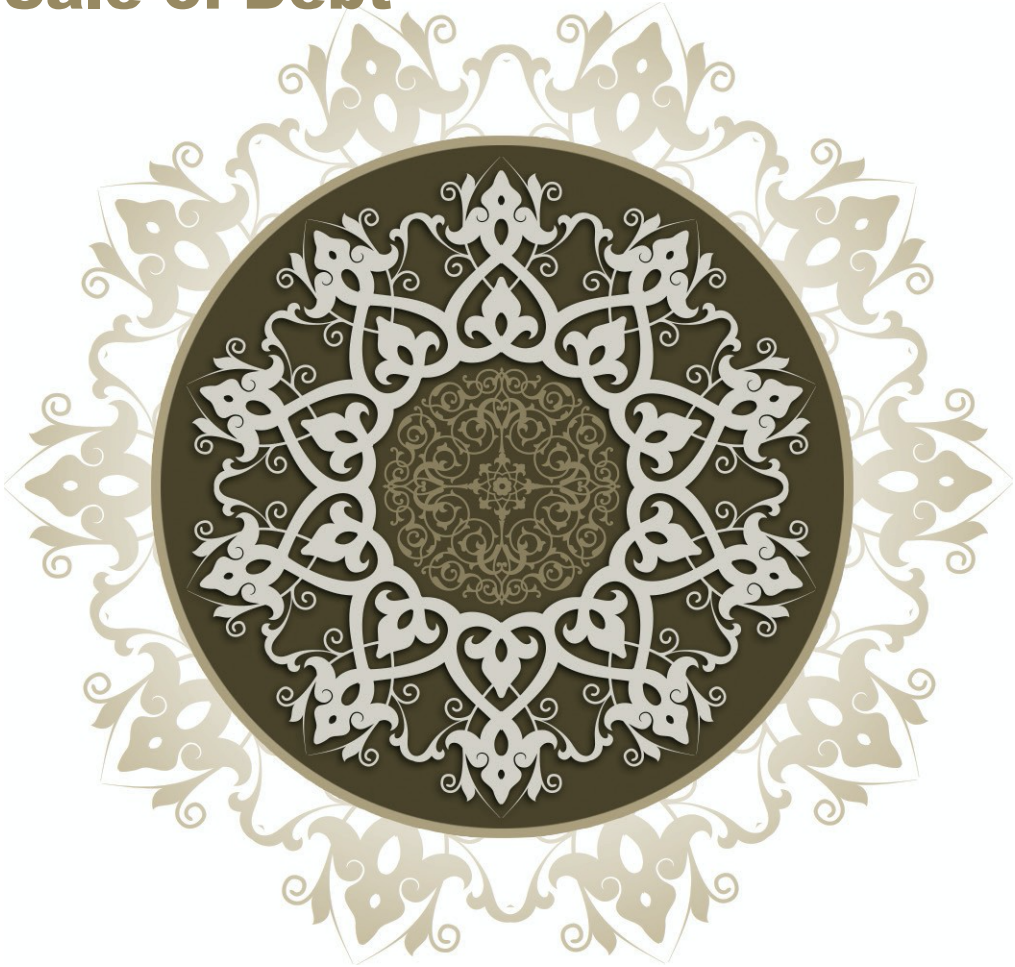




# **The AAOIFI Shari'ah Standard No. (59): Sale of Debt**





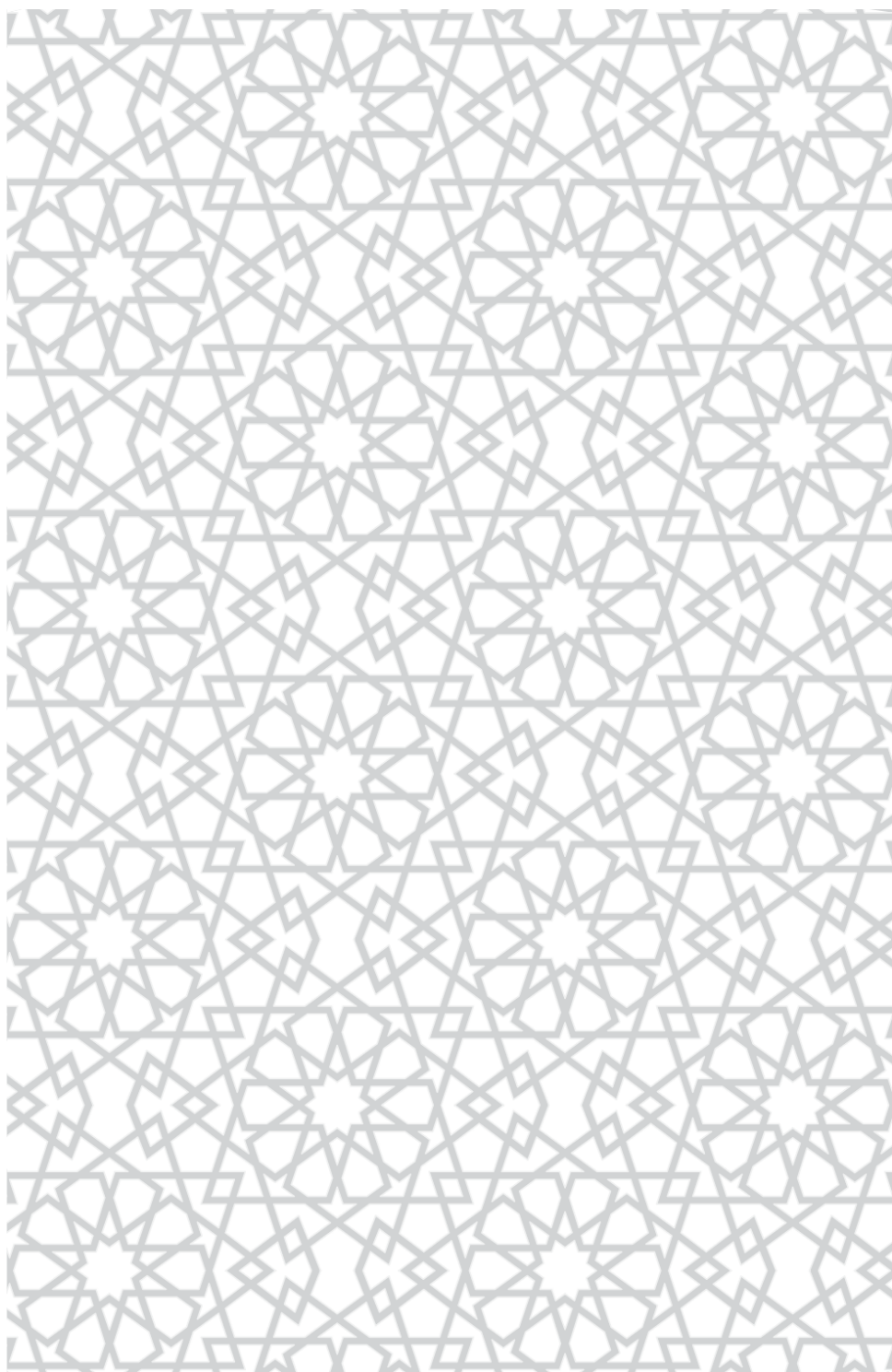
**Shari'ah Standard No. (59)**

## **Sale of Debt**



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***IN THE NAME OF ALLAH, THE MERCIFUL, THE VERY MERCIFUL***

All praise be to Allah, Allah's blessings are upon our master  
Muhammad, and his family and all his companions.

## **Preface**

This Standard aims:

to present basic information about the sale of debt, and

to present the types of sale of debt [as applied] by the Institutions<sup>(1)</sup>  
together with the relevant Shari'ah rules and their application.

*And, Only Allah guides to Success,,,*

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

## Text of the Standard

### 1. Scope of the Standard

This Standard deals with the sale of the debt to the debtor and its sale to a third party, i.e., a party other than the debtor.

[This Standard] does not deal with (i) the discharge of debt (*istifā' al-dayn*) by the debtor, whether in full or in part, if it does not take place through a commutative arrangement nor with (ii) novation (*hawāla*) or (iii) set-off (*muqāṣa*), since there is a separate standard for both.

### 2. Definition of Debt

Debt is an asset that is established and owed, irrespective of its cause of establishment. It may be in the form of money, commodities, or usufructs. It includes debts arising out of (i) a loan or (ii) a commutative contract (*ʿaqd muʿāwada*), or (iii) misconduct or negligence.

### 3. Types of Sales of Debt

As far as the buyer is concerned, the sale of debt is one of the below two types:

3/1 Sale of debt to the debtor himself.

3/2 Sale of debt to a third party other than the debtor.

### 4. Sale of Debt to the Debtor

4/1 It is permitted for the creditor to sell to the debtor a debt that is previously established between them, subject to the following rules:

4/1/1 **The First Rule:** The sale shall not lead to *ribā*.

4/1/1/1 If the debt is a usurious commodity, then it must fall within one of the below conditions [rules]:

**The First Condition:** The consideration of the debt is a usurious commodity and not of the same kind of debt: it is required to take possession of the



consideration in the contract session even if there is a difference in the quantity. Such as:

- the debt is in gold and is substituted with silver,
- the debt is in wheat and is substituted with dates, or
- the debt is in Egyptian Pounds and is substituted with Pounds Sterling.

**The Second Condition:** The consideration of the debt is a usurious commodity, and it is of the same kind of the debt: it is required that the quantities of the debt and its consideration are equal (*tamāthul*) and the possession of the consideration of the debt shall be transferred in the contract session. Such as:

- the debt is in dates and is sold for another type of dates,
- the debt is in sea salt and is sold against rock salt,  
Subject to what is stated in Item No. (4/1/1/2).

4/1/1/2 It is permitted for the creditor to recover his monetary debt, either in the whole or part, in a currency other than the currency in which the debt was established, subject to the following conditions:

- a. Possession of the substitute of the debt should be transferred in the contract session so that no part of the debt amount, which has been converted into other currency, remains outstanding.
- b. Discharge of the debt in another currency prior to the [stipulated] discharge time should not:
  - be stipulated [as a condition],
  - be [noticeable] by anticipation, or
  - a customary practice.
- c. [Discharge of the debt] should be at the exchange rate prevailing on the day of settlement, if:
  - the debt was resulted out of a loan contract,
  - or

there was a delay from the debtor in settling the debt when it matured.

4/1/1/3 In the contract of Salam, it is permitted to substitute the subject of Salam (the subject of sale), other than cash, after the maturity date by another asset without stipulating such substitution in the contract, whether such substitution is of the same or different kind, provided:

the substituting asset (*al-badal*) is fit to be the subject of Salam for the Salam capital, and

the market value of the substituting asset does not exceed the market value of the subject of Salam at the time of delivery.

For example, when the Salam contract is [for the sale of] gas, and it is substituted by oil. See Item No. (4/2) of the Shari'ah Standard No. (10): Salam and Parallel Salam.

4/1/2 **The Second Rule:** The transaction shall not be a legal artifice (*hila*) for *riba*, such as when [the contracting parties] collude to have the buyer pay the cash amount on the spot in exchange for deferred delivery of the commodity, and upon the delivery of the commodity, it is substituted for an amount more than the currency itself.

4/1/3 **The Third Rule:** The transaction shall not lead to establishing a new debt as an obligation upon the debtor with an increase upon the existing debt.

4/1/3/1 It is not permitted to sell the debt to the debtor in exchange for a new debt, which is established as an obligation upon him, if [the new debt] more than the [existing debt], and this shall be as a form of extinction of debt in debt (*faskh al-dayn*) by another debt which is prohibited as per Shari'ah.

4/1/3/2 It is not permitted to make the debt as the Salam capital,

for example, to make cash loans or financing receivables, which are owed to the Institution by the customer, as Salam capital. See Item No. (3/1/4) of the Shari'ah Standard No. (10): Salam and Parallel Salam.

4/1/3/3 All such things are prohibited, which may lead to an increase in the amount or the value of the debt against increasing the debt tenure or could be a means to it, irrespective of whether the debtor is solvent or insolvent. This includes the substitution of the debt by the creditor for a commodity and then selling it to the debtor for a deferred price higher than the amount of debt, and it is in the form of the prescribed sale of 'Inah.

4/1/3/4 Upon the request of a solvent debtor customer, it is permitted to execute a Murabaha contract, between the customer and the creditor Institution, pursuant to which new debt is established upon the customer that will be more than the first debt, even if the customer settles whole or part of the first debt using the sale price of the commodity that was purchased under the new financing. This is subject to the following rules:

- a. The new Murabaha should be a financing transaction independent of the transaction that established the first debt, so that:

[entering into the new Murabaha] will not be stipulated in the contract [of the first debt],

it shall not be required in [the new Murabaha] contract, nor in the financing documentation, to settle the first debt using the selling price of what was purchased by the customer, and

credit approval must be given for [the new Murabaha] because it is new financing.

- b. The contract of new Murabaha should be a valid contract resulting [it's respective] Shari'ah effects, such as:

the customer is entitled to take actual delivery of the subject of sale, and

[the customer] is entitled to retain ownership [of the subject of sale], if the delivery was constructive,

be able to dispose of the subject of sale as he deems fit with no obligation to sell thereof.

What is stated in

the Shari'ah Standard No (8): Murabaha,  
Shari'ah Standard No. (30): Tawarruq, and  
Shari'ah Standard No. (20): Sale of  
Commodities in Regulated Markets  
shall apply.

- c. The customer shall be entitled to dispose of the sale price of the asset he purchased under the new Murabaha, as he deems fit, even if he deposits such the [selling] price in his account held with the Institution. Further, [the new Murabaha should] include the right for the customer to use [the selling price] by [him] as per his choice to settle the first debt after one working day following his receipt of the selling price or getting it deposited in his account.

If the new transaction is entered with a delinquent customer, then:

it is not permitted for the Institution to compensate itself, either directly or indirectly, for the delinquency [of the customer] in settling the first debt, and

the profit rate in the new Murabaha should not exceed the rate for such a customer if he was not delinquent.

- 4/2 It is not permitted to enter into an agreement between the creditor and the debtor at the time of origination of the debt to sell [the debt] to the debtor in the future. Likewise, a bilaterally binding promise between [the creditor and the debtor] is prohibited. Although, if the preceding rules, as mentioned in Item No. 4/1, were materialized in the promised sale, then it is permitted to have a unilaterally binding promise. Refer to Item No. (2/9) of the Shari'ah Standard No. (1): Trading in Currencies.

## 5. Sale of Debt to a Third Party other than the Debtor

- 5/1 It is not permitted to sell a monetary debt against cash or for a monetary debt. However, if the transaction is an assignment of debt, then it is not considered a sale of debt. See Shari'ah Standard No. (7): Hawala.
- 5/2 It is permitted to sell a monetary debt for a commodity with spot delivery or for a usufruct or service wherein its subject-delivery can be ascertained at the time of sale. Hence, it is not permitted to sell a monetary debt against a commodity with deferred delivery, for example, making a debt owed by a third party as the Salam capital. See Item No. (3/1/4) of Shari'ah Standard No. (10): Salam and Parallel Salam. Similarly, it is not permitted to sell [a monetary debt] for a usufruct or a service with unascertained subject-delivery.
- 5/3 It is not permitted to sell a commodity debt prior to taking its possession, whether it is sold against cash, commodity, usufruct, or service.
- 5/4 It is not permitted to sell the debt if it was a usufruct or a service that is due and described (*mawṣūfa fī dhima*) (where the subject of delivery is not specific), regardless of whether [such usufruct or service] are sold for cash, commodity, usufruct, or service.
- 5/5 It is not permitted to sell the debt to a third party if it has excessive *gharar* (uncertainty)<sup>(1)</sup>, such as:
- 5/5/1 The debt is not established either by acknowledgment or by evidence.
- 5/5/2 Lack of knowledge (*jahāla*) of the amount of debt.
- 5/6 The consent of the debtor is not required for the sale of debt to a third party unless the debtor and the creditor have agreed otherwise.
- 5/7 The buyer shall have the rescission option for misrepresentation (*khayār al-taghrīr*) if the seller of the debt was aware of the debtor's insolvency or procrastination, but the buyer was not informed about that. See Item No. (2) of the Shari'ah Standard No. (48): Options for Breach of Trust.

## 6. Division of the Debt

- 6/1 It is permitted for the claimants in one debt to divide it among

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(1) Refer to Shari'ah Standard No. (31): Controls on Gharar in Financial Transactions.

themselves in proportion to their respective shares so that each claimant shall reserve his respective share in it.

6/2 It is permitted for the claimants in multiple debts to divide the debts among themselves so that each claimant shall reserve a debt or more based on his share.

6/3 If what is owned by the partners includes debts, tangible assets, and cash, then it is permitted for them to agree [on an arrangement] where some of them will take debts, some will take cash, and others take tangible assets.

## **7. Transfer of Ownership of the Debt and Its Collateralization**

7/1 Ownership of the debt and its risk are transferred to its buyer by the effect of any means, which customarily allows the buyer of the debt to claim the debt.

7/2 If the debt is collateralized by an established pledge or an established guarantee, then the pledge and guarantee will transfer to the buyer along with the sold debt, if:

it was stipulated by the buyer upon the seller of the debt, or

it was admitted by the custom, and the pledgor or the guarantor has not stipulated non-assignability of the pledge or the guarantee.

7/3 The buyer of the debt may stipulate upon the seller of the debt to collateralize the debt by a Shari'ah compliant guarantee from a third party so that the buyer will purchase the debt that is collateralized with a guarantee. An example is the requirement to have Islamic insurance (Takaful) on the debt prior to its sale. Refer Item No. (6/4) of the Shari'ah Standard No. (5): Guarantees.

7/4 The buyer of the debt may stipulate upon the seller of the debt to guarantee the debt that is owed by the debtor so that the buyer will have the right of recourse upon the seller with regards to the portion of the debt that was not recovered.

## **8. Sale And Negotiability of the Debt When Combined with Other Assets**

8/1 If:

the debt is part of the assets of an entity that is in existence and has

ongoing permissible activities, whether these activities were commercial, financial, industrial, related to real estate, services, agricultural, import-export, sale and purchase of commodities and the like,

then:

it is permitted to sell such an entity or its share of [the debt] without considering the provisions of the sale of debt in regard to [the portion] of the debts out of its assets whatever would be the ratio of debts, as long as such debts are generated from the turnover [of business] because such debts are ancillary to the activity [of the entity].

For example:

shares of joint-stock companies, including Islamic banks,  
investment fund units,

Sukuks that are based on Mudaraba and investment agency provided the entity is not entirely composed of debt.

8/2 If:

assets of the Institution include debts, tangible assets, usufructs, and rights, and out of such assets, the Institution separated some debts, tangible assets, and the like, in a legally recognized entity wherein commingling of assets (*khulṭa*) is materialized (e.g., a special purpose company, or an investment portfolio, that is registered with the relevant authorities), and assets of the Institution are not turned over on an ongoing basis,

then:

the Institution may sell or securitize such an entity (entirely or a common share out of it) or issue Sukuk thereof, subject to the following rule:

8/2/1 The sale shall result in [its respective] Shari'ah effects, including transfer of ownership and risk to the buyer, as the buyer shall bear the risks [associated with] the asset. It is not permitted to stipulate that such risks will be borne by the seller at any stage of the process.

8/2/2 The ratio of tangible assets and other like assets shall exceed 50% of the value of the assets of the entity.

8/2/3 Upon issuance of Sukuk, the Institution should take all the necessary precautions to maintain the referred ratio by selecting the assets for the purpose of issuing Sukuk. Hence, if the ratio is no longer maintained due to a supervening event, which is acknowledged by a competent Shari'ah Board, then the Institution is required to forthwith restore the ratio within a period specified by the Shari'ah Board. In all instances, the ratio of the tangible asset shall not fall at any time below 33% of the value of the asset(s). Otherwise, the Sukuk-holders shall be notified that the Sukuks are no longer negotiable, except in accordance with the Shari'ah conditions for the trading of debts. If the Sukuk were listed on an exchange, it is required to delist, and the Sukuk-holders will be entitled to liquidate [their holding of] Sukuk, subject to compliance with the provisions of disposition of debts.

8/2/4 In case some of the debts of an entity's assets were settled, the entity must, upon purchasing new debts, abide by the rule set out in Item No. (5) of this Standard. It shall not be deemed as a turnover if:

there was the substitution of part of the debts, tangible assets, or other like assets of the entity, or

a new Murabaha was extended to the same debtor.

Due to this, Item No. (8/1) of this Standard shall not be applicable; rather, provisions mentioned in Item No. (8/2) of the Standard will apply.

8/3 If:

debts, other tangible assets, and the like were combined or separated for the purpose of selling them under one leg, without such assets being in an entity (where the principle of Shari'ah compliant commingling, asset out in paragraph (8/2), is materialized), for example: [debts and tangible assets] are:

combined in a sale contract,

subjected to accounting separation, or

separated in an account held with the Institution,

even if it was in the form of a portfolio that is not registered with the



relevant authorities,  
then:

the provisions of the sale of debt, as set out in Para No. (5) of this Standard, apply.

8/4 If:

Sukuk are issued, and a part of their proceeds are utilized in executing the Murabaha transactions while the other part is utilized in tangible assets (e.g., the assets of Mudaraba, Ijarah, or service agency),

then:

trading of such Sukuk shall be subject to Item No. (8/2), provided that the Sukuk issuance shall not amount to guaranteeing what is not permitted as per Shari'ah.

## **9. Contemporary Practices of the Sale of Debt**

### **9/1 Sale and Discounting of Commercial Papers:**

9/1/1 It is permitted to sell a commercial paper to the debtor or to a third-party subject to considering the provisions of the sale of debt, as set out in Item No. (4) and Item No. (5) of this Standard.

9/1/2 It is not permitted to discount the commercial papers, but it is permitted to settle the commercial paper to its first beneficiary (the creditor), prior to its maturity, for an amount less than its value. See:

Item No. (6/1) of the Shari'ah Standard No. (16):  
Commercial Papers, and

Item No. (10) of the Shari'ah Standard No. (47):  
Rules for Profit Calculation in Financial  
Transactions.

### **9/2 Sale of Bonds:**

9/2/1 It is not permitted to trade in Shari'ah non-compliant bonds, whether by their sale, purchase, assignment, or otherwise. See Item No. (5) of the Shari'ah Standard No. (21): Securities (Stocks and Bonds).

9/3 Trading in Salam Sukuk and Murabaha Sukuk:

9/3/1 It is not permitted to trade in Salam-based Sukuk and Murabaha-based Sukuk for a cash price. See Para No. (5) of this Standard and refer Item No. (5/2/14) of the Shari'ah Standard No. (17): Investment Sukuk.

9/3/2 It is permitted to exchange Salam Sukuk or Istisna' Sukuk with the debtor in accordance with the rule of sale of debt, as set out in Item No. (4/1) of this Standard. Further, see Item No. (4/1/1/3) of this Standard.

9/4 Trading in Financial Securities comprising of receivables:

9/4/1 Trading in financial securities, whose underlying assets comprise of debts owed by a third party, shall be subject to the rule set out in this standard.

9/5 Securitization of Receivables:

9/5/1 Securitization of receivables is a mechanism for the conversion of debts to financial securities that can be traded in the money markets.

9/5/2 It is not permitted to trade in the financial securities, which are based on securitization of monetary debts unless their trading is against a commodity, a usufruct, or service wherein its subject-delivery was ascertained, and this shall be in accordance with Item No. (5/2) of this Standard.

9/6 Factoring:

9/6/1 Factoring is a contract whereby an institution assigns its trade receivables, which are invoiced in whole or only in specific types thereof, on a frequent basis to a factor, [a party] that takes the place of the creditor-institution with regards to the debts it assumes and stands obliged to pay its amounts to the institution immediately on the spot or upon maturity, regardless of whether these debts were recovered or not, and [this shall be] in return for a pre-agreed monetary amount.

9/6/2 As per Shari'ah, it is not permitted to deal in a contract of

purchasing the invoices on a discount (factoring), unless their purchase was for a commodity, or a usufruct or a service wherein the subject-delivery is ascertained, according to Item No. (5/2) of this Standard.

9/7 It is not permitted to sell the debt to a third party for another debt, which is owed to this party [i.e., the third party] by another party. Such as when two institutions agree to swap their portfolios of receivables that are [owed] by their customers.

#### **10. Date of Issuance of the Standard**

This Standard was issued on 22<sup>nd</sup> Rabī' Al-Ākhirah 1440 H., corresponding 29<sup>th</sup> December 2018.

## **Adoption of the Standard**

The Shari'ah Standard on Sale of Debt was endorsed by the Shari'ah Board in its 65<sup>th</sup> meeting held in the Kingdom of Bahrain during 20-22 Rabi' Al-Ākhirah 1440 H. (corresponding to 27-29 December 2018).

## **Appendix (A)**

### **Brief History of the Preparation of the Standard**

The Shari'ah Board resolved on 4<sup>th</sup> Rabi' Al-Awal 1435H (corresponding to 4<sup>th</sup> February 2014) to assign one expert to prepare a detailed Shari'ah study on the sale of debt.

The sub-committee of the Shari'ah Standards discussed in its meeting held in Jeddah on 6<sup>th</sup> September 2015 the [presented] study and requested a few amendments from the researcher.

The sub-committee of the Shari'ah Standards discussed in its meeting held in Jeddah on 8<sup>th</sup> November 2015, the revised study and endorsed it and even discussed the draft of Standard, and made amendments as found suitable.

The sub-committee of the Shari'ah Standards continued discussing the draft of the Standard in its meeting held in Jeddah on 23<sup>rd</sup> December 2015, made amendments as found suitable, and submitted the draft to the Shari'ah Board.

The Shari'ah Board initiated discussing the draft of the Standard in its 48<sup>th</sup> Meeting held in the Kingdom of Bahrain between 15<sup>th</sup> to 18<sup>th</sup> Sha'bān 1438H. (corresponding 12<sup>th</sup> to 15<sup>th</sup> May 2017) and made amendments which were found suitable, and it resolved to continue looking into the draft in its following meeting.

The Shari'ah Board continued discussing a draft of the Standard in its 49<sup>th</sup> Meeting held in the Kingdom of Bahrain between 1<sup>st</sup> -3<sup>rd</sup> Muḥarram 1439H (corresponding to 21<sup>st</sup> – 23<sup>rd</sup> September 2017) and made amendments which were found suitable, and it resolved to present the draft to the hearing sessions.

Pursuant to the directives of the Shari'ah Board to present the draft to the hearing sessions, the General Secretariat of AAOIFI held 5 hearing sessions in

The following locations: Riyadh on 23<sup>rd</sup> Rabī' Al-Awal 1439H (corresponding to 11<sup>th</sup> December 2017), Algeria on 26<sup>th</sup> Rabī' Al-Awal 1439H (corresponding to 14<sup>th</sup> December 2017), Sudan on 26<sup>th</sup> Rabī' Al-Awal 1439H (corresponding to 14<sup>th</sup> December 2017), Morocco on 27<sup>th</sup> Rabī' Al-Awal 1439H (corresponding to 15<sup>th</sup> December 2017), and Kuwait on 2<sup>nd</sup> Rabī' Al-Awal 1439H (corresponding to 20<sup>th</sup> December 2017). The hearing sessions were attended by various scholars, jurists, experts representing central banks and Islamic financial institutions, accounting, auditing and law firms, university professors, and other relevant persons in the field. The draft of the standard was discussed in detail, and all the comments and suggestions made by the scholars and experts were recorded.

The Shair'ah Board, in its 51<sup>st</sup> Meeting held in Makkah between 10<sup>th</sup>-13<sup>th</sup> Rabī' Al-Ākhir 1439H (corresponding to 28<sup>th</sup> – 31<sup>st</sup> December 2017), discussed the comments and suggestions which were made in the hearing sessions and made suitable amendments.

The Shari'ah Board continued discussing the draft of the Standard in its 52<sup>nd</sup> Meeting held in Madinah between 20<sup>th</sup> -22<sup>nd</sup> Jamādā Al-Ākhira 1439H (corresponding to 8<sup>th</sup> – 10<sup>th</sup> March 2018) and made suitable amendments.

The Shari'ah Board continued discussing the draft of the Standard in its 55<sup>th</sup> Meeting held in Madinah between 22<sup>nd</sup> – 24<sup>th</sup> Şafar 1440H. (corresponding to 1<sup>st</sup> – 3<sup>rd</sup> November 2018) and made suitable amendments.

The Shari'ah Board continued discussing the draft of the Standard in its 56<sup>th</sup> Meeting held in the Kingdom of Bahrain between 20<sup>th</sup> - 22<sup>nd</sup> Rabī' Al-Ākhir 1440H. (corresponding to 27<sup>th</sup> – 29<sup>th</sup> December 2018) and endorsed the Standard in its present version.

## Appendix (B)

### The Basis of Shari'ah Rulings

#### Introduction:

It is a well-known fact that the inception of Islamic banking, its spread and growth in synchrony with the contemporary requirements, needs of the customers and their interests developed in an unprecedented manner that was not found in earlier times and eras. This was followed by several juristic advances leading to innovative contractual arrangements and financial products of significant importance. Such arrangements clearly address the genuine needs and interests, averting any harm considering the obvious global competition.

All this has resulted in encouraging senior contemporary jurists to find acceptable Shari'ah compliant modes based on sound juristic interpretation of relevant texts, benefiting from legal maxims, general principles of Islamic law, and precedents inherited from previous renowned jurists. This was fulfilled in a collective exercise of sound *ijtihād* (juristic reasoning) based on Islamic legal maxims, legislative principles, juristic schools, and established Shari'ah foundations related to transactional topics.

#### 4. Sale of Debt to the Debtor:

4/1: The basis of permitting the sale of an established and outstanding debt to the debtor:

- Contracts, as a rule, by default are valid and permitted.
- It is reported by the compilers of Sunan and Imām Aḥmad in his Musnad that Ibn 'Umar (RA) said: *I used to sell camels in al-Baqī', so as I sell with the price denominated in gold coins (dīnār) and collected in silver coins (dirham); and sell them denominated in silver coins collecting in gold coins, taking those from that and giving these out of that. I came to the Prophet (PBUH) and inquired (about the permissibility of my act), so he said: "there is no harm in this if it is at the rate of that day, as long*

*as you do not depart without fully concluding the transaction*"<sup>(1)</sup>. This Ḥadīth indicates the permissibility of selling a monetary debt, which is outstanding, to the debtor, and by analogy (*qiyās*) other matters can be permitted.

- The sale of such debt by the debtor is permitted because the debtor is considered as the possessor of what is owed by him. This is similar to permitting the sale of the usurped property (by its owner) to the usurper (being already in possession of the property).
- It would be an exercise of meaningless contriving formality if the creditor was required to take possession of the debt, intended to be sold, and then sell it to the same debtor.
- This contract will cause no harm (to any party) and achieves an evident interest, i.e., discharging the debtor from any outstanding amount owed by him and enabling the creditor to receive his debt settled by the debtor.

4/1/1/1 (a): the basis of requiring to take possession by the creditor of the consideration of the debt within the contract session (*majlis al-‘aqd*) when a debt based on a usurious commodity is sold against a consideration in a usurious commodity of a kind different that of the debt:

- The Shari'ah evidence requiring immediate exchange (*taqābuḍ*) in all sale contracts where both of its considerations are subjected to the provisions of *riba al-nasī'ah*, and one of these evidences is what has been reported in an authentic Ḥadīth of the Prophet (PBUH): "*Gold for gold, silver for silver, wheat for wheat, barley for barley, dates by dates, and salt by salt through equal measure and immediate exchange. If these categories differ, then sell as you wish if it was through an immediate exchange*"<sup>(2)</sup>.

4/1/1/1 (b): the basis of requiring equal quantity and taking possession of the counter-value in the contract session while selling debt with usurious commodity to the debtor against a counter-value which belongs to the same kind of the debt:

- The Shari'ah evidence requires equality in the quantity and immediate exchange while selling usurious commodity against

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(1) Sunan Abū Dāwūd (3/250), Sunan al-Tirmidhī (3/535), Sunan al-Nisā'ī (7/281), Ibn Mājah (2/760), Musnad Aḥmad (9/390), Al-Mustadrak by al-Ḥākim.

(2) Ṣaḥīḥ Muslim (3/1211).



its similar kind, and this includes the prior Ḥadīth.

4/1/1/2: the basis of permitting the discharge of the debt in a currency other than its original currency:

- What was reported by Ibn 'Umar (RA): *"I used to sell camels in al-Baqī', so as I sell with the price denominated in gold coins and collected in silver coins; and sell them denominated in silver coins collecting in gold coins, taking those from that and giving these out of that. I came to the Prophet (PBUH) and inquired (about the permissibility of my act), so he said: "there is no harm in this if it is at the rate of that day, as long as you do not depart without fully concluding the transaction"*<sup>1</sup>. This Ḥadīth permits selling what's outstanding, in one of the monetary debts, against the other monetary debt to a party that owes the outstanding debt.
- The debtor is deemed to be the possessor of the monetary debt owed by him, so it is permitted to enter into a currency exchange of this amount by the debtor against another currency which is transferred in the contract session.

4/1/1/2 (a): the basis of requiring to take possession of the substitute of the debt in the contract session at the time of discharge from the debt in another currency:

- the requirement of immediate exchange as stated in the preceding Ḥadīth.

4/1/1/2 (b): the basis of requiring not to allow discharge from the debt in another currency by stipulating it as a condition, having it noticeable by anticipation, or being a customary practice:

- this would become a deferred *ṣarf*.

4/1/1/2 (c): the basis of requiring that when debt is discharged in another currency, then it shall be the exchange rate on the settlement day:

- what is reported by Ibn 'Umar (RA) said: *I used to sell camels in al-Baqī', so as I sell with the price denominated in gold coins and collected in silver coins; and sell them denominated in silver coins collecting in gold coins, taking those from that and giving these out of that. I came to the Prophet (PBUH) and inquired (about the permissibility of my act), so he said: "there is no harm in this if it*

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(1) See reference in Basis No. 4.1.

*is at the rate of that day, as long as you do not depart without fully concluding the transaction”.*<sup>(1)</sup> Hence the Prophet (PBUH) restricted the permissibility of recovering silver coins out of the gold coins, and visa-versa, and if it was not restricted, was done against the rate of that date, and

- not restricting the exchange rate by the rate of the settlement date might result in adversely impacting the debtor by accepting an increase of the currency rate against his indebtedness and his distress to settle his debt, and this shall constitute an increase in the debt against extending the loan or increase in the time of settlement. On the other hand, this may result in adversely impacting the creditor so that the debtor may reduce part of the creditor's rights via reducing the exchange rate, and the creditor shall be under compulsion to accept it because of the fear from the debtor to be unable to pay, to procrastinate or ingratitude on his part [while settling the debt].<sup>(2)</sup>

4/1/1/3: the basis of permitting substituting the subject of Salam with another thing, that is not money, after the maturity [of the Salam delivery time]:

- in principle, the contracts deemed to be permitted and valid, and
- this shall materialize an acknowledged Shari'ah objective which is the discharge of an obligation, and there is no Shari'ah objection if it was carried by observing its [respective] rules and provisions.

4/1/1/3: The basis of requiring the substituted asset to be fit as the subject of Salam against the capital of Salam:

- this could be a means for selling a usurious commodity against a usurious commodity on a deferred basis, so it was prohibited as the issue of In'ah.<sup>(3)</sup>

4/1/1/3: The basis of requiring not to have the market price of the substitute asset more than the market price of the subject of Salam at the time of delivery:

- this would lead the creditor making profits of that which he has

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(1) *Ibid.*

(2) Sharḥ Mushkil al-Āthār by al-Taḥāwī (3/284).

(3) Mughnī (4/128).

not assumed its risk, and it was proscribed to make profits without assuming its underlying risk<sup>(1)</sup>, and

- this could result in a loan that results in a benefit [for the creditor]. It is mentioned in Muwaṭṭa that Imām Mālik said that there is a consensus among scholars that if a person entered into Salam contract over a slave, livestock, or merchandises, and all of it was described with a Salam delivery to be made by the end of the period, and if such period matured, then the buyer shall not sell what he purchased for a price more than the price of Salam prior to taking possession of the subject of Salam. In case the buyer does that, then it will be *ribā*, as the buyer gave the seller gold coins or silver coins, so he benefited from them, and when the delivery period of Salam was matured with no transfer of possession to the buyer, then the seller purchased from the party owning it [i.e., the buyer] for more than the Salam price, this implies that the seller received back what was the subject of Salam and further added from his side.<sup>(2)</sup>

4/1/3/1 The basis of not permitting the extinction of debt in debt (*faskh al-dayn fī al-dayn*) which is the sale of the debt by the debtor against a new debt that is established as an obligation on [the debtor]:

- As per Ibn Mundhir, scholars have a consensus that [extinction] of debt by another debt is not permitted. This includes a person entering in a Salam contract with another person for food items, and when the delivery of Salam matured, then the seller enters in a Salam [sale] for food of larger quantity or sells that food owed by him for gold coins for a different delivery time. Hence, this implies that the debt has revolved into a similar debt. Further, he mentioned that there is a consensus among the scholars on prohibiting a person who owes gold coins from another person to enter in a Salam sale of food for the known period.<sup>(3)</sup>
- As per Ibn al-Subkī, there is a consensus on prohibiting the person who has a debt owed from another person to create any debt owed by the debtor that shall be different in the quality and value of debt. In reality, it shall be the sale of debt for what shall

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(1) Ḥadīths as mentioned in Sunan Abū Dāwūd (3/283), Sunan al-Tirmidhī (2/526), Sunan al-Nisā'ī (7/288), Musnad Aḥmad (11.253), Mu'jam al-Ṭibrānī (3/207).

(2) Muwaṭṭa by Imām Mālik (2/659).

(3) Al-Ishrāf by Ibn al-Mundhir (6/44); Al-Ijmā' by Ibn al-Mundhir, 94.

turn out to be a debt<sup>(1)</sup>,

- it is in the form of *ribā al-jāhiliyah*, which is the sale of debt against a new debt that is outstanding upon the debtor and is more than the original debt, and this implies an increase of debt against its deferment.

4/1/3/2: The basis of not permitting the making of debt as the capital of Salam:

- It is a form of extinction of debt in debt, and
- A juristic consensus is reported in proscribing it. As per Ibn Mundhir, scholars have a consensus that extinction of debt in debt is not permitted. This includes a person entering Salam with another person for food items, and when the delivery of Salam matured, then the seller enters into Salam for food of larger quantity or sells that food owed by him for gold coins for a different delivery time. Hence, this implies that the debt has revolved into a similar debt. Further, he mentioned that there is a consensus among the scholars to prohibit the person, who owes gold coins from another person, to enter in Salam [sale] of food for the known period.<sup>(2)</sup>

4/1/3/3: The basis of prohibiting all matters that may cause an increase of debt in terms of volume or value against an increase of the time of settlement:

- it is a form of *ribā al-jāhiliyah*, which is an increase of debt against deferment.

4/1/3/4: the basis of permitting the execution of Murabaha, made on the request of an indebted and non-insolvent customer, which will result in a new debt which is higher than the first debt even if the sale proceeds of the commodity [of the new Murabaha] were used, subject to abiding by the given rule, to settle the first debt:

- the rules will make the new Murabaha a new and independent Murabaha for the customer who owes a debt to the institution similar to any other financing; also, there could be a chance that there will be no proceeds of selling the commodity purchased on the new financing of Murabaha, so no settlement of [existing debt] will be made. In case proceeds were generated and the

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(1) Takmilat al-Majmū' (10/106).

(2) Al-Ishrāf by Ibn al-Mundhir (6/44); Al-Ijmā' by Ibn al-Mundhir, 94.

customer settled the existing debt, then it will be upon his disposition, which the Institution has no authority over, and the sale proceeds are in the money, which cannot become specific (*mu'ayyan*) by appropriation (*ta'yyin*).

4/2: the basis of prohibiting to carry a bilateral promise to sell the debt to the debtor if the promise was bilaterally binding:

- bilaterally binding promise in this form is a mean to artificially achieve *ribā*.

### 5: Sale of Debt to a Third Party Other than the Debtor

5/1: The basis of not permitting the sale of monetary debt against cash or against monetary debt:

- it contains *ribā faḍal* (ribā with excess) and *ribā al-nasī'a* (ribā of delay) if the counter-value was different in value of the monetary debt, and it would be *ribā al-nasī'a* if the counter-value was equal in value with the monetary debt.

5/2: The basis of permitting to sell the monetary debt to a third party against a present commodity, usufruct, or service, with specific subject matter:

- specific asset and its usufructs do not represent debt, so it will not result in the sale of debt against debt, and
- if the usufructs were attached to a specific asset, then they are treated as specific assets that is taken into possession. It was based on the scenario given by al-Dasūqī in *Al-Sharḥ al-Kabīr*<sup>(1)</sup> regarding the sale of debt, even if on a spot basis, to someone who does not owe it. This includes when a person has a debt owed by a person; then he sells it on credit to a third party. This does not imply disallowing the sale of debt to someone other than the party owing the debt against a specific asset (e.g., real estate) or usufruct of a specific asset when its transfer of possession is delayed. Hence, if (A) has a debt owed by (B), so it is permitted for (A) to sell the debt to (C) against a specific asset when its transfer of possession is delayed. Further, it is not permitted to sell the debt unless it was present (*ḥāḍir*) or the purchase [of the debt] was against cash. A specific asset (*mu'ayyin*) and its usufructs, where transfer of possession is delayed is not [considered as] cash, because cash refers to what is not owed as a

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(1) Sharḥ al-Kabīr by al-Dardīr and Ḥāshiyat al-Dasūqī (3/63).

liability. It is beyond doubt that specific asset and its usufructs are not owed as a liability, rather they [are deemed] as cash in this sense. Further, cash does not include money that is already taken into possession.

5/3: The basis of not permitting to sell a commodity debt prior to taking it into the possession:

- [such a sale] contains *gharar* (uncertainty).

5/4: The basis of not permitting to sell the debt against a usufruct or service, which will be delivered as per description (with unascertained subject-matter), that:

- [such a sale] contains *gharar* (uncertainty).

5/6: the basis of not having a requirement to secure permission from the debtor to sell the debt to a third party:

- applying the analogy of *hawālā* (novation),
- the creditor may demand his right on his own or by a party acting on his behalf.

5/6: The basis for requiring to seek permission from the debtor while selling the debt to a third party if it was stipulated between the creditor and the debtor:

- saying of the Prophet (PBUH) said: "*Muslims act up their conditions.*"

## 6: Division of the Debt

6/1 and 6/2: The basis of permitting to divide single or several debts among the partners:

- Such a division is separation and not a sale.

6/3: The basis of permitting an agreement among the partners in a joint property (containing tangible assets, debt, and cash) that some [partners] will take debts and cash and some will take tangible assets:

- the division in this scenario is a form of *ṣulḥ* (settlement) among the partners.

## 7: Transfer of Ownership of the Debt and Its Collateralization

7/1: The basis of the transfer of debt and its risk to a buyer of the debt so as to

enable raising a claim for it:

- the risk of the subject of sale will transfer to the buyer either by taking the possession or *tamkīn* (enabling the buyer to take the possession), and the buyer of the debt is deemed to be the possessor if he was enabled to make a claim of the debt.

7/2: The basis of non-inclusion of the pledge or the guarantee in the sale of debt to a third party unless by stipulation:

- the sale of debt, when absolute, shall not include them. This was referred in Ḥāshiyat al-Dasūqī<sup>(1)</sup>, where it was mentioned that if a person buys a debt, or receives it as a gift, which was backed by a pledge or a guarantee, then the pledge or the guarantee will not be included in [the acquired] debt or the gift unless it was stipulated to include the same with presence and acknowledgment of the guarantor of the guarantee. The Standard does not expressly require the presence of the guarantor and his agreement of the guarantee because establishment of the pledge or the guarantee stands for it.

7/3: The basis of permitting to stipulate a condition by the buyer of the debt upon the seller of the debt to be secured by a permitted guarantee:

- it is a condition that is suitable to the contract and has no Shari'ah prevention.

7/4: The basis of the permissibility of stipulating by the buyer of the debt on the seller of the debt to be secured by a permitted guarantee:

- it is a condition which is suitable to the contract) and has no Shari'ah prevention.

## **8. Sale and Negotiability of the Debt that is Joined with Other Assets**

8/1: The basis of selling and trading the debt if it was part of assets of an entity in existence, which has ongoing activities, without observing the rulings of the sale of debt:

- the concept of appurtenance (*taba'īya*) as determined by Islamic jurisprudence, and
- permitting to sell a thing consequentially which cannot be sold independently. In case the entity is comprised purely of debts, then the

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(1) Sharḥ al-Kabīr by al-Dardīr and Ḥāshiyat al-Dasūqī (3/63).

principle of appurtenance is disappplied, and the original rulings of the sale of debt shall be observed.

8/2: the basis of the permissibility of separating debts and tangible assets (and the like) in a legal entity which materializes the commingling principle as per Shari'ah, and disposing of the entity or by part of it without abiding by the rulings of sale of debt:

- formation of the entity will meet the requirements of the assemblage (*tarkīb*), which is required by Mālikīs in permitting the sale of jewelry ornamented by gold or silver for a price out of the same kind of the designed material without looking at its volume. As per al-Ḥaṭṭāb<sup>(1)</sup>, the jewelry should be fixed on the ornament so that it will damage the ornament if removed. In case there is no damage, then this condition is not fulfilled. It is mentioned in Tawḍīḥ, that, as per al-Bājī, this includes stones with fixed jewel and decoration of fixed the sword.

8/2/1: The basis of requiring the buyer of the entity to assume the risk of the tangible assets (and the like) [that are part of the total] asset:

- it is among the Shari'ah requirements of the ownership,
- it is invalid, as per Shari'ah, to make the seller [continue] assuming the risk of the tangible assets [after their sale], and this will imply that the intention of the buyer is directed towards the debts and not the tangible assets, and thus the inclusion of the tangible assets with the debt in an entity will be superficial (*shaklī*) with no regard to treating the entity or its parts as a tangible asset.

8/2/2: The basis of requiring the percentage of tangible assets (and the like) to be more than 50% of the assets of the entity:

- the larger portion will be given the ruling of the whole, and this percentage is an opinion among Mālikīs – against the well-known opinion (*khilāf al-mashhūr*) - for the materialization of the concept of appurtenance based on the volume upon selling items ornamented with gold or silver if the price was of the same kind of the ornaments. As per al-Kharashī<sup>(2)</sup>, the portion of the ornament is one-third or less, as per the popular view. As per al-Abī<sup>(3)</sup>, there is a difference of view about appurtenant, and some said it's one-third, less than one-third,

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(1) Mawāhib al-Jalil (4/331).

(2) Sharḥ al-Kharashī (5/48).

(3) Ikmal al-Mu'alim (5/487).



or half.

8/2/3: The basis of continuance to apply the ruling of trading of the Sukuk on its condition, if the value of the tangible assets (and the like) in the assets of the entity came down, due to a contingency after the issuance of the Sukuk, to a percentage not less than 33%:

- supervening matters (*umūr ṭāri'a*) cannot be repelled, although it is required to avoid it, and the maxim says: *yughtafar fī al-baqā' mā lā yughtafar fī al-ibtidā'* (what can be overlooked during the continuance cannot be overlooked at the inception),
- Less than a third is considered a little in many of the Shari'ah rulings.

8/2/3: The basis of the requirement of notifying the Sukuk-holders, if the value of the tangible assets (and the like) went below 33% of the assets of the entity, about non-negotiability of the Sukuks and their delisting:

- the impermissibility of the trading without abiding by the rulings of the sale of debt as it was given in the preceding Shari'a basis.

8/3: The basis of the requirement of observing the rulings of the sale of debt if debts were collected or separated from tangible assets (and the like) to be sold in a single leg without being held by a legal entity which materializes the Shari'ah principle of commingling:

- this does not fulfill the requirements of the assemblage (*tarkīb*), as mentioned in the basis of Item 8/2, and such is a proscribed artifice to trade in the debts without observing provisions related to their sale, as given in the Item (3/20) of AAOIFI Shari'ah Standard No. (21): Commercial Papers.



