

GOVERNMENT OF PAKISTAN
SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN


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Islamabad the 15th February, 2018

NOTIFICATION

S.R.O. 241(I)/2017.- In exercise of the powers conferred by sub-section (1) of section 225 of the Companies Act, 2017 (XIX of 2017), the Securities and Exchange Commission of Pakistan (the Commission) is pleased to notify Shariah Standards of Accounting and Auditing Organization of Islamic Financial Institutions (AAOIFI) namely; Shariah Standard No. 17 - Investment Sukuk (enclosed as **Annexure-I**), Shariah Standard No. 18- Possession (Qabd) (enclosed as **Annexure-II**) and Shariah Standard No. 23 - Agency and the Act of an un-commissioned agent (Fodooli) (enclosed as **Annexure-III**) for adoption by the companies and notified entities under regulation and supervision of the Commission, the same having been previously published in the official Gazette for eliciting public comments thereon vide notification S.R.O. 1222 (I)/2017 dated 29th November, 2017. Other laws/rules/regulations and circulars/directives issued by the Commission from time to time shall remain applicable.

[No.SY/SECP/8/13]


(Bilal Rasul)
Secretary to the Commission

Shari'ah Standard No. (17)

Investment Sukuk

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IN THE NAME OF ALLAH, THE ALL-MERCIFUL, THE MOST MERCIFUL

All praise be to Allah, the Lord of all the worlds, and blessings and peace be upon our master, Muhammad, and his household and all his companions

Preface

The aim of this standard is to elaborate the Shari'ah rules for the issuance and trading of investment Sukuk (certificates) as well as the elaboration of their types, characteristics, Shari'ah regulations and the conditions for the issuance of Sukuk and dealings in them for trading by Islamic financial institutions (institution/institutions).⁽¹⁾

(1) The word (Institution/Institutions) is used here to refer, in short, to Islamic financial institutions including Islamic Banks.

Statement of the Standard

1. Scope of the Standard

This standard covers investment Sukuk. These Sukuk include Sukuk of ownership of leased assets, ownership of usufructs, ownership of services, Murabahah, Salam, Istisna'a, Mudarabah, Musharakah, investment agency and sharecropping (Muzara'ah), irrigation (Musaqat) and agricultural (Mugharasah) partnerships. The standard does not cover shares of joint stock companies, certificates of funds and investment portfolios.

2. Definition of Investment Sukuk

Investment Sukuk are certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or (in the ownership of) the assets of particular projects or special investment activity, however, this is true after receipt of the value of the Sukuk, the closing of subscription and the employment of funds received for the purpose for which the Sukuk were issued.

In this standard, Sukuk have been designated as Investment Sukuk in order to distinguish them from shares and bonds.

3. Types of Investment Sukuk

Investment Sukuk are of different types, and among these are:

3/1 Certificates of ownership in leased assets

These are certificates of equal value issued either by the owner of a leased asset or a tangible asset to be leased by promise, or they are issued by a financial intermediary acting on behalf of the owner with the aim of selling the asset and recovering its value through subscription so that the holders of the certificates become owners of the assets.

3/2 Certificates of ownership of usufructs

3/2/1 Certificates of ownership of usufructs of existing assets

These are two types:

3/2/1/1 Certificates of equal value issued by the owner of an existing asset either on his own or through a financial intermediary, with the aim of leasing the asset and receiving the rental from the revenue of subscription so that the usufruct of the assets passes into the ownership of the holders of the certificates.

3/2/1/2 Certificates of equal value issued by the owner of the usufruct of an existing asset (lessee), either on his own or through a financial intermediary, with the aim of subleasing the usufruct and receiving the rental from the revenue of the subscription so that the holders of the certificates become owners of the usufruct of the asset.

3/2/2 Certificates of ownership of usufructs of described future assets

These are certificates of equal value issued for the purpose of leasing out tangible future assets and for collecting the rental from the subscription revenue so that the usufruct of the described future asset passes into the ownership of the holders of the certificates.

3/2/3 Certificates of ownership of services of a specified party

These are certificates of equal value issued for the purpose of providing services through a specified provider (such as educational benefits in a nominated university) and obtaining the service charges in the form of subscription income so that the holders of the certificates become owners of these services.

3/2/4 Certificates of ownership of described future services

These are certificates of equal value issued for the purpose of providing future services through described provider (such as educational benefits from a university without naming the educational institution) and obtaining the fee in the form of

subscription income so that the holders of the certificates become owners of the services.

3/3 Salam certificates (Salam Sukuk)

These are certificates of equal value issued for the purpose of mobilising Salam capital so that the goods to be delivered on the basis of Salam come to be owned by the certificate holders.

3/4 Istisna'a certificates (Istisna'a Sukuk)

These are certificates of equal value issued with the aim of mobilising funds to be employed for the production of goods so that the goods produced come to be owned by the certificate holders.

3/5 Murabahah certificates (Murabahah Sukuk)

These are certificates of equal value issued for the purpose of financing the purchase of goods through Murabahah so that the certificate holders become the owners of the Murabahah commodity.

3/6 Musharakah certificates (Musharakah Sukuk)

These are certificates of equal value issued with the aim of using the mobilised funds for establishing a new project, developing an existing project or financing a business activity on the basis of any of partnership contracts so that the certificate holders become the owners of the project or the assets of the activity as per their respective shares, with the Musharakah certificates being managed on the basis of participation or Mudarabah or an investment agency.

3/6/1 Participation certificates

These are certificates representing projects or activities managed on the basis of Musharakah by appointing one of the partners or another person to manage the operation.

3/6/2 Mudarabah Sukuk

These are certificates that represent projects or activities managed on the basis of Mudarabah by appointing one of the partners or another person as the Mudarib for the management of the operation.

3/6/2 Investment agency Sukuk

These are certificates that represent projects or activities managed on the basis of an investment agency by appointing an agent to manage the operation on behalf of the certificate holders.

3/7 Sharecropping certificates (Muzara'ah Sukuk)

These are certificates of equal value issued for the purpose of using the funds mobilised through subscription for financing a project on the basis of Muzara'ah so that the certificate holders become entitled to a share in the crop according to the terms of the agreement.

3/8 Irrigation certificates (Musaqat Sukuk)

These are certificates of equal value issued for the purpose of employing the funds mobilised through subscription for the irrigation of fruit bearing trees, spending on them and caring for them on the basis of a Musaqat contract so that the certificate holders become entitled to a share in the crop as per agreement.

3/9 Agricultural certificates (Mugharasah Sukuk)

These are certificates of equal value issued on the basis of a Mugharasah contract for the purpose of employing the funds for planting trees and undertaking the work and expenses required by such plantation so that the certificate holders become entitled to a share in the land and the plantation.

4. Characteristics of Investment Sukuk

- 4/1 Investment Sukuk are certificates of equal value issued in the name of the owner or bearer in order to establish the claim of the certificate owner over the financial rights and obligations represented by the certificate.
- 4/2 Investment Sukuk represent a common share in the ownership of the assets made available for investment, whether these are non-monetary assets, usufructs, services or a mixture of all these plus intangible rights, debts and monetary assets. These Sukuk do not represent a debt owed to the issuer by the certificate holder.

- 4/3 Investment Sukuk are issued on the basis of a Shari'ah-nominated contract in accordance with the rules of Shari'ah that govern their issuance and trading.
- 4/4 The trading of Investment Sukuk is subject to the terms that govern trading of the rights they represent.
- 4/5 The owners of these certificates share the return as stated in the subscription prospectus and bear the losses in proportion to the certificates owned (held) by them.

5. Shari'ah Rulings and Regulations

5/1 Issuance of investment Sukuk

- 5/1/1 It is permissible to issue investment certificates by way of subscription on the basis of any of Shari'ah-nominated investment contract.
- 5/1/2 It is permissible to issue certificates for (to securitize) assets that are tangible assets, usufructs and services by dividing them into equal shares and issuing certificates for their value. As for debts owed as a liability, it is not permissible to securitize them for the purpose of trading.
- 5/1/3 The issue contract has all the legal effects of the contract upon which the issued certificates are based. This occurs after closing of the subscription and the allotment of the certificates.
- 5/1/4 The two parties of the issue contract are the issuer and the subscribers.
- 5/1/5 The relationship between the two parties to the issue contract is determined on the basis of the type of contract and its status in the Shari'ah as well as the following description:

5/1/5/1 Certificates of ownership of leased assets

The issuer of these certificates is seller of a leased asset or an asset to be leased on promise, the subscribers are the buyers of the asset, while the funds mobilised

through the subscription are the purchase price of the asset. The certificate holders jointly own the assets through an undivided ownership sharing the profits and losses on the basis of the partnership that exists between them.

5/1/5/2 Certificates of ownership of usufructs

a) Certificates of ownership of the usufruct of existing assets

The issuer of these certificates is the seller of usufruct of an existing asset, the subscribers are buyers of such usufruct, while the funds mobilised through subscription are the purchase price of the usufruct. The certificate holders become joint owners of the usufruct sharing its benefits and risks.

b) Certificates of ownership of described usufruct to be made available in the future

The issuer of these certificates is the seller of usufruct of an asset to be made available in the future as per specification. The subscribers are buyers of the usufruct through, the funds mobilised through subscription are the purchase price of the usufruct. The certificate holders become joint owners of the undivided usufruct sharing its benefits and risks.

c) Certificates of ownership of services

The issuer of these certificates is the seller of services, the subscribers are buyers of the services, while the funds mobilised through subscription are the purchase price of the services.

The certificate holders are entitled to sell the profits of all the types that are listed at (a), (b) and (c) and are entitled to the income from the resale of such usufruct.

5/1/5/3 Salam certificates (Salam Sukuk)

The issuer of the certificates is a seller of the goods of Salam, the subscribers are the buyers of the goods, while the funds realised from subscription are the purchase price (Salam capital) of the goods. The holders of Salam certificates are the owners of the Salam goods and are entitled to the sale price of the certificates or the sale price of the Salam goods sold through a Parallel Salam, if any.

5/1/5/4 Istisna'a certificates (Istisna'a Sukuk)

The issuer of these certificates is the manufacturer (supplier/seller), the subscribers are the buyers of the intended product, while the funds realised from subscription are the cost of the product. The certificate holders own the product and are entitled to the sale price of the certificates or the sale price of the product sold on the basis of a Parallel Istisna'a, if any.

5/1/5/5 Murabahah certificates (Murabahah Sukuk)

The issuer of the certificates is the seller of the Murabahah commodity, the subscribers are the buyers of that commodity, and the realised funds are the purchasing cost of the commodity. The certificate holders own the Murabahah commodity and are entitled to its sale price.

5/1/5/6 Musharakah certificates (Musharakah Sukuk)

The issuer of the certificates is the inviter to a partnership with him in a specific project or determined activity. The subscribers are the partners in the Musharakah contract. The realised funds are the share contribution of the subscribers in the Musharakah capital. The certificate holders own the assets of partnership with the accompanying profits and losses and are entitled to their share in the profits of the partnership, if any.

5/1/5/7 Mudarabah certificates (Mudarabah Sukuk)

The issuer of these certificates is the Mudarib, the subscribers are the owners of capital, and the realised funds are the Mudarabah capital. The certificate holders own the assets of Mudarabah and the agreed upon share of the profits belongs to the owners of capital and they bear the loss, if any.

5/1/5/8 Certificates of investment agency (Wakalah Sukuk)

The issuer of these certificates is the investment agent, the subscribers are the principals and the realised funds are the entrusted capital of the investment. The certificate holders own the assets represented by the certificates with its benefits and risks, and they are entitled to the profits, if any.

5/1/5/9 Muzara'ah certificates (Muzara'ah Sukuk)

- a) The issuer of these certificates is the owner of the land (the principal owner or owner of the usufruct of the land). The subscribers are the cultivators on the basis of a Muzara'ah contract (the cultivators or their assignees). The realised funds are the cultivation cost.
- b) The issuer of these certificate may be the cultivator (the worker), the subscribers are the owners of the land (investors whose subscription amounts are used to buy the land); and the certificate holders are entitled to a share of the produce of the land as per agreement.

5/1/5/10 Musaqat certificates (Musaqat Sukuk)

- a) The issuer of these certificates is the owner (or owner of usufruct) of the land that consists of trees; the subscribers are those who assume the obligation of irrigation through a Musaqat contract, while the realised funds are the maintaining cost of the trees.

- b) The issuer of these certificates may be the irrigator (the worker) and the subscribers are the owners of the land (investors whose subscription amounts are used to irrigate the land). The certificate holders are entitled to a share of the produce of the trees as per agreement.

5/1/5/11 Mugharasah certificates (Mugharasah Sukuk)

- a) The issuer of these certificates is the owner of land suitable for planting (trees), the subscribers are those who assume the obligation of planting on the basis of a Mugharasah contract, while the realised funds are the cost of maintaining the plantation.
- b) The issuer may be the planter (the owner of the work), the subscribers are the owners of the land (investors whose subscription amounts are used to undertake plantation in the land), and the certificate holders are entitled to a share in both the trees and the land as per agreement.

5/1/6 The relationships between the parties, namely the issuer and the subscriber shall be governed by applicable contracts of issuing Sukuk. The mere conclusion of the contract will give rise to legal effects with respect to rights and obligations of the parties.

5/1/7 The issuance of the prospectus represents the issuer's invitation to subscription in which case the act of subscription represents an offer. As for acceptance, it is issuer's approval of the subscription, unless it is expressly stated in the prospectus that it is an offer. In this case, the prospectus will be considered as an offer and the subscription becomes an acceptance.

5/1/8 The following shall be observed in the prospectus of issue:

5/1/8/1 The prospectus must include all contractual conditions, adequate statements about the participants in the issue,

their legal position and rights as well as obligations, such as statements about the issue agent, issue manager, originator, investment trustee, the party covering the loss, payment agent as well as others along with the conditions of their appointment and dismissal.

- 5/1/8/2 The prospectus of Sukuk must include the identification of the contract on the basis of which the certificates are to be issued, such as sale of tangible leased assets, Ijarah, Murabahah, Istisna'a, Salam, Mudarabah, Musharakah, Wakalah, Muzara'ah, Mugharasah or Musaqat.
- 5/1/8/3 The contract that forms the basis of the issue must be complete with respect to its elements and conditions and should not include conditions that conflict with its objectives and rules.
- 5/1/8/4 The prospectus must explicitly mention the obligation to abide by the rules and principles of the Shari'ah, and that there is a Shari'ah Supervisory Board that approves the procedures of the issues and monitors the implementation of the project throughout its duration.
- 5/1/8/5 The prospectus must state that the investment of the realised funds and the assets into which the funds are converted will be undertaken through Shari'ah-compliant modes of investment.
- 5/1/8/6 Taking into account item 3/1/5 of the Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations, the prospectus must state that each owner of a certificate participates in the profit and bears a loss in proportion to the financial value represented by his certificates.
- 5/1/8/7 The prospectus must not include any statement to the effect that the issuer of the certificate accepts the liability to compensate the owner of the certificate up to the nominal value of the certificate in situations

other than torts and negligence nor that he guarantees a fixed percentage of profit. It is, however, permitted to an independent third party to provide a guarantee free of charge, while taking into account item 7/6 of Shari'ah Standard No. (5) on Guarantees. It is also permitted to the issuer of the certificate to offer some tangible or personal guarantees with respect to its wrongful acts or negligence, while taking into account item 3/1/4/3 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations as well as the contracts stated in that standard.

5/1/9 It is permissible for the institution to undertake to underwrite the unsubscribed issue, in which case the obligation of the underwriter is based on a binding promise. The underwriter should not receive any commission in lieu of such underwriting taking into account item 4/1/2/4 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations.

5/1/10 It is permissible to issue Sukuk on a short-term, medium-term or long-term basis in accordance with the principles of the Shari'ah. The Sukuk may also be issued without specifying a period depending upon the nature of the contract underlying the Sukuk issue.

5/1/11 It is permissible for the issuer or the certificate holders to adopt permissible methods of managing risk, of mitigating fluctuation of distributable profits (profit equalisation reserve), such as establishing an Islamic insurance fund with contributions of certificate holders, or by participating in insurance (*Takaful*) by payment of premiums from the income of the shares of Sukuk holders or through donations (*Tabarru'at*) made by the Sukuk holders.

5/2 Trading of Sukuk and their redemption

5/2/1 It is permissible, after closing subscription, allotment of Sukuk and commencement of activity, to trade in and redeem investment

Sukuk that represent common ownership of tangible assets, usufructs or services. As for trading or redemption prior to the commencement of activity, it is necessary to observe the rules of the contract of *Sarf* (currency exchange) along with the rules for debts (receivables) when liquidation is complete and the assets are receivables or when the assets represented by the Sukuk are sold for a deferred price.

- 5/2/2 In the case of negotiable Sukuk, it is permissible for the issuer to undertake, through the prospectus of issue, to purchase at market value, after the completion of the process of issue, any certificate that may be offered to him, however, it is not permissible for the issuer to undertake to purchase the Sukuk at their nominal value
- 5/2/3 The certificates may be traded through any known means, that do not contravene the rules of the Shari'ah, such as registration, electronic means or actual transmission by the bearer to the purchaser.
- 5/2/4 It is permissible, immediately upon issue and up to the date of maturity, but after the passing of ownership of the assets to the holders of the Sukuk, to trade in Sukuk that represent ownership of existing leased assets or assets to be leased on promise.
- 5/2/5 It is permissible for the issuer to redeem, prior to maturity, certificates of ownership of leased assets at the market price or at a rate agreed upon, at the date of redemption, between the certificate holder and the issuer.
- 5/2/6 It is permissible to trade in securities of ownership of usufructs of tangible assets prior to a contract for sub-leasing the assets. When the assets are sub-leased, the certificate represents rent receivables, which makes it a debt owed by the second lessor subject to the rules and regulations for disposal of debts.
- 5/2/7 It is permissible for the issuer to redeem Sukuk of ownership of the usufruct of tangible assets from the holder, after allotment

and payment of the subscription price, at the market price or at a price agreed upon between the parties at the time of redemption, on the condition that the subscription amount or redemption price is not deferred. [see item 3/4 of Shari'ah Standard No. (9) on Ijarah and Ijarah Muntahia Bittamleek]

- 5/2/8 It is not permissible to trade in certificates of ownership of usufructs of a described asset before the asset from which usufruct is to be made available is ascertained, except by observing the rules for disposal of receivables. When the asset is ascertained, trading in Sukuk of usufructs of such asset may take place.
- 5/2/9 It is permissible to trade in securities of ownership of services to be provided by a specified party prior to sub-leasing such services. When the services are sub-leased, the certificate represents rent receivables to be collected from the second lessee. In this case, the certificate represents a debt and is, therefore, subject to the rules and regulations of disposal of debts.
- 5/2/10 It not is permissible to trade in securities of ownership of services to be provided by a party to be specified in the future before the source from which the services would be provided is identified, except by observing the rules for dealing in debts. When the source of services is identified, trading in such Sukuk may take place.
- 5/2/11 It is permissible to set up a parallel Ijarah on tangible assets by employing the same description for the usufruct that was provided to the holders of the Sukuk in cases detailed in items 5/2/8 and 5/2/10 provided the two lease contracts remain independent.
- 5/2/12 It is permissible for the second buyer of the usufruct of existing and specified assets to resell them. The buyer is also entitled to issue certificates in this respect.

- 5/2/13 It is permissible to trade in or redeem Istisna'a certificates if the funds have been converted, within the period of the Istisna'a, into assets owned by certificate holders. If the realised funds are immediately paid as a price in a parallel Istisna'a contract or the manufactured item is submitted to the ultimate purchaser, then trading in Istisna'a certificates is subject to rules of disposal of debts.
- 5/2/14 It is not permissible to trade in Salam certificates.
- 5/2/15 It is not permissible to trade in Murabahah certificates after delivery of the Murabahah commodity to the buyer. However, trading of Murabahah certificates is permissible after purchasing the Murabahah commodity and before selling it to the buyer.
- 5/2/16 It is permissible to trade in Mudarabah, Musharakah and investment agency certificates after closing of subscription, allotment of the certificates and commencement of activity with respect to the assets and usufructs.
- 5/2/17 It is permissible to trade in Muzara'ah and Musaqat certificates after closing of subscription, allotment of certificates and commencement of activity with respect to the assets and usufructs. This rule applies when the certificate holders own the land. Thus, trading in these certificates is not allowed where the certificate holders act as workers (who undertake to provide agricultural or irrigation works) in which case trading in these certificates is not permissible before the maturity of the fruits and plants.
- 5/2/18 It is permissible to trade in Mugharasah certificates after closing of subscription, allotment of certificates and commencement of activity irrespective of the certificate holders being owners of the land or workers.

6. Date of Issuance of the Standard

This Standard was issued on 7 Rabi' I, 1424 A.H., corresponding to 8 May 2003 A.D.

Adoption of the Standard

The Shari'ah Standard on Commercial Papers was adopted by the Shari'ah Board in its 10th meeting held on 2-7 Rabi' I, 1424 A.H., corresponding to 3-8 May 2003 A.D.

Appendix (A)

Brief History of the Preparation of the Standard

In its meeting No. (7) held in Makkah Al-Mukarramah during the period of 9-13 Ramadan 1422 A.H., corresponding to 24-28 November 2002 A.D., the Shari'ah Board decided to give priority to the preparation of the Shari'ah Standard for Investment Sukuk.

On Saturday 14 Shawwal 1422 A.H., corresponding to 29 December 2002 A.D., a Shari'ah consultant was commissioned to prepare a juristic study and an exposure draft on the Shari'ah Standards for Commercial Papers.

In its 2nd meeting of Committee (1), held in the Kingdom of Bahrain on 4-5 Safar 1423 A.H., corresponding to 17-18 April 2002 A.D., the Shari'ah Standard Committee discussed the exposure draft of the Shari'ah Standard on Investment Sukuk and asked the consultant to make additional amendments to reflect the comments made by the members of the committee.

In its meeting No. (4) held on 16 and 17 Rabi' I, 1423 A.H., corresponding to 28-27 June 2002 A.D., the committee discussed the exposure draft and made necessary amendments as per the comments and observations of the members and in the light of the recommendations of AAOIFI's First Fiqh Forum in respect to requirements of trading in investment portfolios held in Amman (The Hashimite Kingdom of Jordan) on 16 Rabi' I, 1423 A.H., corresponding to 27 June 2002 A.D.

In its meeting No. (5) held on 2 and 3 Rajab 1423 A.H., corresponding to 9-10 September 2002 A.D., and decided to merge the exposure of this Standard with the exposure draft of the Standard on Securitisation. In its meeting No. (6) held on 19 Rajab 1423 A.H., corresponding to 26 September 2002 A.D., in the Kingdom of Bahrain, the Committee further discussed the

exposure after the merger, made some amendments and decided to present it to the Shari'ah Board.

The revised exposure draft of the Shari'ah Standard was presented to the Shari'ah Board in its 9th meeting held in Makkah Al-Mukarramah during the period of 11-16 Ramadan 1423 A.H., corresponding to 16-21 November 2002 A.D. The Shari'ah Board made further amendments to the exposure draft of the Standard and decided that it should be distributed to specialists and interested parties in order to obtain their comments in order to discuss them in a public hearing.

A public hearing was held in Bahrain on 18 Dhul-Hajjah 1423 A.H., corresponding to 19 February 2003 A.D. The public hearing was attended by more than thirty participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others who are interested in this field. Members of the Shari'ah Standards Committees (1) and (2) responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committees (1) and (2) held a joint meeting on 2 Muharram 1424 A.H., corresponding to 5 March 2003 A.D., to discuss the comments made about the exposure draft. The two committees made the necessary amendments in light of both the written comments that were received and oral comments that took place in the public hearing.

The Shari'ah Board in its meeting No. (10) held in Al-Madinah Al-Munawwarah during the period of 2-7 Rabi' I, 1424 A.H., corresponding to 3-8 May 2003 A.D., discussed the amendments made by the Shari'ah Standards Committee, and made necessary amendments. The Shari'ah Board unanimously adopted some of the items of the Standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

Appendix (B)

The Shari'ah Basis for the Standard

- The basis for the permissibility of issuing investment certificates is that such certificates are usually issued on the basis of Shari'ah-nominated contracts. Hence issuance of Sukuk on the basis of any of these contracts becomes acceptable as well.
- The basis for considering the issue prospectus as an offer and the fact of subscription as an acceptance is that valid contracts take place on the basis of anything that indicates consent without specifying a particular form of expression. It is thus not objectionable that an offer comes from one person and acceptance from a large number of persons.
- The basis for the right of certificate holders to management is that they own the property that their certificates represent, and management is part of ownership.
- The basis for permissibility of trading in investment Sukuk when such Sukuk represent shares in tangible assets or usufruct is that the trading is, in fact, on the assets and usufructs. Since these assets may be traded so too the certificates that represent them.
- The basis for impermissibility of trading in Salam certificates is that the certificate represents a share in the Salam debt in which case the certificates is subject to rules of debt trading.
- The basis for permissibility of trading in Istisna'a certificates after conversion of the realized funds into assets is that such assets represent properties that can be disposed of. The basis for the impermissibility of trading in Istisna'a certificates in case of using the realized funds as a price in a parallel Istisna'a and in case of delivering the manufactured asset to the ultimate purchaser is that the certificate represents the price in the liability of the purchaser. The price then is a monetary debt for which trading of the Sukuk at this stage is subject to the rules of debt trading.

- The basis for the impermissibility of trading in Murabahah certificates after the commodity is sold and delivered to the buyer is that the certificates represent a monetary debt against the buyer, in which case trading is not permissible except in accordance with the limitations of debt trading. However, if purchase of the commodity has taken place and is yet to be sold, trading in these certificates is permissible because the certificates represent assets that can be traded.

Appendix (C)

Definitions

Securitisation (Tawreeq)

Securitisation is known in Arabic terminology as *Taskik* (issues) and *Tasnid* (securities). Securitisation is a process of dividing ownership of tangible assets, usufructs or both into units of equal value and issue securities as per their value.

Issue Contract

Issue contract is the contract that form basis for issuance of the investment certificates.

Issuer of Investment Certificate

Issuer of investment certificate is the party who uses the realised funds in a Shari'ah-compliant investment instrument. The issuer could be a firm, an individual, a government or a financial institution. The issuer may delegate, for a consideration or commission, the process of arranging the operation of the issue to a financial intermediary, which may be stipulated by the issue prospectus.

Issue Agent

It is an intermediary institution that manages the process of issue and performs all procedural arrangements pertaining to the issue on behalf of the issuer against a specific fee to be agreed upon or to be stated in the prospectus of issue. The relationship between the issuer and the issue agent is governed agency contract with remuneration.

Issue Manager

Issue manager is the intermediary institution that acts for remuneration on behalf of the subscribers in executing the issue contract.

Payment Underwriter

Payment underwriter is the intermediary institution that undertakes to pay dues of certificate holders after when realised.

Investment Manager

Investment manager is the party appointed by the issuer or the issue manager to perform all or part of investment operations as indicated in the issue prospectus.

Investment Trustee

Investment trustee is the intermediary financial institution charged with protecting the interests of certificate holders, supervising the performance of the issue manager and safe custody of documents and guarantees for consideration stipulated in the issue prospectus on the basis of agency contract

Trading of Certificates

Trading of certificates refers to disposal of the ownership right contained in the certificate through selling, pledging, gift or any other permissible means of disposal.

Muzara'ah (Sharecropping)

Sharecropping is partnership in crops in which one party presents land to another for cultivation and maintenance in consideration for a common defined share in the crop.

Musaqat (Irrigation)

Irrigating partnership is a partnership that depends on one party presenting designated plants/trees that produce edible fruits to another in order to work on their irrigation in consideration for a common defined share in the fruits.

Mugharasah (Share-Agriculture)

Agricultural partnership is a partnership in which one party presents a treeless piece of land to another to plant trees on it on the condition that they share the trees and fruits in accordance with a defined percentage.



Shari'ah Standard No. (18)

Possession (Qabd)

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IN THE NAME OF ALLAH, THE ALL-MERCIFUL, THE MOST MERCIFUL

All praise be to Allah, the Lord of all the worlds, and blessings and peace be upon our master, Muhammad, and his household and all his companions

Preface

The purpose of this standard is to elaborate actual possession in contracts along with its related Shari'ah rules as well as the significant applications undertaken by Islamic financial Institutions (Institution/Institutions).⁽¹⁾

(1) The word (Institution/Institutions) is used here to refer, in short, to Islamic financial institutions including Islamic Banks.

Statement of the Standard

1. Scope of the Standard

This standard covers possession in contracts and what acts as a constructive substitute for it (constructive possession). It elaborates the mode of its realisation in immovable and movable property as well as in things that are ascertained and those established as a liability by description. The standard also identifies the person responsible for its costs (maintenance and expenses) in various types of contracts along with their modern applications.

The standard does not cover acts other than contracts, like possession in usurpation (*Ghasb*) and the like. Further, it does not cover the nature of possession with respect to liability for compensation or otherwise, nor to possession in set-offs, as these have their specific standards.

2. Definition of Possession

Possession is the gathering of a thing or what takes its rule, according to the requirements of customary practice.

3. Mode of Taking Possession

3/1 The basis for determining the mode of possession in things is custom ('Urf). It is for this reason that possession of things has differed in accordance with the nature of things and differences among people with respect to things.

3/2 Actual possession is realised in immovable property through relinquishment and enabling transactions in it.

3/3 Actual possession takes place in movables through physical corporeal delivery. Constructive possession, in ascertained movables as well as in those established as a liability by description, takes place -after their ascertainment by means of one of the methods known for their

ascertainment- by relinquishing (releasing) the thing for the person entitled to it enabling him to deliver it without any obstacle even when no transportation or transmission has taken place. This takes place irrespective of the thing being one that is acquired by hand in practice or is one in which delivery (transmission) is stipulated through one of the customary units of measure -cubic measure, weight or linear measure- or it is a commodity to which these measures do not apply due to their inapplicability or with the possibility of their applicability, but the measures are not applied, as in the case of sale by estimate.

- 3/4 Constructive possession includes the registration of a mortgage of immovables and (hypothecation) of mobile movables like cars, trains, steamers and airplanes through registration that is valid under the law. Registration stands in place of actual possession with respect to its rules and legal effects.
- 3/5 The possession of documents, like bills of lading and warehouse receipts, issued in the name of the possessor or acknowledging his interest therein is deemed constructive possession of what the documents represent if the ascertainment of commodities, goods and appliances is attained through them along with the ability of the possessor to undertake transactions in them.
- 3/6 Prior possession of a tangible thing stands in place of subsequent lawful possession due to a cause acknowledged by the Shari'ah irrespective of the possession of the prior possessor being on the basis of the liability to bear loss (Daman) or one of trust (Amanah) and irrespective of the subsequent constructive possession entailing liability for loss or a burden of trust (Amanah).
- 3/7 Reciprocal possession stipulated in the contract of *Sarf* (transaction in gold, silver and currencies) is delivery and acceptance of delivery within the session of the contract on a spot basis (*Yadan Bi Yadin*). [see item 2/6 of Shari'ah Standard No. (1) on Trading in Currencies]

4. Expenses of Possession

4/1 Expenses of possession in financial commutative contracts

- 4/1/1 The expenses of delivering the sold commodity -for presenting it if it is absent, for ascertaining it through one of the customary units where that entails a claim for ascertainment like wages of employing a cubic measure, weight, linear measure and counting- is the responsibility of the seller. As for the expenses of delivering the price, if any, it is the responsibility of the buyer, unless there is a stipulation or customary practice to the contrary, in which case it is binding to follow such stipulation or practice.
- 4/1/2 The expenses of conveyancing, witnessing, preparation of instruments that record a sale and the formalities of registration are borne as stipulated by the parties to the contract. If there is no such stipulation on their part, customary practice is relied upon.
- 4/1/3 Where it is stipulated by the buyer for the seller that the sold commodity be delivered at a particular place, other than the one where it is present at the time of the contract, and that it be delivered at the expense of the seller, the seller is bound to deliver it at the specified place and the expenses of transporting it to such place will be borne by the seller.
- 4/1/4 The rules for the expenses of possession explained in items 4/1/1, 4/1/2 and 4/1/3 apply to all financial commutative contracts, like Salam, Istisna'a and others. Accordingly, the expenses of delivering the Salam commodity will be borne by the seller, the expenses of delivering the capital (Ras al-Mal) will be borne by the Rab al-Salam (the buyer); the expenses of taking possession of the leased property will be borne by the lessor, the expenses for the delivery of possession of the lease value (wages) shall be borne by the lessee; and the expenses for delivering the subject matter of Istisna'a will be borne by the manufacturer, while the expenses for the delivery of the price shall be borne by the orderer. In all these cases, if there is a customary practice or stipulation to the contrary, then, such practice or stipulation shall be observed.

4/2 Expenses for delivery of possession in a loan (Qard)

4/2/1 The expenses for delivery and recovery in a contract for loan, expenses that pertain to its ascertainment through one of the customary units of measure and the like, shall be borne by the borrower.

4/2/2 The expenses for the drawing up of documents, promissory notes, title deeds and the like that are required for transacting a loan contract; its implementation or documentation shall be borne by the borrower. [see Shari'ah Standard No. (19) on Loan (Qard), item 8]

4/3 Expenses for delivery of possession in a deposit (Wadi'ah)

The expenses of deposit and withdrawal in a contract of deposit shall be borne by the depositor (the owner of the deposit).

5. Key Modern Applications of Possession

5/1 Possession by the beneficiary of a bank draft or personal cheque is deemed constructive possession of the amount payable by the drawee bank. This is deemed possession of the payable amount even though there is delay in the payment of the actual amount, keeping in view what is laid down in Shari'ah Standard No. (1) on Trading in Currencies (item 2/6/5) as well as what is laid down in the Shari'ah Standard No. (12) on Commercial Papers (items 6/1 and 6/2).

5/2 Payments for a credit card are deemed constructive possession of such payments. [see Shari'ah Standard No. (2) on Debit Cards and Credit Cards (item 4/4)]

5/3 A deposit by a person of an amount in a bank account maintained for a debtor, upon his demand or with his consent, is deemed constructive possession irrespective of the deposit being by way of cash, by endorsement or by cheque drawn upon a bank with which an account is maintained, and the depositor is absolved of liability when he is indebted to the extent of such amount.

6. Date of Issuance of the Standard

This Standard was issued on 30 Rabi' I, 1425 A.H., corresponding to 19 May 2004 A.D.

Adoption of the Standard

The Shari'ah Standard on Possession was adopted by the Shari'ah Board in its 12th meeting held in Al-Madinah Al-Munawwarah during the period of 26-30 Rabi' I, 1424 A.H., corresponding to 15-19 May 2004 A.D.

Appendix (A)

Brief History of the Preparation of the Standard

In its meeting No. (8) held during the period of 28 Safar to 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., in Al-Madinah Al-Munawwarah, the Shari'ah Board decided to issue the Exposure Draft of Shari'ah Standard on Possession (Qabd).

On 24 Rajab 1423 A.H., corresponding to 1 October 2002 A.D., the Shari'ah Standards Committee decided to assign to a Shari'ah consultant the responsibility of preparing the Exposure Draft of the Shari'ah Standard on Possession (Qabd).

The Shari'ah Standards Committee (1), in its meeting No. (7), which was held in the Kingdom of Bahrain on 16 Muharram 1424 A.H., corresponding to 19 March 2003 A.D., discussed the Shari'ah study and required the consultant to incorporate certain necessary amendments in the light of the discussion and the comments made by the members.

In its meeting No. (8) held on 16-17 April 2003 A.D., in the Kingdom of Bahrain, the Shari'ah Standards Committee (1) discussed the exposure draft of the Standard on Possession in the light of the discussions and the observations of the members, just as the Committee discussed the exposure draft in its meeting held during the period of 25-26 Rabi' II, 1424 A.H., corresponding to 25-26 June 2003 A.D., and made necessary amendments to the draft in the light of the discussion and observations of the members.

In its meeting No. (9) held in Amman, the Hashimite Kingdom of Jordan, during the period of 23-24 Jumada I, 1424 A.H., corresponding to 23-24 July 2003 A.D., the Committee discussed the exposure draft and made necessary amendments in the light of the discussions and the observations of the members.

The revised exposure draft of the Standard was presented to the Shari'ah Board in its meeting No. (11) held in Makkah Al-Mukarramah during the period of 2-8 Ramadan 1424 A.H., corresponding to 27 October - 2 November 2003 A.D. The Shari'ah Board incorporated amendments to the exposure draft of the Standard and decided that it be distributed among specialists and interested parties in order to obtain their comments as a preliminary to the discussion in a public hearing.

A public hearing was held in the Kingdom of Bahrain on 29 Dhul-Qa'dah 1424 A.H., corresponding to 21 January 2004 A.D. The public hearing was attended by more than fifteen participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in the field. The members of the Shari'ah Standards Committees (1) and (2) responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committees (1) and (2) in a joint meeting in the Kingdom of Bahrain on 30 Dhul-Qa'dah 1424 A.H., corresponding to 22 January 2004 A.D., discussed the comments that were made during the public hearing as well as the observations received in writing. The Committees made amendments that were deemed suitable.

The amended exposure draft was presented to the Drafting Committee in its meeting held in the Kingdom of Bahrain on 25 Safar 1425 A.D., corresponding to 15 April 2004 A.D.

The Shari'ah Board in its meeting No. (12) held in Al-Madinah Al-Munawwarah during the period of 26-30 Rabi' I, 1425 A.H., corresponding to 15-20 May 2004 A.D., discussed the amendments suggested by the Shari'ah Standards Committee and the Drafting Committee, and incorporated the amendments deemed suitable. The Shari'ah Board unanimously adopted some of the items of the Standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

Appendix (B)

The Shari'ah Basis for the Standard

Realisation of Possession in the Shari'ah

- The basis for the realisation of actual possession with respect to gold, silver and currencies through actual physical possession is the sound tradition reported from Ubadah Ibn Al-Samit (may Allah be pleased with him), that the Messenger of Allah (peace be upon him), said, *"Gold for gold, silver for silver. . . ,"* till he said, *"like for like, equal for equal, from hand to hand. If these species differ, then sell as you like as long as it is from hand to hand".*⁽²⁾
- The basis for acknowledging custom ('Urf) as the basis for the realisation of possession is the consensus (Ijma') of the Jurists (Fuqaha). It is in this regard that Al-Khatib Al-Shirbini says: "The reason is that the Law-giver has used the term possession in an unqualified sense and has deemed it the basis of rules. He did not elaborate it, and there is no definition for it in the language. It is for this reason that recourse is to be had to custom ('Urf)".⁽³⁾ Ibn Taymiyyah said, "As long as there is no definition for it in the language or in the Shari'ah, recourse must be had to the custom of the people, like possession mentioned in the words of the Prophet (peace be upon him): *'He who buys food is not to sell it until he takes possession of it.'*"⁽⁴⁾ Al-Khattabi says: "Forms of possession differ for things in accordance with a difference in their own forms and in accordance with the varying practices of the people with respect to them."⁽⁵⁾
- The basis for the realisation of possession in immovable property through relinquishment is customary practice. The opinion of the

(2) Related by Muslim in his "Sahih".

(3) "Mughni Al-Muhtaj" [2: 72].

(4) "Majmu' Al-Fatawa" by Ibn Taymiyyah [3: 272].

(5) "Ma'âlim Al-Sunan Li Al-Khattabi", [3: 136].

majority of the jurists among the Hanafis, Malikis, Shafi'is, Hanbalis and Zahiris, as well as others besides them, is that possession in immovable property is delivered through relinquishment and the facilitating of transactions in it.⁽⁶⁾ Hanafi jurists have stipulated that if a lock is placed on the immovable property, then, it is sufficient for the delivery of possession to deliver the key along with relinquishment so as to provide the facility to the possessor to open it without difficulty.⁽⁷⁾

- The basis for considering registration of immovable property as constructive possession in the case of mortgage (Rahn) is custom and its practice (in countries that have adopted the system of registration of property) whereby registration of mortgage of immovable property by entry in a page of the register of mortgages is deemed delivery of possession under the law (constructive possession) and it acts as a substitute for actual delivery of possession with respect to its legal effects and results. This applies even if the property has in it the household assets of the tenant or is attached to the rights of the lessor over this property, because in such a case too they are considered possession constructively and in fact.⁽⁸⁾
- Add to this the fact that official mortgage grants to the creditor (mortgagee) a personal right over the mortgaged property, which gives him, as a result of the death of the owner or his insolvency, a right prior to all the creditors for the satisfaction of his claim from this property.⁽⁹⁾

Possession of Ascertained Moveable Property

- The basis for the realisation of possession in ascertained moveable property, as well as liabilities by description, through relinquishment in favour of one entitled to it and in a manner that enables him to deliver it without any

(6) *"Al-Fatawa Al-Hindiyyah"* [3: 16]; *"Radd Al-Muhtar"* [4: 561], passim; *"Rawdat Al-Talibin"* [3: 515]; *"Al-Majmu' Sharh Al-Muhaddhab"* [9: 276]; *"Mawahib Al-Jalil"* [4: 477]; *"Kashshaf Al-Qina"* [3: 202]; *"Al-Mughni"* [4: 333]; *"Al-Muhalla"* [8: 89]; see article (263) in *"Majallat Al-Ahkam Al-'Adliyyah"*; article (435) in *"Murshid Al-Hayran"*; and article (335) in *"Majallat Al-Ahkam Al-Shar'iyyah 'Ala Madhhab Al-Imam Ahmad"*.

(7) *"Radd Al-Muhtar"* [4: 561]; *"Al-Fatawa Al-Hindiyyah"* [3: 16]; see articles (270) and (271) in *"Majallat Al-Ahkam Al-'Adliyya"*; and articles (435) and (436) in *"Murshid Al-Hayran"*.

(8) *"Al-Madkhal Al-Fiqhi Al-'Amm Lil-Zarqa"* [1: 278] and [2: 648] marginal note.

(9) *"Al-Mudhakkirah Al-Idahiyyah Li Al-Qanun Al-Madani Al-Kuwayti"*, (P. 339) as quoted by Muhammad Wahid Al-Din Suwar in his book on Islamic Fiqh, (P. 94).

restriction, whether or not the moveable property needs to be delivered through one of the customary units of measure, is that delivery of a thing literally means delivering it completely without any impediments, so that no one shares it with the possessor, and this is possible by relinquishment. Further, the person who is under an obligation to deliver must have a way through which he can be discharged of his obligation, and what is in his ability is to relinquish it and remove all obstacles. As for actual physical possession (by hand), it is not within his ability to provide that for it is a voluntary act of taking possession. If the obligation to make such a delivery is imposed on him, it would become difficult for him to meet such an obligation.⁽¹⁰⁾ This rule, as well as its basis, has been supported by a resolution of the Islamic Fiqh Academy (OIC).⁽¹¹⁾

- The basis for considering the registration of pledges (hypothecation) of mobile moveable property like cars, steamers, airplanes and trains in the official register for the beneficiary (in countries where a system of registration has been adopted for such moveable property) is deemed constructive possession for what it represents. It is the governing custom that considers official registration as the delivery of constructive possession to the beneficiary and acts as a substitute for actual possession with respect to its legal effects and consequences.
- The basis for stipulating the ascertainment (setting aside) of moveable property through customary units of measure for the realisation of possession are the words of the Prophet (peace be upon him): *"He who buys food (wheat) is not to sell it until he has measured it."*⁽¹²⁾ insofar as they indicate that possession in this case is not attained except by the use of the cubic measure. Thus, ascertainment in what is estimated by cubic measure is through cubic measure and the remaining types are assigned

(10) "Bada'i' Al-Sana'i" [5: 244]; "Al-Fatawa Al-Hindiyyah" [3: 16]; "Radd Al-Muhtar" [4: 561]; "Sharh Al-Majallah Li Al-Atasi" [2: 200 and after]; "Al-Mughni" [4: 111]; "Al-Ihsah Li-Ibn Hubayrah" (P. 224); articles (272) to (275) of "Majallat Al-Ahkam Al-'Adliyyah"; and articles (437) and (438) in "Murshid Al-Hayran".

(11) Resolution No. 53 (4/6) in its 6th Session (Sha'ban 1410 A.H./March 1990 A.D.).

(12) Related by Muslim in his "Sahih", [10: 169]; Abu Dawud in his "Sunan" [2: 252]; and Al-Nasa'i in his "Sunan" [7: 285].

a similar rule on the basis of analogy.⁽¹³⁾ This is the view of the majority of the Jurists from among the Malikis, Shafi'is and Hanbalis upholding that possession in things that are estimated by cubic measure, weight, linear measure and counting is attained by taking delivery through these measures accompanied by relinquishment.

- The basis for considering the delivery of documents pertaining to commodities, appliances and goods (like bills of lading and warehouse receipts) as constituting constructive possession of what they represent is the customary practice in this respect seeking support from the view of the Malikis that the mode of possession in moveable property that is not subjected to estimation is recourse to custom ('Urf).⁽¹⁴⁾ Further, the basis for stipulating cubic measure for the soundness of possession in food that is estimated by cubic measure in the tradition from the Prophet (peace be upon him) is the custom that was prevalent during the period of the Prophet (peace be upon him) to the effect that possession in things subjected to cubic measure is through cubic measure and for the rest analogy is to be employed. As the determination of the issue of possession in contracts is based on custom, therefore, everything that is taken by custom to be possession in a certain period is to be deemed as possession from the perspective of the Shari'ah. If the custom of the people changes in this respect, the consideration of that mode as possession ceases. The reason is that where the constructive basis of rules is custom, the rules will alter with a change in custom,⁽¹⁵⁾ except for those things that have been specified by the Shari'ah. As far as the custom prevalent in our times is based upon the consideration of the delivery of documents for moveable commodities and goods -even where these are subjected to estimation- as amounting to possession of these commodities and goods, it will be deemed valid from the perspective of the Shari'ah. The basic principle here is what is stated by Al-Wansharisi, "A thing that is acted upon by the people and is preferred by their custom and practice must

(13) "*Mughni Al-Muhtaj*" [2: 173]; "*Kashshaf Al-Qina*" [3: 201]; and Ibn Qudamah, "*Al-Mughni*" [4: 111].

(14) "*Sharh Al-Khirashi*" [5: 158]; Al-Dardir, "*Al-Sharh Al-Kabir*" [3: 145]; and Al-Baji, "*Al-Muntaqa*" [6: 97].

(15) "*Al-Mughni*" [6: 188]; "*Al-Furuq*" [1: 176]; and Al-Qarafi, "*Al-Ihkam Fi Tamyiz Al-Fatawa 'An Al-Ahkam*", (P. 231).

be accommodated through the Shari'ah even against disagreement and opposition, as far as possible".⁽¹⁶⁾

- The basis for considering prior possession of a certain thing as a substitute for subsequent possession on grounds that are acknowledged by the Shari'ah, when it represents it, is that the purpose behind the realisation of possession is to establish control over, and the ability to undertake transactions in, the thing possessed. If this state is found possession is found too. This is based on what is upheld by the Malikis and Hanbalis to the effect that if a person sells a thing, or gives it away as gift or pledges it, while the thing is in the possession of a usurper, borrower, bailee, hirer, agent or another, then prior possession represents absolutely subsequent entitled possession through the contract, irrespective of the nature of possession exercised by the possessor being that of liability or trust and irrespective of the entitled possession being in the nature of trust or liability. As for what arises from this with respect to the possessor being liable for the thing possessed or holding it as a trustee, it has no connection with or effect upon the reality of possession.⁽¹⁷⁾

Expenses of Possession

- The basis for the view that the expenses of possession of the sold commodity are borne by the seller is that the delivery of the sold commodity is obligatory on the seller by virtue of the contract, and the contract is not completed without it; and a thing without which an obligation cannot be fulfilled is also obligatory. Accordingly, this is what was upheld by the majority of the Jurists to the effect that meeting the expenses of the delivery of the sold commodity -by presenting it if it is absent and by ascertaining it if it needs to be ascertained by a customary unit of measure- is the responsibility of the seller. The basis for the view that expenses, if any, of taking delivery of the price are the responsibility of the buyer, is that payment of the price to the seller is obligatory upon the buyer, thus, it is binding on him to bear the burden of all that is required by such delivery. The basis for qualifying this rule to impose the expenses on both parties insofar as there

(16) Al-Wansharisi, *"Al-Mi'yar"* [6: 471].

(17) *"Mayyarah 'Ala Al-Tuhfah"* [1: 111]; *"Bidayat Al-Mujtahid"* [2: 229]; Majd Ibn Taymiyyah, *"Al-Muharrar"*, [1: 374]; Ibn Taymiyyah, *"Nazariyyat Al-'Aqd"*, (P. 236); *"Kashshaf Al-Qina"* [3: 249 and 373], [4: 253]; and Al-Qarafi, *"Sharh Tanqih Al-Fusul"* (P. 456).

is no condition to the contrary, is extended from the ruling of the majority of the Jurists of upholding conditions. As for the qualification that "there is no custom to the contrary," it is based on the view of the Jurists, insofar as it is stated in their texts that if there is a stipulation or custom to the contrary, then, it is binding to follow such stipulation or custom.⁽¹⁸⁾

- The basis for the buyer bearing the expenses of constructive possession of what he has purchased, as represented by official registration and attestation for the sale of immovable property or its mortgage in countries that have adopted a system of registration of transfer of immovable property, as well as the sale of some mobile moveable property like cars, vehicles, steamers and airplanes or their pledging (hypothecation) in countries that have adopted a system of officially registering such things, and as well as the purchase of shares of corporations -whose trading is permissible according to the Shari'ah in markets for financial paper- is the customary practice in all these things. Further, such a practice secures the interest of the buyer and is supported by the rule that gain is linked to the bearing of expenses. It is also supported by derivation of the rule from what has been stated by the Hanafi Jurists to the effect that the expenses of the drafting of documents, promissory notes and of witnessing, which confirm the transaction of sale, are to be borne by the buyer as long as there is no custom or stipulation to the contrary.
- The basis for the seller bearing the expenses for the delivery of the sold commodity to the buyer with the stipulation of a known place (other than the place of contract where it is present) is what has been stated by the Hanafis and the Hanabalīs affirming that such expenses are borne by the seller in case of a stipulation to this effect.⁽¹⁹⁾

(18) *"Al-Zurqani 'Ala Khalil"* [5: 158]; *"Hashiyat Al-Dusuqi"* [3: 144]; *"Al-Bahjah 'Ala Al-Tuhfah"* [2: 144]; Al-Dardir, *"Al-Sharh Al-Saghir"* [3: 197]; *"Al-Mughni"* [6: 188]; *"Sharh Muntaha Al-Iradat"* [2: 192]; *"Mughni Al-Muhtaj"* [2: 73]; *"Bada'i' Al-Sana'i"* [5: 243]; Al-Atasi, *"Sharh Al-Majallah"* [2: 221]; articles (45-242) in *"Majallat Al-Ahkam 'Ala Madhhab Al-Imam Ahmad"*; articles (288-91) in *"Majallat Al-Ahkam Al-'Adliyyah"*; and articles (67-466) in *"Murshid Al-Hayran"*.

(19) *"Durar Al-Hukkam"* [3: 230]; *"Kashshaf Al-Qina"* [3: 180]; *"Sharh Muntaha Al-Iradat"* [2: 161]; articles (353), (446) in *"Murshid Al-Hayran"*; article (287) in *"Majallat Al-Ahkam Aal-'Adliyyah"*; and article (342) in *"Majallat Al-Ahkam Al-Shar'iyyah 'Ala Madhhab Al-Imam Ahmad"*.

Expenses of Possession in Qard (Loan)

- The basis for the borrower bearing the expenses of delivery and acquisition, which refer to taking of delivery through customary units of measure in a contract of Qard, is that the lender has undertaken a good act, and costs are not to be imposed on one who does a good act.⁽²⁰⁾ Linked to these with respect to the rule are the expenses of the drawing up of documents, promissory notes and so on, which are matters that are needed for the implementation, execution or verification of the contract of Qard (loan), it is the borrower who bears these costs insofar as these are the requirements or appendages of raising a loan, which is for his interest. The lender is undertaking an act of donation of the benefits of his wealth and the person doing good is not to be made to bear costs over and above his granting of a thing, because “No ground (of complaint) can there be against those who do good.”⁽²¹⁾ If it is made binding on him to bear the costs of lending and recovery as well as attestation, it would run counter to his good act, and it would lead to the preventing to those who own wealth from lending it.

Expenses of Possession in Deposit (Bailment)

- The basis for the depositor bearing the costs of deposit and recovery in a contract of *Ida'* (deposit) is that “The burden of possession on each thing is binding upon the one who benefits from its possession, due to the principle: Gains are based on the bearing of costs.”⁽²²⁾ It is known that the benefit in deposit and its return belong to the depositor alone, thus, the expenses that are incurred on its deposit and recovery are binding upon him.⁽²³⁾

Key Modern Applications of Possession

- The basis for considering the possession of a bank draft or a personal cheque, accepted for payment by the drawee, as constructive possession of

(20) “*Al-Zarqani 'Ala Khalil*” [5: 158]; Al-Dardir, “*Al-Sharh Al-Saghir*” [3: 197]; and “*Hashiyat Al-Dusuqi*” [3: 144].

(21) [Al-Tawbah (Repentance): 91].

(22) “*Durar Al-Hukam*” [2: 333].

(23) “*Al-Bahr Al-Ra'iq*” [7: 276]; “*Durar Al-Hukam*” [2: 272]; “*Al-Mughni*” [9: 269]; “*Kashshaf Al-Qina*” [4: 203]; “*Asna Al-Matalib*” [3: 84]; “*Tuhfat Al-Muhtaj*” [7: 124]; “*Al-Muhalla*” [8: 278]; articles (793) in “*Majallat Al-Ahkam Al-'Adliyyah*”; and articles (1340) in “*Majallat Al-Ahkam Al-Shar'iyyah 'Ala Madhhab Al-Imam Ahmad*”.

the amount accepted is customary banking practice and trading transactions in this respect. The confirmation of this is laid down in a resolution of the International Islamic Fiqh Academy.⁽²⁴⁾

- The basis for considering a payment on a credit card as constructive possession of the amount of repayment is banking practice in this respect. Likewise, in the consideration of a deposit by a person of an amount in a bank account of the client, irrespective of this being cash, a bank endorsement, or a cheque accepted for payment by the drawee bank, as constructive possession by the beneficiary. This has been confirmed by a resolution of the International Islamic Fiqh Academy.⁽²⁵⁾

(24) Resolution No. (53) 4/6 in its 6th Session (Sha'ban 1410 A.H./March 1990 A.D.).

(25) 25 Resolution No. (53) 4/6 in its 6th Session.

Appendix (C)

Definitions

Al-'Aqar (Immoveable Property)

It is something that has a permanently affixed foundation and it is not possible to transfer it or move it, along with the subsistence of its shape and form, like land and houses.

Al-Manqul (Moveable Property)

It is something that can be transferred and moved. Thus, it includes cash, loans, animals, cars, ships, airplanes, trains, things subjected to cubic measure or weight.

Bay' Al-Juzaf (Sale by Random Estimate)

It is the sale of something whose precise quantity is not known, and its quantity is known through estimation without employing a cubic measure, weight, linear measure, count.

Al-Qabd Bi-Sifat Al-Daman (Possession Creating a Liability for Return)

It is the acquisition of a thing that leads to the liability for the return of the thing, if it is a fungible commodity, that is, its return to its owner as long as the thing exists, and its value, if it is non-fungible, on its loss or conversion, whatever the cause of this, and this when it occurs without the permission of the owner (as a wrongful act, delict, tort), like the possession by a thief or usurper, or with the permission of the owner, but with the intention of owning it, like the possession of one bargaining for it or one who has expressed the intention to own it. Some Jurists have deemed the possession by the borrower, the mortgagee (pledge), lessor and the independent contractor to be of this nature.

Al-Qabd Bi-Sifat Al-Amanah (Possession Creating a Trust)

It is the acquisition of a thing that leads to its treatment as a trust in the possession of the possessor insofar as he does not bear the liability of its

loss, and as long as he has not committed a tort or negligence in its safe-keeping. This occurs with the permission of the owner when there is no intention to own it rather it is for the interest of the owner, like the bailee, agent, dedicated servant, Wali and Wasi, or it is for the interest of the person acquiring it, like the tenant, borrower, and mortgagee, or for their common interest, like the Mudarib, partner, tenant and irrigator.

'Urf (Custom)

It is what is practised by the people and what they have come to follow in terms of words, acts or relinquishment. The 'Urf that is acknowledged by the Shari'ah is the one that meets the following conditions:

1. That it should not contradict the Shari'ah. If the 'Urf goes against a Shar'iah Text or one of the principles of the Shari'ah, it is a custom that is void.
2. That the 'Urf should be continuous or predominantly so.
3. That the 'Urf be prevalent at the time of the undertaking of the transaction.
4. That the two parties to the contract should not have expressly stipulated against it. If they express such a stipulation the 'Urf is not admissible.



Shari'ah Standard No. (23)

**Agency and the Act of an
Uncommissioned Agent (Fodooli)**

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IN THE NAME OF ALLAH, THE ALL-MERCIFUL, THE MOST MERCIFUL

All praise be to Allah, the Lord of all the worlds, and blessings and peace be upon our master, Muhammad, and his household and all his companions

Preface

The purpose of this Standard is to clarify the Shari’ah rulings that govern the activities of Islamic financial Institutions (Institution/Institutions)⁽¹⁾ in appointing agents or becoming agents of others, whether in arranging contracts and disposing of property, or undertaking procedural tasks, or managing/investing funds. The Standard also indicates the underlying conditions of Agency, elaborates on its various forms, spells out its repercussions, and outlines the responsibilities of both the Principal and the Agent. Moreover, the Standard aims to embark upon the Act of an Uncommissioned Agent “Fodooli” and the Shari’ah rulings thereon.

(1) The word (Institution/Institutions) is used here to refer, in short, to Islamic financial institutions including Islamic Banks.

Statement of the Standard

1. Scope of the Standard

This Standard covers agency and the acts of an uncommissioned agent in concluding contracts on financial transactions (such as sale, Ijarah and compensatory reconciliation), disposing of assets, providing services and conducting practical acts such as receipt, payment and delivery. The Standard also covers areas such as fund management, real estate and investment agency. However, it does not cover agency and the act of an uncommissioned agent in several other affairs of life such as worshipping (like Zakah, for which there is a separate standard), personal affairs, penalty affairs, legal prosecution/advocacy, and documentary credits (which have also been dealt with in a separate standard).

2. Agency

2/1 Definition, permissibility and characteristics of agency

2/1/1 Agency is the act of one party delegating the other to act on its behalf in what can be a subject matter of delegation and it is, thus, permissible.

2/1/2 Agency is, basically, a non-binding contract for both the parties thereto. However, it may sometimes become a binding contract. [see 3/4 below]

2/2 Basic elements of agency

2/2/1 The basic elements of agency include the form, the subject matter of agency, and the two parties to the contract (the principal and the agent).

2/2/2 The form of agency comprises any act that customary practices traditionally consider a delegation of the right to acting by someone on behalf the other. Such delegation comprises of

Shari'ah Standard No. (23): Agency and the Act of an Uncommissioned Agent (Fodooli)

offer and acceptance which has no standard form of wording and may be expressed through utterance of words, writing, messaging or gesture. In accepting non-paid agency, silence is also considered as sufficient acceptance, while a negative response is indicative of rejection of agency.

2/2/3 Agency may take place in any of the following forms:

2/2/3/1 Immediate Agency, as usually the case, where the contract becomes effective as soon as it is entered into.

2/2/3/2 Conditional Agency: where the validity of the contract is made subject to fulfillment of a certain condition, for instance when a debtor agrees to put his own assets under the management of his creditor in case of default.

2/2/3/3 Future Agency: where the contract becomes valid only at a specific date in the future.

2/2/3/4 Agency, whether free or limited, shall be subject to specific conditions. In case of free agency, consideration should be given to customary practices, interest and the state of the principal.

2/2/4 While conditionality and limitation may be resorted to in concluding agency contracts, they may also be confined to the disposal of the subject matter of agency. In this case, though the agency contract is immediately effective, disposal is made subject to the fulfillment of a specific condition, such as resorting back to the principal before disposal. The conditions set by the principal should be observed such as offering him a guarantee or lien.

2/2/5 The subject matter of agency is for what the contract is entered into. [see item 3/3]

2/2/6 The two parties to the contract are the principal and the agent. [see items 3/1 and 3/2]

3. Conditions on the Agency Parties

3/1 Conditions on the principal

3/1/1 The principal should possess legal capacity to enter into contract.

3/1/2 The principal should have the right to dispose of the asset in question. Agency, therefore, is not acceptable from a legally incapable person like a lunatic or an indiscriminating minor. A partially capable person, such as a discriminating minor, may appoint an agent for matters that result in absolute benefit to him, such as accepting donations from others, but he cannot appoint an agent in harmful matters like making donations. In acts that may be harmful or useful, such as buying and selling, a partially capable person may appoint an agent, but the acts of that agent remain pending the approval of the principal's guardian or whosoever enjoys the similar right on behalf of the principal.

3/2 Conditions on the agent

3/2/1 The agent should have full legal capacity, because a lunatic or an indiscriminating minor cannot become an agent. A discriminating minor may become an agent, provided that all the contractual commitments are the sole responsibility of principal.

3/2/2 The agent should be aware of his status as an agent. When somebody acted on behalf of another and later on, the former comes to know that he is an agent of the latter, the preceding act does not fall under the agency contract. If, however, he does so with the intention of performing the act regardless of agency, the case should be subjected to the rules governing the act of an uncommissioned agent (*Fodooli*). [see item 8]

3/3 Conditions on the subject matter of agency

3/3/1 The subject matter of agency should be known to the agent. However, minor *Jahalah* (unknowability) that does not lead to

dispute, or temporary uncertainty, may be dispensed with. It can also be overlooked when, in absolute agency, the principal authorizes the agent to channel the funds in any form of investment. Nevertheless, the agent should observe the interest of the principal, as well as the norms and customary practices if necessary.

3/3/2 It should be owned by the principal, or he has the right of depositing thereof.

3/3/3 It should be something that can be disposed of through agency. This includes all types of financial contracts and dealings that a person can perform personally. Any contract that a person is permitted by Shari'ah to be involved in personally can be performed through agency.

It should not involve a Shari'ah-banned practice, like trading in impermissible commodities or committing usurious lending.

4. Types of Agency

4/1 Agency may take the following forms:

4/1/1 Specific versus general agency. General agency includes all methods of disposing of assets provided that the interest of the principal and the customary practices are well observed. Disposal of assets here does not include making donations, unless the principal authorizes the agent to do so.

4/1/2 Limited versus absolute agency. Absolute agency is bound by customary practices and the interest of the principal. It is not permissible in absolute agency to sell at less or buy at more than the market price, nor is it permissible to perform barter and deferred payment sales, except with the prior consent of principal.

4/1/3 Paid versus non-paid agency. [see item 4/2]

4/1/4 Binding versus non-binding agency. [see item 4/3]

4/1/5 Temporary versus continuous agency. [see item 4/4]

4/2 Paid agency

- 4/2/1 Paid agency is permissible in Shari'ah, whether remuneration is explicitly stipulated in the contract or ascertained in accordance with the customary practices, as when the agent does provide such service except for remuneration.
- 4/2/2 When agency is paid, it falls under the Shari'ah rulings on Ijarah. [see item 4/3]
- 4/2/3 The amount payable as remuneration for agency should be known, whether in lump sum or as a share of a specific amount of income. It may also be defined in terms of an amount of income to be known in the future, as when remuneration is linked to an indicator that may be quoted at the beginnings of different intervals of time. However, it is not permissible to leave remuneration for agency undetermined and allow the agent to take an unspecified share from the entitlements of the principal.
- 4/2/4 When remuneration for agency is not specified, it may be measured in terms of the prevailing market rate for similar effort.
- 4/2/5 Remuneration for agency may be any gain in excess of a specific amount of output of the operation, or a share of the output.
- 4/2/6 A certain share of the output may be added to the specific remuneration of the agent, as a motivation.
- 4/2/7 When the agent, for no reasonable excuse, refrains from carrying on agency that he has been paid for, and the work he has done was beneficial, he becomes entitled to the remuneration commensurate with the part of work done, and within the limits of the contract value for that part of work. The agent in this case is bound to indemnify the principal for any actual loss resulting from his refusal to continue the work.

When the principal, for no reasonable excuse, forces the agent to discontinue the work before the end of the agency period,

the agent becomes entitled to the full remuneration agreed upon.

When the principal, for a valid reason, forces the agent to discontinue the work before the end of the contract, the agent becomes entitled to remuneration for that part of work he has already performed.

4/2/8 Damage of the subject matter of agency does not relieve the principal from paying remuneration to the agent for the part of the work the latter has already performed. When the damage occurs because of misconduct or negligence of the agent, he is bound to indemnify the principal for it.

4/3 Binding agency

Agency is, basically, not binding, because each of the two parties has the right to revoke the contract without denying its effects that may continue after revocation. However, agency becomes binding in the following cases:

4/3/1 When it involves rights of others, as when the mortgagor appoints the mortgagee as an agent, or when the mortgagor is authorized to seize the mortgaged asset or sell it on maturity. Agency in the latter case is binding to the mortgagor (the debtor). A further example of binding agency is a case when the owner of an income-generating asset assigns the collection of his entitlements to an agent manager.

4/3/2 When agency is a paid agency. [see item 4/2]

4/3/3 When the agent commences tasks that cannot be discontinued or phased out without causing injury to him or to the principal. Agency in this case remains binding until it is possible to suspend the work, or phase it out without causing injury to any of the two parties.

4/3/4 When the principal or the agent undertakes not to revoke the contract within a certain period.

4/4 Temporary agency

- 4/4/1 Basically, agency has no time limit beyond which the contract becomes no longer valid, because the agent can be terminated at any time. The two parties, however, may agree on a certain period after which the agency becomes invalid without a request from any of them to revoke the contract.
- 4/4/2 The effect of specification of a time limit for agency is confined to restrain the agent from commencing new operations subsequently.
- 4/4/3 Unless the contract stipulates otherwise, the agent may commence new operations during the contract period even if the effects of such operations will succeed the period of the contract.

5. Commitments of the Principal and the Agent

5/1 Commitments of the principal

- 5/1/1 In contract of procurement agency, the price and other expenses should be borne by the principal. Besides the price of purchased commodity, the principal should reimburse the agent expenses such as those of transportation, storage, taxation, maintenance and insurance. In paid agency, such expenses should not be stated in the contract as payable by the agent now or in the future.
- 5/1/2 In paid agency, the principal should pay the agent the amount of remuneration agreed upon in the contract. [see item 4/2]

5/2 Commitments of the agent

The agent is considered as a trustee in holding the asset in question, and therefore, he is not bound to indemnify the principal for that asset in case of damage. He shall be held responsible for indemnity only when the damage results from his own misconduct, negligence or breach of terms or stipulations of the contract. Breach of contract for this purpose does not include acts that serve the interest of the

principal, like selling at a higher or buying at a lower price. In this regard, Shari'ah Standard No. (5) on Guarantees indicates under item 2/2/2 the following:

“It is not permissible to combine agency and personal guarantees in one contract at the same time (i.e. the same party acting in the capacity of an agent on one hand and acting as a guarantor on the other hand), because such a combination conflicts with the nature of these contracts. In addition, a guarantee given by a party acting as an agent in respect of an investment turns the transaction into an interest-based loan, since the capital of the investment is guaranteed in addition to the proceeds of the investment, (i.e. as though the investment agent had taken a loan and repaid it with an additional sum which is tantamount to Riba). But if a guarantee is not stipulated in the agency contract and the agent voluntarily provides a guarantee to his principals independently of the agency contract, the agent becomes a guarantor in a different capacity from that of agent. In this case, such an agent will remain liable as guarantor even if he is discharged from acting as agent”.

6. Stipulations on the Agent

6/1 Performing deals with one's self and relatives

6/1/1 When an agent conducts deals with his ascendant or descendant relatives, who are neither under his guardianship, nor are the agent's spouse, the deal is permissible unless it encompasses injustice or favoritism. In case of deals that involve relatives who are under the guardianship of the agent, or deals that involve the agent's spouse, the agent should obtain the consent of the principal.

6/1/2 An agent should not conduct deals with his own self or with his son/daughter who is still under his guardianship, or with his partner (*Sharik*) in the same contract.

6/1/3 The agent should not act for both parties to the contract.

6/1/4 An agent may purchase what he has bought for the principal, by way of offer and acceptance. The deal should be concluded

in such a way that the guarantees stemming from the agency contract and the sale contract are kept separate. After the completion of the conclusion of the sale contract, the commodity becomes under the guarantee of the purchaser/agent. [see Shari'ah Standard No. (8) on Murabahah – item 3/1/5]

6/2 Monitoring of the provisions and rights of the contract

Monitoring the provisions of contract is the responsibility of principal, whereas monitoring the activities stipulated in the contract (except donations that should be assigned to the principal) is the responsibility of agent. Nevertheless, the principal, by virtue of ownership, may pursue the agent's activities.

6/3 Breach of contract stipulations

6/3/1 When the agent breaches the contract in a way that does not serve the interest of the principal, the latter is free to maintain the contract or declare it invalid. Breach of the contract on the part of the agent may relate to the subject matter of agency or part thereof, the price, on spot or deferred payment, possession (purchase), or transfer of ownership (sale). [see items (8) and 5/2]

6/3/2 When the agent breaches the contract by purchasing at a price that exceeds both the market price and the price set forth by the principal, he should compensate the principal for the difference between the purchase price and the market price. Similarly, if the breach is by selling at less than the price specified by the principal, compensation should be for the difference between the selling price and the market price. Hence, the case here is similar to what happens in Mudarabah or investment agency whereby selling is stipulated to take place for a profit not less than a specified proportion. And hence, the agent (or the Mudarib) doesn't guarantee that proportion, but his guarantee is limited to any amount less than the price of a similar fungible good.

6/4 Appointing a sub-agent

The agent has no right to appoint a sub-agent except with the permission of the principal. Once a sub-agent is appointed, his termination does not spontaneously follow the termination of the first agent, but the principal can terminate him.

6/5 Appointing more than one agent

When more than one agent are appointed in the same contract, none of them should become the sole decision-maker unless with the authorization of principal. If they have been appointed by separate contracts, each of them has the right to discharge their responsibilities independently, unless the principal requires joint action from them.

7. Expiry of Agency

7/1 The agency contract expires in the following cases:

- 7/1/1 The contract expires when the principal or the agent dies or loses legal capacity or when the Institution undergoes bankruptcy or liquidation.
- 7/1/2 When the principal terminates the agent or the latter resigns. In case of termination, the principal has to inform the agent [see item 4/2/7], for compensation of loss resulting from refusal by the agent to continue the work, or forced discontinuation of work imposed by the principal before the expiration of contract or agency term, in regard to the consequent remuneration or damage compensation.
- 7/1/3 When the agent completes the work assigned to him in fixed-task agency or the principal performs the task in question.
- 7/1/4 When the principal no longer owns the asset in question or the principal has lost the right of disposing thereof. Agency also expires if the principal has performed the work, or the subject matter of agency no longer exists.
- 7/1/5 At the occurrence of the incidence that has been stipulated for ipso facto expiry of the agency.

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7/1/6 At the expiry of the contract term in temporary agency. In this case, the contract may be extended to the required term when necessary. [see item 4/3]

7/2 Interminable agency remains effective even after the death of the principal or liquidation of the Institution. It continues up to the end of the subject matter of agency.

8. Act of an Uncommissioned Agent (Fodooli)

8/1 An uncommissioned agent (Fodooli) is a person who discharges (in the absence of any need or urgency) the affairs of others without being an agent or having a right to do so by virtue of Shari'ah. The deal becomes subject to the rulings on the Fodooli, even when the acts of a real owner makes him appear an agent.

8/2 The approval or denial of a contract concluded by an uncommissioned agent is subject to the discretion of the owner. Approval of such contract by the owner should also precede revocation of the contract by either of the two parties; otherwise, a new contract has to be initiated. If the owner of the property does not approve the act of the uncommissioned agent, the act becomes binding to the latter, if he did not declare at the time of signing the contract that he had no authority.

8/3 The rulings on the uncommissioned agent are applicable to all financial contracts, including compensatory contracts like sale, purchase, rent and hiring contracts, donations by way of gift, and investment agency contracts.

8/4 When the owner of the asset approves the act of the uncommissioned agent, the contract becomes effective, and subject to all rulings on agency. The approval shall be retroactively effective, based on the date of such an act.

9. Date of Issuance of the Standard

This Standard was issued on 23 Rabi' I, 1426 A.H., corresponding to 30 April 2005 A.D.

Adoption of the Standard

The Shari'ah Board adopted the Shari'ah Standard on Agency and the Act of An Uncommissioned Agent in its meeting No. (14) held in Dubai on 21 – 22 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D.

Appendix (A)

Brief History of the Preparation of the Standard

The Shari'ah Board decided in its meeting No. (10), held on 2–7 Rabi' I, 1424 A.H., corresponding to 3–8 May 2001 A.D., in Al-Madinah Al-Munawwarah to issue a Shari'ah Standard on Agency and the Act of Uncommissioned Agent.

On 17 Sha'ban 1423 A.H., corresponding to 13 October 2002 A.D., the Shari'ah Standards Committee decided to commission a Shari'ah consultant to prepare a draft standard on Agency and the Act of Uncommissioned Agent.

In its meeting No. (10) held on Friday and Saturday 26-27 Safar 1425 A.H., corresponding to 16-17 April 2004 A.D., in the Kingdom Of Bahrain, the Shari'ah Standards Committee (2) discussed the Shari'ah study and advised the consultant to make necessary changes in light of the discussions and observations of its members.

In its meeting No. (11) held on Wednesday 28 Rabi' II, 1425 A.H., corresponding to 16 June 2004 A.D., in Dubai (U.A.E), the Shari'ah Standards Committee (2) discussed the draft Standard on Agency and the Act of Uncommissioned Agent (Fodooli) and introduced some changes thereto in light of the discussions and observations of the members.

Once again, the committee discussed the draft standard in its meeting held on 24–25 Rajab 1425 A.H., corresponding to 9-10 September 2004 A.D., and made further changes in light of the discussions and observations of its members.

The revised draft of the standard was then submitted to the Shari'ah Board in its meeting No. (13) held in Makkah Al-Mukarramah on 26-30

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Sha'ban 1425 A.H., corresponding to 10–14 October 2004 A.D. The Board made some changes in the document and decided to send the amended document to a number of experts for their comments before discussing it in a public hearing.

A public hearing was held in the Kingdom of Bahrain on 15 Safar 1426 A.H., coresponding to 25 March 2005 A.D., and attended by more than 35 participants representing central banks, financial Institutions, accounting firms, Shari'ah scholars, academics and other concerned parties. Several comments were made before and after the public hearing. Some members of the Shari'ah Standards Committees (1) and (2) responded to the quires made during the session.

In the meeting of the Shari'ah Standards Committees (1) and (2), held in the Kingdom of Bahrain on 15-16 Safar 1426 A.H., corresponding to 25-26 March 2005 A.D., the comments made during the public hearing were discussed and some changes were made to the document.

The Shari'ah Board convened its meeting No. (14) on 21–23 Rabi' I, 1426 A.H., corresponding to 30 April - 2 May 2005 A.D., held in Dubai (U.A.E) and adopted the Standard.

Appendix (B)

The Shari'ah Basis for the Standard

- Permissibility of agency by Shari'ah is demonstrated in the noble Qur'an, where Allah, Exalted be He, says: {*"...So send one of you with this silver coin of yours to the town, and let him find out which is the good lawful food..."*}.⁽²⁾ Similitude of this incidence to agency is that the one who was sent to the town to buy the food was the agent of the others.⁽³⁾ In Sunnah, a Hadith was narrated by Urwah Al-Bariqi (may Allah be pleased with him) who said that the Prophet (peace be upon him) had given him one dinar to purchase a sacrificial sheep for the Prophet,⁽⁴⁾ an incidence that involves agency. As regards to Ijma' (consensus of Fuqaha), the author of the "*Al-Bahr Al-Zakhkhar*" and others have demonstrated permissibility of agency. Also, in common sense agency is well demonstrated in terms of the help of others that one may sometimes need, especially for things that he cannot do himself.⁽⁵⁾
- Permissibility of initiating agency in any wording which indicates initiation thereof is based on the fiqh principle that "What matters in contracts are intentions and meanings rather than wording and constructions". Therefore, whatever indicates delegation, which is the essence of agency, is acceptable for initiating the contract. The underlying reason for consideration of silence as acceptance in case of non-paid agency is that acceptance in this case is considered to have been given implicitly⁽⁶⁾. Effectiveness of the agency contract can be linked to fulfillment of a certain condition or to a future date because agency is delegation of power rather than an act of ownership

(2) [Al-Kahf (The Cave): 19].

(3) Related by Al-Bukhari, Abu Dawud and Al-Tirmidhi: "*Al-Talkhis Al-Habir*" [3: 304].

(4) "*Nayl Al-Awtar*" [5: 352]; "*Fath Al-Qadir*" by Ibn Al-Humam [6: 554]; "*Al-Mughni*" by Ibn Qudamah [5: 203]; and "*Al-Bahr Al-Zakhkhar*".

(5) "*Al-Bahr Al-Ra'iq*" by Ibn Nujaym [7: 153].

(6) "*Al-Minhaj*" by Al-Nawawi [2: 164]; and "*Fath Al-Qadir*" [6: 553].

transfer that could be required immediately. On the contrary, a person may need to tie delegation to the occurrence of a certain incidence, or to a specific date in the future.

- The principal shall possess the right of disposing of the asset in question because the agent is going to derive such right from him; hence the former cannot delegate a right that he does not own⁽⁷⁾.
- As for the detailed rulings pertaining to partial legal capacity of the agent, these rulings hold true for all dealings including agency.
- The ruling that agency should be known to the agent is manifested in the fact that knowledge in this case is a necessity for completion of the process of offer and acceptance, and hence distinction between a real agent and an uncommissioned agent.
- Imposition of four conditions on the subject matter of agency is necessary to facilitate conclusion and validity of the contract that cannot be attained without these four conditions namely: existence of the asset, asset ownership by the principal, possibility of disposing of the asset through agency and the absence of any Shari'ah restriction that prevents the deal.
- Permissibility of paid agency stems from the fact that agency is a useful work for which the agent has the right to ask remuneration. An agent who is known to be providing agency services only against payment is entitled to remuneration even when remuneration is not explicitly mentioned in the contract, because a customary practice is acceptable as long as it does not encounter a Shari'ah restriction. Non-paid agency is also permissible because it is considered, in this case, as a form of donation.
- The justification for the clauses relating to remuneration of the agent is that such clauses are essential to make remuneration well known at either the time of the contract conclusion or in the future. Temporary uncertainty about the exact amount of the remuneration is overlooked because knowledge of the amount in the future will leave no room for dispute.⁽⁸⁾ Permissibility of adding a certain share of the profit to the principal remuneration rests on the fact that such addition does not distort knowledge of the principal

(7) *"Al-Lubab"* by Al-Maydani [2: 139].

(8) *"Al-Insaf"* [5: 403]; *"Al-Rawdah"* by Al-Nawawi [4: 301]; *"Al-Khurashi"* [7: 5]; *"Al-Fatawa Al-Hamidiyyah"* [1: 324]; and *"Tadhkirat Al-Fuqaha"* by Al-Hilli [2: 114].

amount. In this case, the commitment to offer the agent a certain share of the profit is in the sense of a pledge to offer donation. Thus, the offered share of the profit can be considered as a conditional gift, or as Ju'alah. There is another viewpoint that considers the pledged share of the profit as a subsidiary addition to the principal remuneration, and concludes that in a subsidiary we can overlook what we cannot overlook in the principal.

- Agency is, originally, non-binding because it is an act of delegation that neither the principal nor the agent should be forced to continue. The exceptional cases of binding agency have been dealt with to preserve whatever rights of others involved therein. Moreover, an exceptional treatment is also needed for paid agency that should be subjected to the rulings on Ijarah, as well as the case when there is a pledge not to revoke the contract within a specific period because breaching such commitment may cause injury to others.
- It is permissible to specify a time limit for agency, because agency is nothing but a contract that could have a specific duration, like Ijarah for instance.
- The justification for defining the commitments of the principal and the agent is – as set out in the Standard- the need to honor contractual obligations of agency and pursue the acts and liabilities that emerge from it.
- The agent is considered as a trustee in holding the asset because he works for the interest of others (the principal) and trusteeship is the normal status in similar engagements. Moreover, the principal's act of choosing the agent for the purpose in question is an indication of his good faith on him, and therefore the principal should not reverse that good faith, except for misconduct, negligence or breach of the contract's limitations.
- Impermissibility of combining agency and guarantee in the same contract, is based on their opposing implications, in addition to the fact that guarantee by the agent entails a suspicion of Riba (usury). Therefore, the status of the agent as a trustee contradicts with provision of guarantee.
- Impermissibility for the agent to represent both parties to the contract – as per the Hanafi School and the predominant view in the Shafi'i School – is to avoid assigning both offer and acceptance to the same party, and hence prevent any probable self bias. Adopting the viewpoint of these two Schools is, therefore, most suitable for Institutions to avoid malpractices and

misleading formalism in making transactions and prevent overlapping of guarantees.

- Monitoring of the contract's provisions is assigned to the principal because he is the principal party of the contract, whereas the agent, who is just a contractor, has to monitor the activities of the contract.
- Suspension of an agent act that breach the contract without adding to the benefit of the principal, until obtaining the principal's approval conforms to the normal Shari'ah practice of exerting the best possible effort to rectify an act of a Muslim.⁽⁹⁾ The act here remains pending approval of the principal to safeguard him against injury.
- An agent who breaches the contract by selling or buying at a price other than the price agreed upon has to indemnify the principal for the difference between the price he accepted/offered, and the market price. The justification for this ruling is the need to establish justice and compensate the principal for loss, without committing the Shari'ah-banned practice of accepting capital on pre-fixed return, which entails a suspicion of Riba. This case has been discussed in "*Al-Mughni*" by Ibn Qudamah, who referred also to another viewpoint that suggests revocation of the deal.⁽¹⁰⁾
- Agency in selling a mortgaged asset is treated as an exceptional case where the contract does not expire on the death of the agent (agency to be pursued by inheritors), in order to preserve the rights of the mortgagee. Moreover, such agency is originally irrevocable before fulfillment of its purpose, for thereto is attached others' rights.
- The justification for adopting the fiqh viewpoint that advocates suspending the act of the uncommissioned agent rather than revoking the deal (for uncertainty about its confirmation by the principal), is the fact that an act of a Muslim should, as far as possible, be preserved from cancellation.⁽¹¹⁾ Preservation of the act against cancellation is possible here through suspension, in addition to the fact that the act may prove to be useful to the

(9) "*Al-Mughni*" by Ibn Qudamah [5: 135-136].

(10) Ibid.

(11) In "*Al-Bada'i*" [5: 177], it is stated: "The act of the Muslim should, as far as possible, be perceived as correct"; and in "*Fath Al-Qadir*" [2: 445], it is stated: "Making the best possible effort to rectify the act of the Muslim".

owner of the property in question. In this connection, Ibn Al-Humam said: "When the case is viewed from the standpoint of Gharar (uncertainty), the contract appears to be invalid, whereas if it is viewed from the standpoint of benefit and absence of harm the contract appears to be permissible. Therefore, Ibnul Humam supports reconciliation of the two standpoints by suggesting permissibility with suspension."⁽¹²⁾ It has also been narrated that the Prophet (peace be upon him) said: "*Whoever can offer a benefit to his Muslim brother, should do so*". If, however, the act turned to be harmful to the principal, he can revoke it by virtue of the right he has.

Moreover, permissibility of suspending the act of the uncommissioned agent until approval of the principal can also be derived from the Hadith narrated by Hakim Ibn Hizam (May Allah be pleased with him) stating that the Prophet (peace be upon him) gave him one dinar so as to buy a sheep that the Prophet (peace be upon him) wanted to sacrifice. Hakim purchased the sheep for one dinar and sold it for two. Then he purchased another sheep for the Prophet (peace be upon him) for one dinar and handed over the remaining dinar to him. The Prophet (peace be upon him) took the remaining dinar and spent it on charity and then prayed to Allah to bless Hakim's trading business.⁽¹³⁾



(12) "*Fath Al-Qadir*" [5: 317].

(13) Related by Abu Dawud and Al-Tirmidhi.