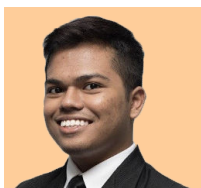


Islamic Capital Market: Securities Commission Malaysia Guidelines for Shariah Advisers



by Megat Hizaini Hassan and Saiful Akmal Suhaimi



Shariah advisers play an important role in the Islamic capital market (ICM), and their functions are regulated by the Securities Commission Malaysia (SC), being the regulator for the ICM in Malaysia. Shariah advisers provide advisory services relating to compliance with Shariah in respect of an ICM product or an ICM activity that is regulated by the SC.

Such services provided by Shariah advisers are specified to be capital market services for the purpose of s 76A of the Capital Markets and Services Act 2007 (CMSA).¹ On 20 December 2021, the SC issued the “Guidelines for Shariah Advisers”, which came into effect on 1 January 2022 (2022 Guidelines). The 2022 Guidelines supersede and replace the “Registration of Shariah Advisers Guidelines”, which were issued and came into effect on 10 August 2009 (2009 Guidelines). In this article, the authors highlight key similarities and differences between the latest and previous guidelines.

Requirements for registration

Shariah advisers can be Malaysian and foreign individuals, or corporations that have made an application to register as Shariah advisers, subject to them meeting the requirements as set out in the 2022 Guidelines. This is in line with s 76A(2) of the CMSA, which requires that a person providing any capital market services must be registered. As at February 2022, there are 61 individuals and 18 corporations registered as Shariah advisers.²

In addition, in both the 2009 Guidelines and the 2022 Guidelines, Islamic financial institutions—in particular, (a) licensed Islamic banks as defined in the Islamic Financial Services Act 2013; and (b) licensed banks and licensed investment banks as defined in the Financial Services Act 2013, approved by Bank Negara Malaysia (BNM) to carry on Islamic banking business—are deemed to be registered with the SC as Shariah advisers under both sets of guidelines and, as such, are not required to apply for registration. Nevertheless, such financial institutions are still subject to the compliance of the conduct requirements and continuous obligations as set out in the 2022 Guidelines.

Registration requirements: Comparison between 2009 and 2022 Guidelines

To become a Shariah adviser, one must fulfil the criteria for registration relating to background, qualification and experience. The key differences between the two sets of guidelines are as follows:

¹ [Act 677]

² Securities Commission Malaysia website, ‘List of Registered Shariah Advisers’ (as at April 2022) <https://www.sc.com.my/development/icm/shariah/registered-shariah-advisers/list-of-registered-shariah-advisers>

2009 Guidelines	2022 Guidelines
<p><i>Individual Shariah adviser</i></p> <ul style="list-style-type: none"> Has at least a degree in Shariah, particularly in <i>fiqh muamalat</i> or Islamic jurisprudence, from an institution recognised by the Malaysian government. At least two years of relevant experience and/or exposure in Islamic finance, or has at least one year of relevant experience and/or exposure in Islamic finance and has attended at least five relevant Islamic finance courses/workshops. The applicant must <i>not</i>: <ul style="list-style-type: none"> (a) have been convicted, whether within or outside Malaysia, of an offence involving fraud or other dishonesty or violence or the conviction of which involved a finding that it or he acted fraudulently or dishonestly; (b) have been convicted of an offence under the securities laws; or (c) have contravened any provision made by or under any written law appearing to the SC to be enacted for protecting members of the public against financial loss due to dishonesty, incompetence or malpractice by persons concerned in the provision of financial services or the management of companies; or (d) have contravened any provision made by or under any written law appearing to the SC to be enacted for protecting members of the public against financial loss due to the conduct of undischarged bankrupts. 	<p><i>Individual Shariah adviser</i></p> <ul style="list-style-type: none"> Holds, at a minimum, a degree in any of the following: <ul style="list-style-type: none"> (a) Shariah; (b) Law, with a focus on Shariah; or (c) Islamic studies, in which the degree must include study in <i>fiqh muamalat</i> (Islamic transaction/commercial law) or <i>usul fiqh</i> (Islamic jurisprudence). At least three consecutive years of relevant working experience in Islamic finance preceding the application.³ Meets the “fit and proper” criteria as set out in Appendix 1 of the 2022 Guidelines.
<p><i>Corporation as a Shariah adviser</i></p> <ul style="list-style-type: none"> Should employ at least one full-time officer to be responsible for Shariah matters and must also satisfy the criteria set out for an individual Shariah adviser. The corporation or any of its directors or chief executive must <i>not</i>: <ul style="list-style-type: none"> (a) have been convicted, whether within or outside Malaysia, of an offence involving fraud or other dishonesty or violence or the conviction of which involved a finding that it or he acted fraudulently or dishonestly; (b) have been convicted of an offence under the securities laws; or (c) have contravened any provision made by or under any written law appearing to the SC to be enacted for protecting members of the public against financial loss due to dishonesty, incompetence or malpractice by persons concerned in the provision of financial services or the management of companies; or (d) be an undischarged bankrupt whether within or outside Malaysia. 	<p><i>Corporation as a Shariah adviser</i></p> <ul style="list-style-type: none"> Must have at least one full-time Shariah officer. The Shariah officer has met the requirements as specified for an individual Shariah adviser. The corporation, its directors and senior management are “fit and proper”, in accordance with the criteria as set out in Appendix 1 of the 2022 Guidelines.

³ Under the 2022 Guidelines, “relevant working experience” in Islamic finance includes working in the financial institution, licensed capital market intermediaries, academia or government agencies and ministries, that has direct involvement in Islamic finance practices or activities.

2009 Guidelines	2022 Guidelines
<p><i>Financial institution as a Shariah adviser</i></p> <ul style="list-style-type: none"> Registration with the SC is not required where the corporation is an Islamic bank or a financial institution approved by BNM to carry out an Islamic banking scheme. 	<p><i>Financial institution as a Shariah adviser</i></p> <ul style="list-style-type: none"> Registration with the SC is not required for a licensed Islamic bank, or a licensed bank/investment bank approved by BNM to carry on Islamic banking business.
<p><i>Foreign Shariah adviser</i></p> <ul style="list-style-type: none"> Required to submit to the SC, Form 3 attached to this guideline and a copy of the letter of appointment or any other form of verification that would demonstrate his appointment as a Shariah adviser from a foreign institution. 	<p><i>Foreign Shariah adviser</i></p> <ul style="list-style-type: none"> No separate registration category for foreign Shariah advisers under the 2022 Guidelines. Foreign Shariah advisers need to comply with either the individual or corporation requirements set out above.

Roles and responsibilities

Previously, the 2009 Guidelines did not set out the roles and responsibilities of the Shariah adviser, such guidelines being concerned primarily with matters involving registration and renewal of registrations only. However, the guidelines “encouraged” (but did not make it mandatory for) such Shariah adviser to participate in continuing professional development activities to keep abreast with current developments in Islamic finance.

The 2022 Guidelines, on the other hand, set out specific provisions dealing with these matters, as follows:

- (i) Roles of responsibilities of Shariah advisers,⁴ whereby a Shariah adviser must, *inter alia*, provide Shariah expertise and advice on Shariah matters in relation to the ICM products or the ICM activity, ensuring that the applicable Shariah rulings, principles and concepts endorsed by the Shariah Advisory Council of the Securities Commission (SAC) are complied with and apply *ijtihad* (intellectual reasoning) in the absence of any Shariah rulings, principles and concepts endorsed by the SAC. This chapter further provides that a Shariah adviser must act with due care, skill and

diligence as well as provide the ways to deal with ambiguity or uncertainty relating to any Shariah matters, if this were to arise.

- (ii) Continuous obligations⁵ imposed on Shariah advisers, including:
 - (a) fit and proper requirements to be complied with by such individual, corporation (i.e. its directors, chief executive and Shariah officer) and financial institution (i.e. its Shariah

committee members) Shariah adviser;

- (b) attending at least three Securities Industry Development Corporation – Continuing Professional Education approved courses on the capital market annually; and

- (c) reporting to the SC where the Shariah adviser is no longer fit and proper.



⁴ 2022 Guidelines, Chapter 6

⁵ 2022 Guidelines, Chapter 7

Fit and proper criteria

One of the key requirements set out in both the 2009 Guidelines and 2022 Guidelines is the fit and proper criteria applicable to Shariah advisers. Paragraphs 4.04 and 4.06 of the 2009 Guidelines laid down the fit and proper criteria according to the types of applicants, i.e. individuals and corporations. The 2022 Guidelines have taken a different approach by streamlining the fit and proper criteria applicable to all types of applicants in Appendix 1 of the 2022 Guidelines.

Conduct requirements

The 2022 Guidelines have also introduced a new chapter on conduct requirements for a Shariah adviser,⁶ which covers the requirements for the Shariah adviser to act honestly and uphold the principles of Shariah, as well as having adequate arrangements in place to effectively manage or mitigate any conflict of interest.

Conclusion

All in all, the 2022 Guidelines are very much welcomed, as these provide more comprehensive and progressive recommendations for Shariah advisers which are essential for boosting the growth and development of Islamic finance in the future, particularly in the ICM industry.

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