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Shari’ah Parameters for the Application of Wadi’ah Concept in Traditional Family Takaful Products

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ABSTRACT

The objective of the paper is to set parameters for the application of wadi’ah concept in family takaful which is the alternative of guaranteed benefits (non-participating benefits) of life insurance for family takaful. The paper uses analytical and evaluative approach to set parameters to ensure Shari’ah compliancy of the product and therefore, classical and modern Islamic jurisprudence literatures has been reviewed. The wadi’ah-based family takaful product allows various forms of guaranteed benefits (non-participating benefits) to be offered to participants in a manner similar to their conventional counterparts. However, there are some guidelines that should be followed. Every contract should be executed separately to avoid Shari’ah prohibition. Different types of funds need to be separated as well. Takaful Operators (TOs) can provide guaranteed cash surrender benefits only from the Participants’ Wadi’ah Fund (PWF). Finally, Takaful Operators (TOs) should be transparent in the dripping process and charges. Takaful Operators (TOs) should be transparent in taking charges for managing wadi’ah funds, sharing investment profit ratio under mudarabah contract and sharing surplus from the tabarru’ fund. The study would serve the needs of the takaful industry, particularly family takaful, in order for them to avoid Shari’ah compliance risk.

Key words: Takaful, wadi’ah, tabarru’, Participants’ Wadi’ah Fund, Shari’ah Parameter

Introduction

Conventional insurance, which is based on the principle of mu’awadah (exchange) and aims at making a profit out of the insurance operations, is prohibited from a Shari’ah viewpoint since it contains substantial gharar (ambiguity). On the other hand, the Islamic alternative to conventional insurance, also known as takaful, reflects a reciprocal relationship and agreement of mutual help between participating members who undertake to mutually guarantee and indemnify one another in case of a particular defined event. The act of guaranteeing one another implies mutual help and mutual indemnity on the basis of brotherhood, deeply rooted in the tabarru’ principle, which tolerates the presence of gharar.

These basic principles and philosophies underlying the takaful contract have been widely used to structure various products that can replicate conventional insurance, either for general insurance or life insurance products. Notwithstanding the various innovations in developing takaful products that replicate their conventional counterparts, the fact remains that not all features and characteristics of conventional insurance can be easily replicated without violating Shari’ah principles. In particular, one fundamental aspect of traditional life insurance that cannot be offered by a family takaful plan is the non-forfeiture benefit, i.e., the guaranteed cash values of the policy. However, an alternative model based on the wadi’ah concept has been designed in the family takaful product that will allow various forms of guaranteed benefits (non-participating benefits) to be offered to participants in a manner similar to their conventional counterparts. The wadi’ah based model needs to follow some Shari’ah parameters for its operation.
Family Takaful at Glance:

In general, the objective of the life insurance product, which is mainly to assist those who are afflicted with various forms of calamities, is also shared by the takaful industry. Consequently, Shari’ah-compliant takaful instruments to protect participants against various misfortunes, such as death, disability and sickness, are being structured and introduced as the demand grows for an alternative to conventional life insurance.

In Malaysia, most of the life takaful products (also known as family takaful) are structured in the form of unit-linked or investment-linked policies. This essentially means that the investment risks are borne entirely by the policyholders (participants). A certain portion of their takaful contribution is allocated to the risk (tabarru’) fund for the purpose of takaful protection against unfortunate events such as death, disability or sickness. There is a close resemblance, in terms of product structure, between conventional life investment-linked insurance and family takaful products since both have basically “transferred” the investment risks to policyholders/participants and, by doing so, have clearly segregated the cost of providing protection, either in the form of tabarru’ or the cost of insurance.

The fundamental principle of takaful, i.e., tabarru’, makes it convenient for the family takaful operator (hereafter TO) to adopt the investment-linked life insurance model. Unlike conventional insurance, which is structured on the basis of mu’awadah, i.e., a contract of exchange between policyholders and life insurance companies in the form of buying and selling insurance coverage, takaful reflects a reciprocal relationship and agreement of mutual help between participating members, who undertake to mutually guarantee and indemnify each other in a particular defined event. The act of guaranteeing each other implies mutual help and mutual indemnity on the basis of brotherhood deeply rooted in the tabarru’ principle, which tolerates the presence of gharar (uncertainty).

Changing the contract of life insurance to family takaful leads to a fundamental difference in ownership of the funds, particularly the risk fund. In conventional life insurance, the risk fund belongs to the life insurance company. In takaful, the risk fund is exclusively and collectively owned by the participants, who have been contributing into the charitable pool (tabarru’) for mutual help and indemnification. In most takaful models, a contract of agency (wakalah) is used to reflect the relationship between the participants and the TO; the latter acts as an agent to manage the takaful fund on behalf of the former in return for a fee. In terms of the prudential requirements for managing this fund, they are similar to those for a conventional risk fund.

Market Challenges in Offering Family Takaful:

Comparing with traditional conventional life insurance products, family takaful seems to be lagging behind. This is due to some inherent features of traditional life insurance that cannot be replicated in family takaful product design, such as:

- guaranteed survival benefits in the forms of cash dividend payouts, cash surrender value, and maturity values
- guaranteed investment returns
- guaranteed capital/refund of contributions

It should be noted that the above factors are significant selling points when it comes to marketing a life insurance product on the basis of guaranteed long-term savings coupled with insurance protection. However, various forms of guaranteed benefits mentioned above may not be readily available for family takaful since, structurally, the only possible guaranteed benefits are in the form of the contingency benefits (except for survival), i.e., benefits linked to misfortunes of the participants, be it death, disability, or sickness-related. This is due to the fundamental concept of takaful, i.e., helping one another. The guaranteed benefits that are contingent upon the survival of the participants cannot be offered by the TOs in a way that is totally acceptable from a Shari’ah standpoint, unless it is taken from the shareholders’ fund. Despite some attempts by family takaful products in the market today to offer guaranteed survival benefits, doubts have been cast upon the validity and permissibility of such structures from a Shari’ah viewpoint.

This study is concerned with how family takaful can be competitively structured in a manner that allows various forms of benefits to be offered that resemble those of traditional life insurance without in any way violating Shari’ah principles.

Shari’ah Appraisal of Guaranteed Benefit:

Based on observation of market trends, the guaranteed survival benefits in family takaful products may be offered in three possible ways:

- a guaranteed maturity value
- a guaranteed series of cash payouts throughout the certificate term
• a guaranteed refund of the contributions

In conventional traditional non-participating life insurance, the above guaranteed benefits are normally taken from a single pool, the risk fund pool, since there is no investment pool available as there is in the case of the investment-linked product. However, this approach invokes Shari‘ah issues as takaful is structured on the premise of tabarru‘, which makes the otherwise prohibited elements in a normal exchange contract, such as riba, gharar and maysir, tolerated. The concept of tabarru‘ is explained in detail below.

**Issues Related to the Concept of Tabarru‘:**

Tabarru‘ is derived from the verb tabarra‘a and carries the meaning of contribution, gift, donation or charity without expecting any compensation in return (Al-Jurjani, 1983; Qal‘aji, 1998). In fiqh terms, tabarru‘ is a unilateral declaration of intent, and this contract has a particular nature in Islamic commercial law. Its purpose is to give a favour to the recipient without any specific consideration in return (Bank Negara Malaysia, 2010).

If a donor stipulates a benefit for his contribution, it will change the reality of the transaction from a tabarru‘ to an exchange contract. This is consistent with the legal maxim, “In contracts, consideration is given to intention and meaning rather than words and forms.” (Wizarat al-Awqaf wa al-Shu’un al-Islamiyah, 2006; Ibn al-Qayyim, 1994; Nujaym, 2005; al-Zarkashi, 1982; Al-Qarafi, 1994). This issue is known in classical jurisprudence as hibah bi thawab (a gift with expected compensation), according to the Maliki School, or hibah bi shart al-iwad (a gift with stipulated counter-value), according to the Shafi‘i and Hanbali Schools (Al-Jaziri, 2003). Whatever they call it, jurists agree that when the gift and compensation have been exchanged, hibah bi shart al-iwad is no longer a charitable (tabarru‘) contract; rather, it becomes a mu‘awadah (exchange) contract. Some of them consider it an exchange contract from the time of the offer and acceptance (Zuhaily, 1997; Al-Jaziri, 2003).

In the takaful context, the gift is the contribution and the thawab is the indemnification by the risk fund. If that is the case, the ruling of hibah bi thawab will take the ruling of an exchange contract. If takaful is considered an exchange contract, all the issues of riba, gharar and jahalah will reemerge. Therefore it is not possible for TOs to design products that pay any form of cash or survival benefits out of the risk fund (tabarru‘ fund).

**The Inherent Impediments in the Existing Model:**

Besides the issue of tabarru‘ as discussed above, the inherent impediments of the existing takaful model also restrict TOs from providing guaranteed benefits to participants. This is particularly true as the existing models of takaful, which are based on wakalah, or mudarabah, or a hybrid, do not allow any form of guarantee. In the wakalah (agency) model, the TO acts as the fund administrator, managing it in trust on behalf of the participants. In return, the TO is paid a fee for services rendered. However, any loss incurred is still borne by the participants since wakalah is merely a contract of trust. Similarly, under the mudarabah model, the contracting parties have the right to share profit, while loss is borne by the participants. Exhibit 1 depicts the common structure of the wakalah and mudarabah models of family takaful.

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**Exhibit 1:** Basic Structure of Unit-Linked Insurance
In practice, for family takful, funds are normally further segregated into the participants’ risk fund (representing the tabarru’ fund) and the participants’ investment fund (representing the mudarabah fund). To have a guaranteed benefit scheme, even out of the participants’ investment fund, would be tantamount to a violation of the Shari’ah.

The majority of jurists agreed that the entrepreneur (mudarib) is a trustee (amin). The mudarib receives the capital with the consent of the capital provider (rabb al-mal), and hence, he is not liable to guarantee it except in case of negligence (taqsir), misconduct (ta’addi) or violation of stipulated conditions (mukhalafat al-shurut) (Al-Baji, 1914).

Structuring Family Traditional Non-Participating Takaful Based on Wadi’ah:

The nature of wadi’ah yad lamanah means that the custodian of the fund provides a total guarantee of the savings, while the ownership of the fund belongs entirely to the participants or depositors. Moreover, by virtue of its ruling, which is similar to a loan in characteristics and principles, participants are not entitled to any returns from the fund except on the discretion of the custodian, who can utilize and invest it as long as he provides a guarantee of the fund. The concept of wadi’ah is deemed to be a suitable structure for use in structuring a family traditional non-participating (non-par) fund.

If we revisit the fundamental understanding of a non-par life fund, it shares the same philosophy as wadi’ah, which is based on trust. The function of a non-par fund is to provide the insurance guarantee, be it on the insurance benefits or survival benefits. The only different is that the non-par fund belongs to the life insurance company, which is the opposite of the wadi’ah fund. This may entail further analysis from practitioners regarding the responsibility of ensuring the safety of the fund in the event the takaful company goes out of business, since the money belongs to the participants, similar to their savings in a bank.

It is also important to understand that life insurance is a risk-transfer mechanism between policyholders and a life insurance company and that the risk is guaranteed via the non-par fund. On the contrary, in takaful, protection is conceived of as a risk-sharing mechanism, which is the underlying spirit of the tabarru’ fund. However, with regard to the guaranteed savings part using wadi’ah yad lamanah, it is, basically, a risk-transfer mechanism since the fund custodian has full responsibility to manage the fund, which belongs to the participants, and to guarantee its solvency at any point of time. In other words, the fund custodian, i.e., the takaful operator, guarantees the fund against underlying risks.

The Modus Operandi of the Wadi’ah-Based Family Takaful Model:

Exhibit 2 below depicts the proposed model of traditional family takaful based upon the wadi’ah concept together with other established contracts and principles, including tabarru’, wakalah and mudarabah.
As depicted in Exhibit 2 above, the model works similarly to the existing *takaful* model applied by most TOs these days, except that the *wadi’ah* fund has been added to the model alongside the *mularabah* and *tabarru’* funds. Interestingly, it can be argued that the whole model resembles a combination of participating and non-participating funds under one roof. The participating fund is the *mularabah* fund, as TOs share the profits of the investments of the fund, whilst the non-participating funds are the *wadi’ah* and the *tabarru’* funds as both provide the guaranteed benefits. The former is on the concept of *qarāl*, and the latter is on the concept of risk sharing. The *wadi’ah* fund functions to provide the guaranteed survival benefits (non-forfeiture benefits), similar to conventional life insurance.

It is important to note that the dripping process of contribution to the *tabarru’* fund can be done in any of the following manners:
1. Up-front allocation to the *tabarru’* fund out of contributions (after deducting the *wakalah* fee);
2. Dripping from the *mularabah* (participant’s investment fund)
3. Dripping from the *wadi’ah* (participant’s savings fund)

In addition, since the *wadi’ah yad Īmanah* contract is similar to a *qarāl* contract, it will allow the TOs to utilize and invest the fund as long as they fully guarantee it. Any returns generated from the investment activities are exclusively earned by the TOs. The TOs are not obliged to share any returns generated out of this fund with the participants. However, on a yearly basis, should the TOs at their own discretion decide to distribute a portion of the realized returns, they can do so in the form of voluntary *hibah*. However, this should not become customary; otherwise it will be deemed as a contractual obligation and invoke the Shari’ah issue of *riba*.

Nevertheless, the operational model of a *takaful* operator may prevent this issue from cropping up. As mentioned earlier, most TOs operate with a non-guaranteed savings fund in the form of *mularabah* (equivalent to the par fund in a life insurance company). This makes it convenient for the operator to transfer the investment returns to the *mularabah* account (par fund), should they wish to give away part of the returns to the participants. This will essentially avoid the issue of customer expectation for investment returns from the *wadi’ah* fund.

It is also proposed that the calculation of the guaranteed survival benefits or non-forfeiture benefits under *wadi’ah yad Īmanah* apply actuarial methodology, either using the discounting technique or the asset-share method. The non-forfeiture values generated need to be disclosed to all participants, however, as they enter the *takaful* contract with the TOs. Table 2 illustrates the operation of non-par traditional family *takaful* based on the *wadi’ah* concept.

**Table 1:** Illustration of a Non-Participating Plan Using the *Wadi’ah* Concept

Sample Illustration of *Takaful* Plan (Non-Par & Par) using Wadiah Yed *Dhamanah* and *Mudharabah* (This illustration is intended to illustrate how wadiah works, full workings will ultimately depend on the product design)

It assumes contribution is net of wakalah fee that has been taken upfront)

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* Mudarabah portion is not inclusive of investment returns.

Apparently, in Table 2 above, the columns of *wadi’ah* savings (as depicted in Columns B and C), imply that the *wadi’ah* functions almost exactly the same as the non-par plan illustrated previously in Table 1. The *wadi’ah* portion (see Column B) is calculated up-front by the TO similar to the way the conventional life plan calculates
its cash values, and it is allocated on a yearly basis. It will then accumulate and give the annual accumulated cash values in a way similar to a conventional life plan. At any point in time, if a participant decides to surrender his certificate, he will get the accumulated cash value as per Column C.

Needless to say, the above illustration is merely meant to show how wadiʻah works to provide for the non-forfeiture benefits. It assumes that the wakalah fee has been taken up front. In a real situation of product development, the TO would need to carefully study the proportions that would go into each part below:

1. up-front wakalah fees for management expenses and commissions
2. mūlarabah investments
3. wadiʻah savings
4. tabarru’ charges

These items may give a different complexion to the final arrangement. However, one can draw an example from the conventional traditional plan to replicate the same benefit as we can see that the application of the normal life fund is now being split into four different parts to form the traditional life takaful plan.

As explained above, the non-forfeiture option is a benefit built into the traditional par and non-par traditional life products. A policy would have acquired cash values as the policy progresses towards maturity, which normally can be used for different options in the event the policyholders can no longer pay the premiums till the end of the policy.

It was argued above that the cash values in the wadiʻah fund are similar to the non-forfeiture benefit in a traditional life plan. However, it is important to note that there is a fundamental difference between these products, i.e. takaful and conventional life insurance. Whilst the latter is based on a purchase-and-sale arrangement, the former is not. The wadiʻah fund, which is entirely owned by the takaful participants, will not allow for such arrangement for the above facilities, i.e., the non-forfeiture options. Though it is proposed that the calculations of cash values in the wadiʻah fund may use the same methodology as conventional life insurance, the option, as available in the traditional life insurance above, cannot be offered due to the difference in the underlying contracts.

Shari’ah Parameters for the Implementation of the Wadiʿah Model:

The Combination of Various Contracts Should be Executed Independently:

The proposed traditional life takaful product applying the wadiʻah concept coupled with mūlarabah and wakalah contracts may trigger a possible Shari’ah issue on combining contracts in one deal.

The majority of jurists are of the view that the original ruling of any financial transaction is permissibility as long as no clear evidence indicates otherwise (Al-ʻImrani, 2006). Ibn Taymiyyah stated that everyone is at liberty to enter into any contract they consider necessary and to have added value as long as no explicit divine text prohibits it (Ibn Taymiyyah, 1398 AH.). The Qur’anic command to “fulfill your contracts” (5: 1) implies the legitimacy of employing any contract that the Lawgiver has not specifically banned.

Based on these general principles, the original ruling of combining various contracts is, therefore, permissibility. The Shafi’i jurists generally allow the application of hybrid contracts in financial transactions, such as the combination of leasing and sale, as these contracts are valid when executed separately (Arbouna, 2007). More specifically, al-Kasani allowed the combination of mūlarabah and wadiʻah contracts in one deal (Al-Kasani, 1986), and al-Sarakhsi (1993) permitted the combination of mūlarabah and qarḍ contracts. AAOIFI, (2010) in its Shari’ah Standards, clearly mentioned that the combination of contracts in a single deal is permissible provided that each combined contract is legitimated by the Shari’ah and there is no stipulation making entry into one contract conditional upon entry into another. AAOIFI (2010) set out the following parameters for applying hybrid contracts:

1. The process does not include cases that are clearly prohibited by the Shari’ah.
2. It is not designed as a trick or excuse to practice riba.
3. It does not involve contracts that are contradictory in their rules and objectives.

To ensure that the application of various contracts in the proposed model is in adherence with Shari’ah principles and guidelines, the various contracts must be executed separately and independently. The wadiʻah contract is applied to manage the non-par fund (known hereafter as the Participants’ Wadiʻah Fund [PWF]) for the guaranteed survival benefit, and the mūlarabah contract is used to manage the Participants’ Investment Fund (PIF), while the wakalah contract is solely employed for underwriting the Participants Risk Fund (PRF).

The funds should be clearly segregated:

TOs should establish clear segregation between the assets of the takaful funds and the assets of the takaful operators. The Participants’ Risk Fund (PRF) and Participants’ Investment Fund (PIF) must also be segregated from each other. This is to avoid the commingling of funds and to recognize the different purposes, ownerships
and risks associated with each fund. It is also important to establish the Participants’ Wadi’ah Fund (PWF) along with the PIF and the PRF. Since the PWF belongs to the participants individually, there must be a clear distinction and demarcation for each fund so that any rights and liabilities pertaining to each fund is acknowledged and monitored accordingly.

However, TOs may commingle the Participants’ Investment Fund (PIF) and the Participants’ Wadi’ah Fund (PWF). This is based on the opinion of some jurists from the ×anafi Schools (e.g. al-Kasani and al-Sarakhsi) who did not require segregation of mularabah funds and wadi’ah funds. Al-Sarkhasi (1993) said:

When one man gives another 1000 dirhams and says, “Half of it is a loan to you, and half of it is for you to use in mularabah,” and the mularib accepts it, it is permissible as stipulated. As for the portion assigned for mularabah, there is no difficulty because commingled capital ownership does not invalidate the mularabah contract. That is because it’s essential condition is that the capital is a trust in the hand of mularib, and that [condition] is realized in the commingled portion. As for the loan, it is a transfer of ownership with an exchange [of the same at a later date], and commingling does not prevent it from being valid, as in a sale.

Notwithstanding to the above opinion, operationally it would be suggested that the investments of these two funds are carried out separately since the returns from both funds have different ownership status.

**Transparency in the Dripping Process:**

As mentioned earlier, the dripping process of the funds for the Participants’ Risk Fund (PRF) can be done either from Participants’ Investment Fund (PIF) or even the Participants’ Wadi’ah Fund (PWF). It can also be dripped directly from the contributions paid up-front after netting off the wakalah fee. However, the whole dripping process must be done in a transparent manner, and the participants must give their clear consent to it.

For example, if a TO decides to drip from the mularabah (PIF) fund into the tabarru’ (PRF) fund, the dripped amount for PRF should be transparent. From the Shari’ah viewpoint, obtaining prior consent, at the outset of contractual execution, from each participant is essential since it effectively means that the participants have agreed to waive their rights and entitlements with regards to the funds and returns generated in the PIF for the purpose of tabarru’ and mutuality. This practice is in line with the fiqh concept of tanazul (waiver of entitlement to a claim) or isqal al-Ìaqq (waiving one’s right). The same requirements of transparency and consent apply to any amount dripped from the PWF for tabarru’ purposes since the PWF is exclusively owned by the participants as individuals.

**Guaranteed Cash Surrender Benefits Can Only Be Taken From the PWF:**

Any form of guaranteed survival benefits to be introduced by TOs can only be structured in the form of the Wadi’ah Fund (PWF). However, it is important to note, in applying the concept of wadi’ah in takaful, the need to understand the Shari’ah’s limits on guarantees. In order to make it comply with the Shari’ah, the level of guarantee cannot exceed the total contributions paid (after netting off the wakalah fees earned by the operator). This means that the guarantee is limited to the amount of money that is deposited into the Wadi’ah Fund.

Any amount of guarantee provided by TOs in excess of the Wadi’ah Fund (PWF) would be tantamount to riba. This is particularly true, since the rules for wadi’ah yad lamanah (guaranteed safekeeping) are based on the principle of qarîl (loan). One of the fundamental requirements for the validity of qarîl, from a Shari’ah viewpoint, is the absence of any extra benefit beyond the principal amount. Qarîl is a charitable contract designed for assistance and helping the other party. It is, therefore, impermissible to stipulate any condition that will give benefit to the lender, as it will depart from the nature of qarîl, turning it from a charitable contract to a commercial contract (Wizarat al-Awqaf wa al-Shu’un al-‘Islamiyah, 2006). Prophet Muhammad (peace be upon him) said:

“Any loan that results in some benefit for the lender is a kind of riba.” (Al-Bayhaqi, 2003).

**Clear Justification for Charges and Sources of Income:**

_Takaful_ operators are remunerated through fees, charges and shares of profit/surplus. The remunerations should be specific, appropriate, reasonable, and justifiable as being for particular works and services. In this proposed model, the TO’s remunerations may be derived from various sources as follows:

**A. Charge for Managing the Wadi’ah Fund:**

Jurists held different views in regard to the permissibility of stipulating compensation as a reward for the custodian’s effort to safeguard the deposit. According to the ×anbali School, it is impermissible to request a fee for safekeeping. A fee, according to them, is warranted in an ijarah contract but not in a wadi’ah contract. However, Shafi’i and ×anafi jurists allow the custodian to require a fee in a wadi’ah contract, and it is deemed a
valid and binding condition. It is stated in Murshid al-×ayran: “A custodian is not entitled to a fee for safekeeping a deposit if it is not stipulated in the contract” (Hammad, 1993).

Meanwhile, the Maliki School distinguished between a storage fee and safekeeping fee. While they permitted charging for the former, they disallowed taking a fee for the latter unless it becomes a customary practice or is stipulated in the contract (Hammad, 1993).

However, it is important to note that this proposed model has changed the ruling of wadi‘ah to the ruling of qar‘l since the participants authorize the TO to utilize the Wadi‘ah Non-Par Fund. Therefore, the ruling of charging a fee should also follow the ruling of qar‘l.

AAOIFI has passed a resolution that Islamic financial institution acting as custodian may charge a service fee for managing loan-based current accounts. It is stated in AAOIFI’s Shari‘ah Standards (2010): “10/1/1. The reality of current accounts is that these are loans and not deposits. Thus, the institution comes to own the amounts, and a liability to repay the amount is established against it. 10/1/2. It is permissible for the institution to demand a fee for services rendered to the holders of the current accounts.”

It can be concluded from AAOIFI’s Shari‘ah Standard 10/1/2 that the TO may impose an appropriate and reasonable charge to participants for services provided in managing the wadi‘ah non-par fund.

B. Investment Return from Participants’ Wadi‘ah Fund (PWF):

Jurists agree that the custodian is ruled to have misbehaved, and hence he is held liable, if he invests the deposit fund without the consent of the depositor. Nevertheless, there are diverse views with regard to the profit accumulated from investment activities using a deposit fund, which can be summarized in five opinions:

1. The profit exclusively belongs to the depositors as it is generated from the deposit fund where any profit should follow the principal. This view is held by Ibn ‘Umar, Nafi’, Abu Qulabah, Islaq and AlÃ‘mad, in one narration from him.
2. The profit should be channeled to the Bayt al-Mal. This opinion is proposed by ‘AÏa and by AlÃ‘mad in one narration.
3. The profit should be given to alms or charity on the basis that all income accumulated unlawfully must be channelled to charity. This view is held by Abu ×anifah, Zufar, Mulfammad ibn al-×asan and al-Sha‘bi, and is attributed to AlÃ‘mad in one narration.
4. The profit is the exclusive right of the custodian as it is the outcome of his effort and work. He is entitled to the profit as compensation for his liability to guarantee the deposit fund. This view is held by Shurayl, ×asan al-Balri, Imam Malik, al-Thawri, Layth ibn Sa’d, Abu Yusuf and others.
5. The profit is shared between the depositor and the custodian, as in a mularabah contract. This view is reported in one narration from Imam AlÃ‘mad. According to Ibn Taymiyyah, it is the most authentic opinion on the basis that ‘Umar bin al-Khattab issued the same ruling (Hammad, 1993).

The authors of this paper prefer the fourth view, that the profit belongs exclusively to the custodian on the basis that it is a result of his effort and a compensation of his liability to guarantee the deposit, based on the Íadith in which the Prophet said: (“Profit goes with liability”) (Dawud, 2003). Hence, in this proposed model, the authors are of the view that all investment income generated from the wadi‘ah non-par fund is the exclusive right of the TO. The TOs are not obliged to share the investment profit, bonus or reward with the participants; and any token of appreciation, if given to the participants, must be on a discretionary, and occasional, basis in order to prevent it from becoming an ‘urf (custom) that is prohibited by the Shari‘ah. This is in line with the following maxim. “What is known [and expected] by custom is like a stipulated condition” (Al-Zarqa, 1989).

C. Wakalah Fee for Managing the PRF:

Islamic jurists allow wakalah contracts with or without a fee (Al-Zuhaily, 1997). If a person serves as an agent without stipulating a defined fee, it is considered a form of ibla’. In contrast, if he imposes a fee for his capacity as an agent, the concept applied is basically ijarah (Majallat al-Ahkam al-‘Adliyyah, 1426 AH.). The proposed model allows TOs to charge a reasonable and justifiable fee in their capacity as agents managing the tabarru’ fund. The fee can be either a percentage of the contribution or a fixed amount. It is not allowed to impose a fee based on a percentage of the surplus or a percentage of the profit. It is important to emphasize that the wakalah fee is imposed solely for managing the PRF and covers management expenses and a commission. TOs should be very careful in determining the wakalah fee, especially when the PRF is dripped out from the PIF, to ensure that the fee is prudently calculated purely for managing the PRF; it is not allowed to make part of the wakalah fee compensation for managing the mularabah-based PIF.
D. Profit Sharing from the Participants’ Investment Fund (PIF):

Another income source for TOs in this proposed model is an unguaranteed profit share in their capacity as the investment managers of the *mularabah* fund. The share of profit should be a percentage of the profit as agreed up-front and not a lump sum or a percentage of the capital. The profit should not be guaranteed, as the TO are trustees. Any financial loss is borne solely by the participants.

The Shari’ah has made profit-sharing the basis of compensation for the investment manager in a *mularabah* contract. It is, therefore, inappropriate to charge a management fee for running a *mularabah* fund. AAOIFI (2010) has resolved that combining a share of the profit and a fee in a *mularabah* contract is impermissible. However, if the fee is for other services executed in an independent contract, it is allowed.

E. Surplus Sharing from PRF:

Another potential income source for the TO in this proposed alternative model is sharing the surplus from the PRF. The Takaful Operational Framework (TOF) stipulates that the share of surplus for TOs should not exceed 50% of underwriting surplus. The SAC BNM, in its 62nd meeting, dated 4 October, 2006, resolved that TOs are entitled to share in the surplus from the *tabarru’* fund based on *wakalah* concept as a performance fee on an agreed ratio. The SAC’s ruling is premised upon following justifications (Bank Negara Malaysia, 2010):

1. The *takaful* contract is formed on the basis of *tabarru’, ta’awun* and mutual agreement between the contracting parties. The *tabarru’* principle is the core principle of *takaful* product whereas other contracts such as *wakalah* and *mularabah* are applied in managing *takaful* operations.

2. The SAC’s resolution is based on a performance fee, which is in line with legal maxim: “The fundamental [requirement for the validity] of a contract is the consent of the contracting parties, and its effects are the rights and duties they agree to.”

Conclusion:

Along with the market competition, *wadi’ah* based *takaful* should follow some parameters. This is because, the Shari’ah compliancy has supremacy over market competition. Every contract should be executed separately to avoid the prohibition mentioned in the *Hadith* and different types of funds need to be separated as well. TOs can provide guaranteed cash surrender benefits only from the PWF. Finally, they need to be transparent in the dripping process from different funds and taking charges and sources of income. TOs should be transparent in taking charges for managing *wadi’ah* funds, sharing investment profit ratio under mudarabah contract and sharing surplus from the *tabarru’* fund.

References

Majallat al-Alkam al-‘Adliyyah, 1426 AH.