

The Financial Services Act 2012 - Interest in Shares (Part 2)

(Part 4 of 4)

By Gopal Sundaram
April 2013

This series of articles are written to introduce and explain significant features of the Financial Services Act 2012 which was recently passed by Dewan Rakyat and Dewan Negara of the Malaysian Parliament. The Royal Assent to the Bill has not been announced yet. Neither has the new Act been gazetted. The Bill provides that the Act will come into force on a day determined by the Minister of Finance.

One of the primary uses of the concept of interest in shares in the FSA is in the provisions relating to the acquisition and disposal of shares of a licensed person. (A licensed person in the FSA refers to a commercial bank, insurance company or investment bank licensed under that Act.) While acquisition of an interest in shares of a licensed person not exceeding 5% is not controlled under the FSA, the acquisition of interest in shares of 5% and subsequent acquisitions exceeding any multiple of 5% requires the approval of the Bank.

As will be noted, there are a few departures in the FSA from the requirements under the BAFIA:

1. The approvals for acquisitions of 5% and beyond are from the regulator, Bank Negara Malaysia, not the Minister of Finance.
2. No approvals are needed for acquisitions beyond 5% but not exceeding 10%. The approval of the regulator is needed for an acquisition resulting in a 10% holding but no approval is needed for acquisitions thereafter which would result in a holding exceeding 10% but not exceeding 15%. In short, approvals from the regulator are only needed for holdings, at intervals of multiples of 5, i.e. holdings of 5%, 10%, 15%, 20%, etc.
3. The power to approve a holding of 50% interest in shares and any holding which would result in the control of the licensed person however lies, not with the regulator but with the Minister of Finance. Disposal of interest in shares by a person holding 50% or more interest in the shares of a licensed person or a person having control of a licensed person also require the approval of the Minister of Finance. The approvals of the Minister for such acquisitions or disposals are to be given by him on the recommendation of the regulator.
4. The computation of the total holdings of a person of interests in the shares of a licensed person is derived by aggregating the legal, beneficial, direct and effective interest held by the person in the licensed person. Further, in determining the aggregate interest in shares held by such person in the licensed person, the holding of his spouse, child, family corporation or persons acting in concert with him shall be added to his holding.
5. As explained earlier, the concept of effective interest in shares used in computing the aggregate interest in shares of a licensed person departs from the concept of deemed interest in shares used in the BAFIA.

Schedule 3 of the FSA states in some detail how the term "interest in shares" is to be construed. Many provisions from the Companies Act 1965 relating to interest in shares are retained to explain what constitutes "interest in shares" except that the provision on the concept of deemed interest in shares has been dropped. In place of the deemed interest concept, the concept of "effective interest in shares"

" is defined and the manner of determining the effective interest in shares is set out. Let me quote paragraph 2 of Schedule 3 not only to explain the concept but also to show the convoluted language needed to express this compled:

Where a series of body corporates hold shares in succession in the subsequent level body corporate one after the other, and if a person has a direct interest in shares of a body corporate in that series (hereinafter referred to as "first level body corporate")—

- (a) such person shall be taken to have an effective interest in shares of any other body corporate (hereinafter referred to as "second level body corporate") in which the first level body corporate has a direct interest in shares; and
- (b) such person shall be taken to have an effective interest in shares in each subsequent level body corporate in that series following the second level body corporate, provided each preceding level body corporate in the series has a direct interest in shares of each subsequent level body corporate in that series.

Paragraph 3 of Schedule 3 states that the effective interest in shares of a person in a body corporate X in the series of body corporates referred to in paragraph 2 shall be derived by multiplying the percentage of his direct interest in the first level body corporate in the series and the direct interest of each subsequent level body corporate down to the direct interest in shares held by the preceding body corporate, in that body corporate X and thereafter a mathematical formula is provided to compute the effective interest.

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Gopal began his highly distinguished career in Bank Negara Malaysia (BNM) in 1982, pursuant to graduating from University of Malaya on a Bank Negara scholarship. He was appointed as Assistant Governor in 2006. As Assistant Governor he was responsible for the Legal Department, Finance Department and the IT Services (Computer) Department as well the Money Museum and the Art Gallery. During his tenure, he was a member of various committees chaired by the Governor, inter alia, the Management Committee, the Monetary Policy Committee, the Financial Stability Committee, the Budget Committee, the Risk Management/ Committee and in attendance at the Malaysia International Islamic Financial Centre Executive Committee (MIFC), a multi-agency committee appointed by the Prime Minister.

Upon his retirement in 2011, he was appointed as Project Advisor to BNM to advise and supervise the drafting of an omnibus legislation for banking, insurance, payments systems and exchange control as well as an omnibus Islamic legislation for Islamic banking, takaful, payment systems and exchange control proposed to be tabled in Parliament later this year.

Gopal is the only member of the International Monetary Law Committee of the International Law Association (MOCOMILA) from Malaysia. He is also in the Executive Committee of the Malaysian Chapter of ASIL (Asian Society for International Law). Gopal sits on the Board of Directors of Kuwait Finance House (Malaysia) Berhad, the Board of Management of Methodist College Kuala Lumpur, the Council of Education, Methodist Church in Malaysia and the Judicial Council, Methodist Church in Malaysia.

He is a leading adviser on the new Financial Services Act (FSA) and Islamic Financial Services Act (IFSA).

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