

## THE 266<sup>TH</sup> SHARIAH ADVISORY COUNCIL OF THE SECURITIES COMMISSION MALAYSIA MEETING (16 MARCH 2023)

### SUKUK *WAKALAH BI AL-ISTITHMAR* AND ITS TRADABILITY

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#### INTRODUCTION

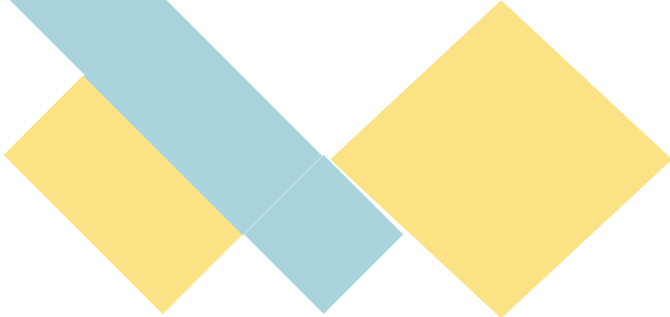
Sukuk *wakalah bi al-istithmar* (Sukuk *Wakalah*) refers to certificates of equal value evidencing the certificate holder's undivided ownership in the investment assets pursuant to their investment through the investment agent.<sup>1</sup>

A Sukuk *Wakalah* may be structured whereby the Shariah-compliant *wakalah* investment portfolio (*Wakalah* Portfolio) comprises a combination of non-debt investment assets and debt investment assets.

For instance, under the structure of Sukuk *Wakalah*, the sukuk trustee (Sukuk Trustee) (acting on behalf of the sukukholders) enters into a *wakalah* contract with the sukuk issuer. The sukuk issuer is appointed by the Sukuk Trustee as its agent (*Wakil*) to perform certain services which include investing the Sukuk *Wakalah* proceeds received from the sukukholders into a *Wakalah* Portfolio and managing the *Wakalah* Portfolio in accordance with the agreed terms.

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<sup>1</sup> Guidelines on Islamic Capital Market Products and Services (ICMPS Guidelines), Chapter 3, Definition.



The *Wakalah* Portfolio may comprise of investment in Shariah-compliant business or tangible assets<sup>2</sup> and Shariah-compliant commodities which are traded under the Shariah principle of *murabahah* (via *tawarruq* arrangement) (“Commodity *Murabahah* Investment”)<sup>3</sup>. The income generated from the *Wakalah* Portfolio will be distributed to the sukukholders based on the agreed terms and conditions.

Based on the above instance, the Shariah Advisory Council (SAC) had focused its deliberation to the investment of Sukuk *Wakalah* in a *Wakalah* Portfolio comprising a combination of non-debt investment assets and debt investment assets. In this regard, several questions have been raised as follows:

**(i) Minimum Percentage for Non-Debt Investment Assets in a *Wakalah* Portfolio**

What is the minimum percentage for non-debt investment assets to ensure that such sukuk complies with the features of Sukuk *Wakalah* that invest in a *Wakalah* Portfolio comprising a combination of non-debt investment assets and debt investment assets?; and

**(ii) Tradability of Sukuk *Wakalah***

Is Sukuk *Wakalah* that comprises of non-debt investment assets (the percentage of which is less than the percentage of debt investment assets) considered as debt and is the tradability of such Sukuk *Wakalah* on the secondary market subjected to the principle of *bai` al-dayn* (sale of debt)?

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<sup>2</sup> Among the examples of non-debt investment assets.

<sup>3</sup> Among the examples of debt investment assets.



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## RESOLUTION

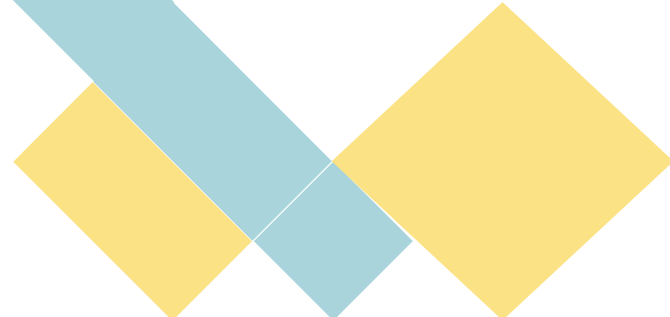
In the 266<sup>th</sup> SAC meeting held on 16 March 2023, the SAC had deliberated several issues in relation to *sukuk wakalah bi al-istithmar* (Sukuk *Wakalah*) where the *Wakalah* Portfolio comprises a combination of non-debt investment assets and debt investment assets. The SAC resolved as follows:

### **(A) Minimum Percentage for Non-Debt Investment Assets in *Wakalah* Portfolio**

- (i) At least 33% of the Sukuk *Wakalah* proceeds shall be invested into non-debt investment assets. This minimum percentage must be complied with at the time of each issuance of Sukuk *Wakalah*.
- (ii) It is not required to maintain such percentage throughout the tenure of the Sukuk *Wakalah*. However, the non-debt investment assets shall at all times be a component of the *Wakalah* Portfolio.

### **(B) Tradability of Sukuk *Wakalah***

- (i) Sukuk *Wakalah* that has a component of non-debt investment assets (even when its percentage is less than the percentage of debt investment assets) is considered as a portfolio of assets. Therefore, such Sukuk *Wakalah* is not categorised as debt.



- (ii) Such Sukuk *Wakalah* can be traded on the secondary market at any negotiated price between the contracting parties without being subjected to the principle of *bai` al-dayn* as long as the non-debt investment assets shall at all times be a component of the *Wakalah* Portfolio.

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## SHARIAH JUSTIFICATION

The main Shariah justification for the above SAC resolution is based on the principle of *khultah*. Literally, *khultah* means comingling of one to another. Technically, it refers to a property owned by two or more persons that are comingled based on *musha`*.<sup>4</sup>


In the context of Sukuk *Wakalah*, the principle of *khultah* is viewed from the perspective of comingling of investment assets in the *Wakalah* Portfolio i.e. a combination of non-debt investment assets and debt investment assets.

Sukuk *Wakalah* can be traded based on mutually agreed price if such sukuk involves investment in tangible assets and usufructs that are comingled with debts and currency although the ratio of the said tangible assets and usufructs are lesser than the debts and currency. This is because when such debts and currency are comingled with the tangible assets and usufructs, it adopts the ruling of tradability of tangible assets.<sup>5</sup>

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<sup>4</sup> Nazih Hammad, *Mu`jam al-Mustalahat al-Maliyyah wa al-Iqtisadiyyah fi Lughah al-Fuqaha`*, Dar al-Qalam, Damsyik, 2008, First Edition, p. 198-199. *Musha`* from the perspective of *fuqaha`* refers to joint ownership over an asset in proportion and physically undivided. Ibid. p. 417-418.

<sup>5</sup> Husain Hamid Hassan, *Sukuk al-Istithmar al-Islami*, al-Dawrah al-Tasi` Ashr Li Mu'tamar Majma' al-Fiqh al-Islami al-Dawli, 2013, p. 615, 617-618.



The above matter is in line with the hadith narrated by Ibnu Umar r.a. that Rasulullah S.A.W. said:<sup>6</sup>

مَنْ بَاعَ عَبْدًا وَلَهُ مَالٌ فَمَالُهُ لِلَّذِي بَاعَهُ إِلَّا أَنْ يَشْتَرِطَ الْمُبْتَاعُ

Meaning: "When a person sells a slave who has wealth, then the wealth is for the seller, unless the buyer stipulates this so."

The above hadith implies that when a slave as a sale item is comingled with his property (such as money) and it is stipulated that the property is included as part of the sale item, such property is considered as one single item together with the slave without being subject to the principle of *bai` al-sarf* (currency exchange). This is clarified by Ibn Qudamah where such hadith indicates that the trading of slave who owns a property is permissible if the intention of the buyer in such transaction is to own such slave, whether such property is known by the buyer or not, is from the same value (*thaman*) or not, is based on an asset or debt, or its value is less or more.<sup>7</sup>

Based on the said hadith, the tradability of Sukuk *Wakalah* that has comingled investment assets in the *Wakalah* Portfolio on a secondary market is permissible at any mutually agreed price provided that the element of *khultah* in such portfolio exists and it is not a requirement for the non-debt investment assets to be more than the debt investment assets.

With regard to the determination of the 33% of the investment of Sukuk *Wakalah* proceeds into non-debt investment assets, the SAC is of the view that such percentage is reasonable by taking into account the current practice in the Islamic capital market in Malaysia.

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<sup>6</sup> Al-Imam al-Hafiz Abi `Isa Muhammad `Isa Al-Tirmidzi, *al-Jami' al-Kabir*, Dar al-Gharb al-Islami, Beirut, Lebanon, 1996, vol. 2, p. 525.

<sup>7</sup> Yusuf `Abdullah al-Shubaili, *Abhath Fi Qadhaya Maliyah Mu`asirah*, Dar al-Maiman, Riyadh, Saudi Arabia, 2020, vol. 2, p. 109.