year horizon.

What do the relaxations under the FE Notices mean to Malaysian corporates affected by COVID 19?

Some of these new measures will allow Malaysian corporates to have the flexibility to tap into funding/capital from foreign investors. For example, a Malaysian company may now borrow from international private equity funds through the issuance of Ringgit-denominated redeemable preference shares.

The flexibility relating to Malaysian corporates being permitted to give financial guarantees for the benefit of borrowings incurred by their foreign subsidiaries will enhance Malaysian corporates' ability to support their global operations and protect their overseas investments. For example, a Malaysian corporate is now free to issue financial guarantee(s) in any amount in favour of an offshore bank to secure a loan granted by such bank to the Malaysian corporate's foreign subsidiary (e.g. property developer or manufacturer or trading company). In addition, Malaysian corporates with foreign shareholders can now have their foreign shareholders issue financial guarantees in any amount to secure loans taken by the Malaysian corporates without having to register such financial guarantees with BNM.

Conclusion

From a borrowing and lending perspective, the FE Notices have relaxed the requirements on giving and obtaining financial guarantees by residents and such flexibility (by removing the approval and registration requirements) will help to expedite the timing required for financing transactions to go to market. However, the requirements on external borrowing in foreign currency by residents remain unchanged.

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