
THE NAME IS BOND, *SUKUK* BOND: PATHWAYS
FORWARD FOR ISLAMIC DEBT FINANCIAL INSTRUMENTS
IN WESTERN MARKETS

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Over the last few decades, the market for Sharia-compliant financial products has grown steadily. Despite originating in geographic areas with largely Muslim populations to reflect consumer demand for financial products with terms and structures that were compliant with Islamic law, they have since expanded into Western financial markets—albeit with some hesitation. One such instrument is sukuk—Sharia-compliant, fixed-income capital markets instruments. This note argues that despite the upward trend in adoption of sukuk issuances by Western markets in the last decade, certain qualities of these Islamic law-compliant debt instruments have prevented their full integration into American capital markets. Part I of the note provides an overview of the historical development of the Sharia capital markets, introducing the various forms and structures of sukuk and the regulatory regimes that govern them. In consideration of the history of Islamic finance and the complexities of structuring sukuk, Part II discusses the various barriers to entry that such products have faced in Western markets, including regulatory hurdles, transactional costs, tax implications, recourse, and securities and trading laws. Finally, Part III proposes pathways forward for the expansion of sukuk across global markets, such as tapping into the nascent green investing market or the existing real estate and project finance markets, using asset-based sukuk as the global standard, and predicting movement pursuant to Sharia Standard 62.

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INTRODUCTION

Over the last few decades, markets have carved out an ever-growing space for “Sharia-compliant, fixed-income capital market instruments”—popularly known by their Arabic name, *sukuk*.¹ *Sukuk* originated in geographies with largely Muslim populations to reflect consumer demand for financial products with terms and structures that were compliant with Sharia law. Sharia law, used interchangeably with “Islamic law” for the purposes of this paper, is an interpretation of the *sharia* – “divine counsel” that guides Muslim life per the Quran

¹ Debashis Dey, *What are sukuk and how do they work?*, THE ASS’N OF CORP. TREASURERS, <https://www.treasurers.org/hub/treasurer-magazine/what-are-sukuk-and-how-do-they-work> [https://perma.cc/3VKC-8XMR] (last visited Dec. 5, 2025).

and *hadith*² of the Prophets.³ Islamic law interprets the Quran, *Sunnah*,⁴ Arabic language, and legal theory to create a nuanced legal system that is influenced by local customs and perpetuates, but also evolves, across generations and schools of thought.⁵ Sharia-compliant finance has not only been long-prevalent in the Middle East and Southeast Asia, but has recently made its mark on global capital markets and the broader Western commercial finance systems.⁶ Islamic Finance broadly has seen its greatest applications in project finance,⁷ and it has even made its way into American bankruptcy courts.⁸

² *Hadith* refer to the sayings and narrations of the Prophet Muhammad's speech, deeds, beliefs, and acts expressing approval or disapproval of certain practices. Along with the text of the *Quran*, they are among the main sources of guidance in Islamic jurisprudence. See *Types of Hadith*, ISLAM.ORG, <https://www.islam.org.uk/hadith/types-of-hadith/> [<https://perma.cc/Z36W-7JPZ>] (last visited Dec. 5, 2024).

³ See *Islam and Prophets*, AM. ISLAMIC OUTREACH, <https://americanislamicoutreach.org/islam-and-prophets/> [<https://perma.cc/KW43-7N6E>]. The Islamic Prophets or Prophets of Allah refer to individuals believed to be chosen by God to guide Muslims in their life and religious practice at various points in history. The sayings of the Prophets have been recorded and passed down through history and are central to even contemporary Muslim religious practice and belief.

⁴ *Sunnah* refers to the body of traditional social and legal custom and practice of the Muslim community and forms a major source of *sharia* law. *Sunnah* has roots in precedents established by the communities of pre-Islamic Arabia and have been enshrined in modern Islamic practice as a general way of life. *Sunnah*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Sunnah> [<https://perma.cc/MA8J-GE2M>] (last visited Dec. 7, 2025); see also *Muhammad*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Muhammad> [<https://perma.cc/L958-DNJU>] (last visited Dec. 7, 2025).

⁵ See Kali Robinson, *Understanding Sharia: The Intersection of Islam and the Law*, COUNCIL ON FOREIGN RELS. (Dec. 17, 2021), <https://www.cfr.org/background/understanding-sharia-intersection-islam-and-law> (on file with the Columbia Business Law Review).

⁶ Global *sukuk* volumes are projected to cross USD \$1 trillion outstanding in 2025. *Sukuk* continues to remain a key part of the international debt capital markets, not only in the Muslim World (denoted by the Organization of Islamic Cooperation countries), but also in American and European markets. Notably, *sukuk* represents twelve percent of all Emerging market US dollar debt issued in 2024 excluding China. See Bashar Al Nator, *Global Outstanding Sukuk to Cross USD 1 Trillion in 2025; Overall Credit Profile Stable*, FITCH RATINGS (Jan. 8, 2025), <https://www.fitchratings.com/research/islamic-finance/global-outstanding-sukuk-to-cross-usd1-trillion-in-2025-overall-credit-profile-stable-08-01-2025> [<https://perma.cc/EHK4-K2AM>].

⁷ See *Unlocking growth: Islamic finance sees global expansion*, CRISIL COALITION GREENWICH (June 10, 2025), <https://www.greenwich.com/corporate-banking/unlocking-growth-islamic-finance-sees-global-expansion> [<https://perma.cc/C3TW-APQ4>].

⁸ One recent example of a *sukuk* default that has made its way into American courts is the *In re Certain Funds* case, involving investment vehicles managed by affiliates of Fortress Investment Group who applied *ex parte* to the

This paper argues that despite the upward trend in adoption of *sukuk* issuances by Western markets in the last decade, certain qualities of these Islamic law-compliant debt instruments have prevented their full integration into American capital markets. These barriers are largely cultural, administrative, and pertain to the restrictions surrounding the assets that can be backed by Islamic securities. Whereas asset-backed *sukuk* are more in line with the Sharia tradition, asset-based *sukuk* have a higher likelihood of recourse and more closely resemble a traditional debt instrument. Increasing accessibility of *sukuk* in Western markets provides new options to investors in those jurisdictions who have preferences for certain types of ethical investment products. Unless these products are popularized, such investors may remain an untapped market for companies looking to diversify their investor base. Additionally, as discussed later, many foreign-based *sukuk* are contracting under the laws of jurisdictions such as New York and London. As this practice becomes popular, a move towards standardizing and integrating these products into Western markets could begin to reduce barriers to access faced by issuers and investors alike. One compromise between the two legal systems is to increase asset-based *sukuk* offerings to American markets, which can help bridge the gap between the two markets. A second possible approach to the increased proliferation of *sukuk* in Western markets is to employ “sustainable bonds,” in line with the demands of sustainable corporate practice as well as the notion of “*halal*” investing. In Part I of this note, I will introduce the concept of *sukuk* offerings and distinguish them from conventional debt instruments such as bonds. In doing so, I will emphasize two major characteristics of the *sukuk* – the asset-backed nature and the compliance with *halal* investing. I will also address the historical development of Islamic Finance and introduce key regulatory and oversight bodies. In Part II, I have synthesized and condensed market-wide critiques of *sukuk* to evaluate what are deemed as barriers to entry to Western financial markets. Case studies highlight instances where *sukuk* offerings have demonstrated these very complications. Finally, in Part III, I take a three-pronged approach to developing a broader strategy to make *sukuk* offerings and Islamic Finance generally more accessible and appealing to foreign investors. Without compromises in the corporate practices of both Western buyers and Islamic issuers, it is unlikely that

United States District Court for the Southern District of New York for an order to authorize them to obtain discovery from domestic auditors including KPMG and PricewaterhouseCoopers LLP. The case involved the Golden Belt 1 *sukuk*, a financial instrument issued by the Kingdom of Bahrain. In re Certain Funds, Accts., and/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. LLC, No. 14 Civ. 1801, 2014 WL 3404955 (S.D.N.Y. July 9, 2014), *aff'd sub nom.*, Certain Funds, Accts. and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113 (2d Cir. 2015).

sukuk will grow to occupy a market share that rivals the scale of Islamic project finance.

I. THE HISTORICAL DEVELOPMENT OF THE SHARIA CAPITAL MARKETS

A. *Introducing the Concept of Sukuk*

While *sukuk* are often referred to as ‘Islamic bonds’, this analogization is somewhat misguided. A bond, defined by the United States Securities and Exchange Commission, is a “debt obligation, like an IOU.”⁹ An investor purchasing a corporate bond assumes the role of a lender, lending money to the issuing corporation or entity.¹⁰ In exchange, the borrowing party generally makes a twofold legal commitment: first, to pay interest on the principal amount; and second, to return the principal amount when the bond matures.¹¹ The proceeds from bond issuances can be used to serve numerous purposes, including research and development, financing new projects, stock buybacks, paying shareholder dividends, financing mergers, and in debt refinancing.¹² There are three fundamental differences between an asset-backed *sukuk* and a conventional bond: first, the underlying ownership interest; second, repayment based on performance rather than interest; and finally, the return on principal.¹³

1. *The Asset Underpinning a Sukuk Offering*

Ownership Interest: First, unlike a conventional secured or unsecured bond, *sukuk* typically represent an interest in an underlying funding arrangement, entitling the holder to a proportionate share of returns guaranteed by the arrangement as well as the return of capital at a future date.¹⁴ In other words, *sukuk* investors are granted partial ownership of an asset or business, along with the right to profit payments staggered over a specified repayment schedule.¹⁵

⁹ OFF. OF INV. EDUC. & ADVOC., INVESTOR BULLETIN, *What Are Corporate Bonds?*, SEC, https://www.sec.gov/files/ib_corporatebonds.pdf [https://perma.cc/22PS-3RLU] (last visited Dec. 9, 2025).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ McKean James Evans, *The Future of Conflict Between Islamic and Western Financial Systems: Profit, Principle and Pragmatism*, 71 U. PITT. L. REV. 819, 829 (2010).

¹⁴ Dey, *supra* note 1.

¹⁵ Faras Ghani, *What is Islamic halal investment and why is it on the rise?*, AL JAZEERA (Mar. 28, 2024), <https://www.aljazeera.com/news/2024/3/28/what-is-islamic-and-halal-investment-is-it-on-the-rise> [https://perma.cc/P3GU-7VBE].

Repayment Structure: Second, *sukuk* do not grant repayments based on interest as a percentage of capital raised but rather profits as proportional to the performance of the underlying asset. This is attributed to the structure of the bond as an ownership interest with a legal right to returns.¹⁶ The consequence of this is that every *sukuk* issuance includes a contractual agreement that the bondholder is entitled to returns at a percentage, which had been previously determined by the LIBOR rates before the general departure from that metric.¹⁷ In the event that the underlying asset underperforms, the asset manager typically will pay the bondholder the difference by means of an interest-free loan.¹⁸ Effectively, the issuer of a *sukuk* sells a certificate to an investor group, uses the proceeds of the group certificate to purchase an asset that the investors have partial ownership in, the investors' earnings are then partially tied to the returns generated by the asset, and the issuer is bound by a contractual promise to buy back the bond at par value at a future date.¹⁹

Principal Recovery Mechanism: Finally, an asset-backed *sukuk* differs from a bond in that they have different mechanisms for recovery of the principal loan amount. In a traditional bond, the holder is entitled to the return of the principal regardless of where or how the amount was distributed. Per Sharia finance principles, the return on *sukuk* must be based on the performance of the underlying asset to which it is tied. Therefore, a *sukuk* agreement includes a 'repurchase' term whereby the asset manager agrees to repurchase the *sukuk* at the price for which they were originally sold. This structure essentially mimics the fundamental principal-recovery feature of a bond.²⁰

Like a conventional bond, however, *sukuk* share some common features. In most markets, *sukuk* are freely transferable on the secondary market provided they are listed on the appropriate

¹⁶ Evans, *supra* note 13, at 825.

¹⁷ While returns associated with *sukuk* issuances were previously determined with regard to London Interbank Offered Rate (LIBOR) interest rates, organizations have largely shifted to issuing Secured Overnight Financing Rate (SOFR)-linked *sukuks*. E.g., *Groundbreaking SOFR-linked Sukuk Issued by the Islamic Development Bank*, ISLAMIC DEV. BANK (Apr. 22, 2021), <http://isdb.org/news/groundbreaking-sofr-linked-sukuk-issued-by-the-islamic-development-bank> [<https://perma.cc/YA97-3RMG>].

¹⁸ Evans, *supra* note 13, at 829.

¹⁹ *Id.*; see also *Sukuk (Islamic Bond) at a Glance*, SEC: NIGERIA, <https://sec.gov.ng/our-mandate/development/investor-education/investment-basics/sukuk-islamic-bond-at-a-glance/> [<https://perma.cc/MD2V-CWSQ>] (last visited Dec. 9, 2025).

²⁰ Evans, *supra* note 13, at 829.

exchange, they are structured to guarantee a regular return, and they are also redeemable at a predetermined point of maturity.²¹

2. *Halal Investing as a Tenet of Islamic Finance*

Islamic Finance is also premised on the notion of “*halal* investing.”²² This means that fundamentally, Sharia finance must be structured in accordance with principles of Islam. Therefore, a key distinction between *sukuk* and traditional bonds is that all forms of conventional interest—or *riba*—are strictly prohibited in Sharia finance, which means that *sukuk* must be intentionally structured to ensure that they generate returns without reliance on an interest on income structure.²³ This runs contrary to the Western financial system, which is premised on the debtor-creditor model. In a traditional model, money is not only a medium of exchange but also a commodity itself. Because accretive earnings on a principal amount of money are at the heart of the system, interest is centralized in Western financial markets.²⁴ This very principle runs contrary to *sharia* values. In addition, investments cannot be made in assets, projects, or commodities that are considered haram. And finally, investments must not be made on *gharar*, which is the term used to describe high-risk or high-uncertainty investments or transactions that would otherwise preclude an investor from having full certainty and transparency in his business dealings.²⁵

²¹ *Overview of Assets Recycling Through Islamic Finance*, WORLD BANK GRP.: PUB. PRIV. P'SHIP RES. CTR., <https://ppp.worldbank.org/public-private-partnership/applicable-all-sectors/overview-assets-recycling-through-islamic-finance> [<https://perma.cc/E9NX-FKXB>] (last visited Jan. 15, 2026).

²² *Halal*, in Islam, refers to any act or object sanctioned by Islamic law. The primary source of proscriptions and permissions is the Quran, elaborated further by the Prophet Muhammad during his lifetime. While far from comprehensive, these original forms of guidance shape, at a high level, new cultures, habits, and notably, business practices encountered by Muslims. In the context of *halal* investing, restrictions are placed on the types of assets that can underpin a bond. Examples of *haram* – or not *halal* – assets, projects, or commodities include the trade, sale, manufacturing, or dealing in pork products, alcohol, drugs, military equipment, etc. See *Halal*, BRITANNICA, <https://www.britannica.com/topic/halal> [<https://perma.cc/8CLP-QFY9>].

²³ *Introduction to Sukuk*, CLIFFORD CHANCE (Mar. 2013), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2013/04/introduction-to-sukuk.pdf> [<https://perma.cc/LW5K-9NNZ>].

²⁴ Michael J.T. McMillen, *Asset Securitization Sukuk and Islamic Capital Markets: Structural Issues in These Formative Years*, 25 WIS. INT'L L.J. 703, 713 (2008).

²⁵ See Evans, *supra* note 13, at 822–23.

B. *Structuring of Sukuk al-Ijarah: Asset-Based and Asset-Backed*

The underlying structural framework for a *sukuk* is more appropriately a trust certificate, bringing attention to the key fact that there must be some undivided beneficial ownership interest in an underlying asset, notably in such a way that the return on the investment is based on how the underlying asset performs.²⁶ Because of this, *sukuk* are often linked to this asset through an *ijarah* arrangement in order to ensure the generation of revenue to mirror coupon payments that would be received under a conventional bond structure.²⁷ This structure justifies the generation of the return because the ‘bond-holder’ assumes ownership risks associated with owning the underlying asset.²⁸ While there are other types of *sukuk*, *sukuk al-ijarah* is widely accepted as the most appropriate mechanism for structuring and issuing *sukuk*, primarily for two reasons: its compliance with overarching principles of Islamic finance; and law firms’ and issuers’ familiarity with its sale and leaseback structure.²⁹ The basic structure of a *sukuk al-ijarah* is as follows:

1. The entity that is seeking capital—here, the originator—sells tangible or intangible assets to a special purpose vehicle (SPV);³⁰
2. The SPV finances the purchase of these assets with the proceeds of a *sukuk* issuance;

²⁶ See *Overview of Assets Recycling Through Islamic Finance*, *supra* note 21.

²⁷ *Ijarah* is the term used to describe the alternative to a conventional lease contract developed by Islamic Finance in order to remain Sharia-compliant. Understood in its most simple form, *ijarah* refers to the legal contract that involves hiring or renting an asset or commodity in order to receive compensation, consideration, and return from it. Unlike a conventional sale contract, ownership of an *ijarah* asset remains with the lessor while possession is transferred to the lessee. *Introduction to Ijarah (Lease) Contracts*, BLOSSOM FIN. (Apr. 18, 2020), <https://www.blossomfinance.com/posts/introduction-to-ijarah-lease-contracts> [<https://perma.cc/73BR-A9QZ>].

²⁸ See *Overview of Assets Recycling Through Islamic Finance*, *supra* note 21.

²⁹ *Id.*

³⁰ Under the terms of the sale and purchase agreement (SPA) entered into by the originator and the SPV, the originator agrees to sell a specified asset to the SPV. This asset becomes the underlying asset of a *sukuk*, and the SPV agrees to pay the purchase price of the asset, thus resulting in ownership. This transaction is structured such that the asset purchase price is equal to the amount the originator needs to borrow and therefore the *sukuk*-holders will cumulatively loan. See ISLAMIC FINANCE DEAL STRUCTURE: *SUKUK AL-IJARAH*, Thomson Reuters 1-500-9556 (database updated Feb. 20, 2018).

3. The SPV holds the tangible or intangible assets in trust for the *sukuk*-holders, each of whom owns an interest in the assets proportional to the value of their investment;³¹
4. The SPV then leases the fully purchased assets to the originator or an affiliate; and finally,
5. The SPV uses the lease or rental payments to make payments to the *sukuk*-holders.³²

Under certain circumstances, the contractual agreement provides for a right of resale back to the originator/lessee. The SPV may typically exercise this right either at the date of maturity or if a default has occurred as defined by the transaction documents. Should the SPV exercise its rights under the purchase undertaking, the price that must be paid by the originator is equal to the outstanding principal amount plus the exercise price, which is not based on the performance or value of the underlying asset but instead is equal to any accrued but unpaid period distribution amounts.³³ Risk allocation is fundamental to *sukuk*. Under the general principles of Islamic Finance, the investor and originator should bear equal risk with respect to the transaction. More commonly, despite the *sukuk* being issued by an orphan SPV, modern structures allow the investor to be exposed to the credit risk of the obligor rather than the credit risk of the SPV. With regards to recourse, however, the investor must consider whether the *sukuk* gives recourse to the obligor or to a separate trust or estate represented by the assets that underpin the funding arrangement.³⁴

While this underlying structure remains generally consistent across most *sukuk* issuances today, *sukuk* still vary in terms of whether they are asset-backed or asset-based. Asset-backed *sukuk* are viewed as the type of issuances most closely aligned with Islamic Finance principles.³⁵ This type of *sukuk* involves a true sale and transfer of assets from the originator to *sukuk*-holders, resulting in an effective registration of the property in the name of the new owners—the

³¹ Note that while it may seem incongruous with the “complete ownership” principle of Islamic Finance that the *sukuk*-holders themselves do not own title to the underlying asset, it is not always possible for every *sukuk* holder in an offering to have ownership rights over a single underlying asset. The leading reason is that it is not typically possible to register thousands of individuals as owners of a single asset; therefore, the *sukuk al-ijarah* is structured to award each individual beneficial interest in the asset. *See id.*

³² *See* GLOSSARY: *SUKUK AL-IJARA*, Thomson Reuters 5-500-7353 (2026).

³³ *See* ISLAMIC FINANCE DEAL STRUCTURE: *SUKUK AL-IJARA*, *supra* note 30.

³⁴ *See* Dey, *supra* note 1.

³⁵ Essia Ries Ahmed et al., *Asset-Based and Asset-Backed Sukuk: Structure and Legitimacy*, 35 *OPCIÓN* 1248, 1252 (2019) (finding that asset-backed *sukuk* are more legitimate than asset-based *sukuk*).

investors.³⁶ In theory, this moves the asset from the balance sheet of the obligor to the investor through the Special Purpose Vehicle. Ownership is then binding in the sense that investors would have recourse to the asset itself and prioritized claims in the event of bankruptcy.³⁷ An asset-based *sukuk*, on the other hand, more closely resembles a conventional unsecured bond but uses an asset to align with the requirements of Sharia. In an attempt to still meet the transfer of ownership requirement, the structure involves constructive or beneficial ownership, notably when the *sukuk*-holder investor class is too large. What this means is that the 'sale' of the asset is not true from an accounting or legal perspective.³⁸

The difference between asset-based and asset-backed *sukuk* becomes particularly salient for investors with respect to two factors: return and recourse. In an asset-based structure, the investor is not concerned with the sale value of the underlying asset or the lease value of the asset to third parties. Through the purchase undertaking, the originator promises to purchase the asset back at par value at maturity or in the case of early termination through bankruptcy. Therefore, the investor relies only on the credit strength of the obligor as the principal lessee of the asset and therefore the credit exposure of the investors is transferred to the obligor.³⁹ When the transaction is asset-backed, however, the profit and return are based on the asset. In these instances, investors can be expected to ascertain the value of the asset and the transaction.⁴⁰ Hence, it is also essential for recourse reasons that an investor understand whether the asset underlying his or her *sukuk* issuance has been permanently transferred to the SPV, given that there are two paths for recourse. On one hand, the investor will have recourse to the underlying asset if the structure is an asset-backed *sukuk*;⁴¹ on the other hand, the investor's only recourse for an asset-based *sukuk* is against the obligor. In the second case, even though the asset has been transferred between obligor and SPV, the transfer is not effective against third parties and cannot be targeted by the insolvency estate.⁴²

³⁶ *But see id.* (describing the lack of true sale transactions for asset-based *sukuk*).

³⁷ Habib Ahmed, *Islamic finance at a crossroads: the dominance of the asset based sukuk*, 25 J. INT'L BANKING & FIN. L. 366, 368 (2010).

³⁸ *Id.*

³⁹ *See* Dey, *supra* note 1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

C. *The Historical Development of Islamic Finance and Sukuk*

Islamic Finance traces its presence in markets outside the Middle East to the late 1990s and early twenty-first century where markets saw the rise of real estate and private equity investments.⁴³ Traditionally, these market opportunities were more readily-available and favorable to the preferences of Middle Eastern investors, as well as generally more easily-structured per the principles of Sharia.⁴⁴ Transactions in the United States and Europe occurred on a transaction-by-transaction basis and were facilitated and financed privately by commercial banks.⁴⁵ The debt capital markets did not open up to Sharia-compliant debt instruments until the early 2000s, notably in 2001 and 2003 when the first large-scale offerings were made.⁴⁶ Since then, the market has picked up pace rapidly. Between 2001 and 2003, the Accounting and Auditing Organization for Islamic Financial Institutions (“AAOIFI”) issued a fatwa⁴⁷ that approved standards for *sukuk*, including bond and securitization structures.⁴⁸ In 2003, the Organization of the Islamic Conference recognized that the legal infrastructure in a number of jurisdictions was posing barriers to the growth of the capital markets and leading to international rating agencies being unwilling to rate issuances that did not involve a sovereign credit.⁴⁹ Then, in 2006, the Islamic Financial Services Board (“IFSB”) began to address the legal infrastructural issues faced by access to the capital markets and developed a legal framework for Islamic Finance.⁵⁰ As such, despite being a historically niche market,

⁴³ See Mohamed Aly Sergie, *The Rise of Islamic Finance*, COUNCIL FOREIGN RELS. (Jan. 30, 2014), <https://www.cfr.org/background/rise-islamic-finance> [<https://perma.cc/LNA7-S5EG>].

⁴⁴ Islamic Finance has traditionally mapped best onto private equity transactions. Analysts have identified ‘*Mudarabah*’ as the most common form of an Islamic private equity or venture capital transaction. *Mudarabah* are contracts between two parties to finance a business venture; one party is a *rab al maal* (investor) who solely provides the capital, and a *mudarib* (entrepreneur) who solely manages the project. See Zainab Mansoor, *Islamic Private Equity: Has it Come of Age?*, SALAAM GATEWAY (Aug. 31, 2023), <https://salaamgateway.com/story/islamic-private-equity-has-it-come-of-age> [<https://perma.cc/RWH4-8C88>].

⁴⁵ See McMillen, *supra* note 24, at 705.

⁴⁶ See NATHIF J. ADAM, *ISLAMIC BONDS: YOUR GUIDE TO ISSUING, STRUCTURING AND INVESTING IN SUKUK* 11–16 (Nathif J. Adam & Abdulkader Thomas eds., 2004).

⁴⁷ In Islam, *fatwa* is a formal ruling or interpretation on a point of law known as a qualified legal scholar, typically issued at the behest of the courts. See *Fatwa*, BRITANNICA, <https://www.britannica.com/topic/fatwa> (on file with the Columbia Business Law Review) (last visited Dec. 9, 2025).

⁴⁸ See ACCT. & AUDITING ORG. FOR ISLAMIC FIN. INSTS., SHARI’AH STANDARD NO. 17: INVESTMENT SUKUK 468–78 (2003).

⁴⁹ See McMillen, *supra* note 24, at 707.

⁵⁰ *Id.*

the *sukuk* bond market developed into a more mainstream asset class between 2006 and 2007, when a number of large securitization structures were rated and issued.⁵¹

Attributed to the years of innovation which has provided structure to Islamic Finance, the market for Islamic financial products is currently estimated to be worth USD 867 billion worldwide.⁵² Among other factors, this growth has led to the diversification of not only geographic issuance but also industry sectors, now including sovereign, quasi-sovereign, and corporate issuers. The market for *sukuk* is undoubtedly largest in countries with Muslim majority populations in the Middle East and Southeast Asia, making it no surprise that market leaders are Malaysia, Saudi Arabia, and Indonesia.⁵³ According to UBS, Malaysia remains the largest *sukuk* market as of 2024, with roughly 60% of its local currency debt market denominated in *sukuk*.⁵⁴ The Gulf Cooperation Council (GCC) countries collectively account for 35% of global outstanding *sukuk* and continues to be a growing presence in the field because of the region's ever-increasing number of infrastructure and development projects.⁵⁵

The boom in the market for *sukuk* has been driven by not only a growing demand from investors for Sharia-compliant investment products, but also the recognition by issuers that *sukuk* represent a relatively stable and more 'ethical' investment option because of their compliance with underlying moral principles. Namely, despite their close resemblance to conventional asset structuring, Sharia-compliant financial instruments align closely with subjective investor preferences for the recipient industries of their funding.⁵⁶ Over time and due to the changes in the nature of demand for capital, the asset-based form of *sukuk* issuances has become popularized,⁵⁷ even though there are

⁵¹ *Id.* at 708. The author notes that “[t]he Islamic finance industry began to glimpse the future of securitization *sukuk*,” in 2006 and 2007.

⁵² Laura Slater & Shamaila Khan, *Portfolio diversification with Sukuk*, UBS ASSET MGMT. 1 (Sept. 23, 2024), <https://www.ubs.com/us/en/assetmanagement/insights/asset-class-perspectives/fixed-income/articles/portfolio-diversification-with-sukuks.html> [https://perma.cc/3QRW-DX7Q]; see also *Islamic Banking Assets Continue Double-Digit Growth: Survey*, GULF CULTURAL CLUB, <https://gcclub.org/0000/00/00/islamic-banking-assets-continue-double-digit-growth-survey/> [https://perma.cc/M9RP-6YTM] (last visited Jan. 14, 2026).

⁵³ Slater & Khan, *supra* note 52, at 2.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See *Investing in Alignment with Sharia Values*, MORGAN STANLEY 2 (Mar. 28, 2025), <https://www.morganstanley.com/content/dam/msdotcom/what-we-do/wealth-management/gift/investing-in-alignment-with-shariah-values.pdf> [https://perma.cc/S95W-A5CL].

⁵⁷ See *GCC Sukuk: A Primer, 3rd Edition*, SATURNA CAPITAL (Mar. 22, 2024), <https://www.saturna.com/insights/thought-leadership/gcc-sukuk-primer-3rd->

concerns that this form of asset structure does not closely align with the principles of Islamic Finance.⁵⁸

D. *The Regulatory Regime under the AAOIFI*

As will be discussed later, one of the major points of contention is that Islamic Finance is still largely amorphous and has no clear, single set of rules governing the structuring or issuances of financial assets and instruments like *sukuk*. However, several regulatory bodies have, since the early 2000s, issued guidance in the form of fatwa and regulations that help streamline the tenets of Islamic Finance as well as structuring guidelines for financial instruments. AAOIFI is one such institution. A Bahrain-based non-profit organization established in 1991, AAOIFI is the primary governing body responsible for issuing standards for the global Islamic Finance industry.⁵⁹ To date, it has issued a total of 100 standards. The Sharia Standard No. 62, proposed by AAOIFI in 2023, will mandate that Islamic *sukuk* be backed by underlying assets rather than merely referencing such assets in their structure.⁶⁰ While this Standard has yet to be formally published, such a change can be expected to chill *sukuk* issuances because it would constitute an asset transfer to *sukuk* holders, rather than enabling assets to remain in the ownership of the issuer.⁶¹ It is also unclear whether the AAOIFI Standards operate as governing law, or as general principles of guidance or *dicta*. To this end, it is plausible that holders of AAOIFI Sharia Standard 62-compliant instruments are exposed to the performance risk of the underlying asset and fundamentally alter the credit risk structure. Conversely, this may improve a *sukuk*-holder's recovery prospects with respect to the underlying asset as compared to those who hold 'unsecured bonds.'

edition (on file with Columbia Business Law Review) ("Over the years the market has largely coalesced around the adoption of two types, *sukuk al wakalah* and *sukuk al ijarah*. From 2010 to 2020, 52% of total international *sukuk* issuance was *sukuk al wakalah* and 22% was *sukuk al ijarah*.").

⁵⁸ See Essia Ries Ahmed et al., *supra* note 35.

⁵⁹ About AAOIFI, ACCT. & AUDITING ORG. FOR ISLAMIC FIN. INSTS., <https://aaoifi.com/about-aaoifi/?lang=en#> [https://perma.cc/ZGA6-QT2U].

⁶⁰ In April of 2025, AAOIFI issued a press release stating that they were "now in the process of amending the first published draft version of the standard in the light of the comments received from the industry." Press Release, AAOIFI, Draft Shari'ah Standard No. 62 (Apr. 28, 2025), <https://aaoifi.com/announcement/press-release-from-the-accounting-and-auditing-organisation-for-islamic-financial-institutions-aaoifi-regarding-draft-shariah-standard-no-62/?lang=en> [https://perma.cc/5FX3-RLRR].

⁶¹ Proposed AAOIFI sharia'a standard may slow *sukuk* issuance: Moody's, MUSCAT DAILY (Oct. 29, 2024), <https://www.muscatdaily.com/2024/10/29/proposed-aaoifi-shariaa-standard-may-slow-sukuk-issuance-moodys/> [https://perma.cc/M7W8-NW6S].

The adoption of Standard 62 could cause the pendulum to swing back from the widely issued asset-based *sukuk* toward the asset-backed instrument, which comes with an associated host of transaction costs and limitations.

Over time, as *sukuk* has popularized and the number of cross-border issuances has increased, both issuers and investors have faced a series of roadblocks as they relate to *sukuk*'s proliferation on international markets. As outlined below in Part II, these range from issues with administrative and transactional costs, to fundamental cultural differences. Primarily, issuers struggle with cross-border issuances when they grapple with the nuances of cross-jurisdictional legal differences, including tax, bankruptcy, and securities laws.⁶² Such variance in the laws implicates important aspects of a *sukuk* offering including registration requirements, compliance with exchange laws, the number and size of the offering, as well as any asset categorization that needs to be considered for exemptions. For both issuers and investors, the uncertainty surrounding recourse is a key factor that often prevents issuers from offering their financial products in jurisdictions that are unfamiliar with, or hostile toward the recourse mechanisms in Sharia. Finally, *sukuk* and other Islamic finance products are inherently more complicated than their conventional Western counterparts, which places a premium on standardization.⁶³ The fact that these products must comply with the formal and religious requirements of the Sharia means that issuers must go the extra step of ensuring that their offerings are approved by religious authorities, that the asset is *halal*, that returns on investment are structured in forms other than interest, and more. This has appeared, at least initially, to create issues with economies of scale for these products.⁶⁴ However, such complications are not insurmountable, as suggested by the many historical and recent examples of global and cross-border *sukuk* offerings. Finally, in Part III, a three-part approach is proposed with a primary focus on the first solution, sustainable investing. By harnessing an existing framework, the green *sukuk* market can provide a gateway for increased cross-border investment in a way that borrows from established regulatory and governance frameworks. In more traditional approaches, investors can continue to either bolster the Islamic project finance and real estate fields which have been predominating the field

⁶² Ketut Ariadi Kusuma & Anderson Caputo Silva, *Sukuk Markets: A Proposed Approach for Development* 26 (World Bank, Pol'y Rsch. Working Paper No. 7133, 2014), <https://documents1.worldbank.org/curated/en/637041468320946094/pdf/WPS7133.pdf> [<https://perma.cc/P9F6-RQUY>].

⁶³ Alfred Kammer et al., *Islamic Finance: Opportunities, Challenges, and Policy Options*, IMF, Apr. 2015, at 16, 30.

⁶⁴ *Id.* at 8, 16.

for years or adopt asset-based *sukuk* as a more foreign investor-friendly approach.

II. *SUKUK* AND WESTERN MARKETS: BARRIERS TO ACCESS

A. *An Overview of the Advantages and Disadvantages of Islamic Finance*

Putting aside the nuances of structuring Sharia-compliant debt instruments so that they are ‘more or less’ compliant with the fundamental ethical underpinnings of Islamic Law, it cannot be ignored that there are many larger market benefits for issuers when *sukuk* offerings are introduced into new markets. For one, Islamic Finance exposes a market to new sources of capital. Investors looking for returns structured in accordance with Sharia principles are still a largely untapped investor base; in large part, this shortcoming can be attributed to the scarcity of available Islamic products that are tailored to the developmental needs of a corporate issuer.⁶⁵ Additionally, there is considerable room for crossover into other niche financial markets such as ethical investing,⁶⁶ which has recently seen a huge growth through ESG principles.⁶⁷ Finally, to the extent that this is a priority for issuers, there are overall reputational benefits associated with structuring investments in accordance with Sharia.

This is not to say that the path forward is completely clear – *sukuk* offerings are not without their complications, which have largely posed sometimes-insurmountable barriers to their proliferation among a greater number of markets. At a high level, these can be filtered into a few key categories: (a) the challenges posed by attempting to execute Sharia-compliant contracts in legal and regulatory environments unaccustomed to Islamic law; (b) structuring an investment around a Sharia non-compliant underpinning asset—typically at issue when a *sukuk al-ijarah* funding agreement requires the obligor to have a suitable income-producing asset that can underpin the transaction; (c) overcoming the compliance and transactional costs associated with more complex *sukuk* structuring, particularly when the administrative regime surrounding *sukuk* paperwork is far more amorphous than that of the well-established conventional bond issuance; (d) tax planning of foreign assets, which can diverge from that of conventional bonds; (e)

⁶⁵ *Introduction to Sukuk*, CLIFFORD CHANCE (Mar. 2013), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2013/04/introduction-to-sukuk.pdf>.

⁶⁶ See Dey, *supra* note 1.

⁶⁷ See Jess Liu, *ESG Investing Comes of Age*, MORNINGSTAR, <https://www.morningstar.com/features/esg-investing-history> [<https://perma.cc/86R9-TLGV>] (last visited Dec. 12, 2025).

the struggle for recourse in bankruptcy proceedings; (f) choice of law when determining Sharia jurisprudence, securities, and trading rules; and (g) the lack of accessibility of seeking and receiving specialized legal counsel. As will be discussed, these recurring issues are among the many reasons that Western markets have naturally resisted the wider incorporation of *sukuk* at the same rate as conventional debt instruments. Though not discussed in as much detail below, lawyers and scholars have identified other broader disadvantages of *sukuk* bonds, namely (1) the issue faced by corporates or sovereigns with inadequate credit ratings to break into this market, and (2) the difficulties with substituting assets unless the original purchase and issuing agreements for a *sukuk* offering carefully account for replaceability.⁶⁸

B. *Regulatory Barriers to Access: The Limits of Sukuk Issuances*

1. *Operating in Non-Islamic Legal and Regulatory Environments*

Though the largest markets for Sharia-compliant financial instruments are concentrated in the Middle East and Southeast Asia, all geographic regions with large Muslim populations and robust Islamic financial institutions, *sukuk* offerings have transcended these regions and are now common in Western markets.⁶⁹ This has led to inevitable conflict surrounding the question of how Sharia is to be integrated into or interpreted in accordance with the law of different jurisdictions, notably when these regions have purely secular legal systems.⁷⁰ In countries colloquially deemed ‘Islamic Law’ Countries, the legal system is typically Sharia-incorporated, either *de jure* or *de facto*.⁷¹ In such jurisdictions, the principles of Sharia are either (1) incorporated into the text of the nation’s substantive law, or (2) incorporated as an interpretive matter by the courts or enforcement bodies.⁷² Irrespective of whether the Sharia incorporation is encoded in the law or applied as a matter of long standing legal practice, a contract intended to be governed by Sharia “will be enforced as such, to the extent that the overarching legal principles are incorporated and applicable.”⁷³ What this means, for ease of contracting purposes, is that the parties need not specifically incorporate the language of applicable

⁶⁸ See Dey, *supra* note 1.

⁶⁹ See McMillen, *supra* note 24, at 771–72 (noting that “the comfort level sophisticated Western institutions is increasing,” with respect to Islamic finance).

⁷⁰ *Id.* at 710, 713.

⁷¹ See Michael J.T. McMillen, *Contractual Enforceability Issues: Sukuk and Capital Markets Development*, 7 CHI. J. INT’L L. 427 (2007).

⁷² *Id.* at 440.

⁷³ *Id.*

Sharia provisions into the contract as the language of the contract will be automatically interpreted in accordance with the overarching legal framework including any Sharia.⁷⁴

However, in jurisdictions that are secular, the law of the jurisdiction does not categorically incorporate Sharia. Under the scope of a choice of law clause, sophisticated contracting parties may write provisions in the contract that, in the event of a dispute, will become the governing law as pertaining to that transaction.⁷⁵ In such cases, if contracting parties wish to structure their investments in accordance with Sharia, the language of the contract must explicitly incorporate the applicable language.⁷⁶ This is salient when, for example, a specific secular jurisdiction's governing law is selected (i.e. New York, English law). Courts will then interpret and enforce the contract subject to the letter of that law in accordance with the contract's terms.⁷⁷ More clearly, the designated court, applying the relevant local laws, will enforce only those Sharia provisions that are written into the contract. This extends to both choice of law and choice of forum clauses. If contracting parties wish to choose the law of a purely secular jurisdiction as the governing law for the contract, only provisions explicitly written in accordance with Sharia will be enforced as such to the extent possible and in accordance with the law. Recent transaction trends have indicated that most Sharia-compliant transactions are drafted so as to be governed by New York, English, German, French, or other secular law.⁷⁸

The first instance of a *sukuk* offering backed by a U.S.-based asset was groundbreaking for the industry, even if it happened after Islamic Finance had already become a global phenomenon. In July 2006, the Texas-based East Cameron Gas Company's *sukuk* offering was thought to mark a dramatic expansion of the pool of assets from which *sukuk* could be structured, while simultaneously growing into new, unexplored markets.⁷⁹ Arguably the first of its kind, the transaction was structured around an underlying oil and gas asset and combined American laws with Islamic Financing guidelines to issue a \$167 million securitization.⁸⁰ The East Cameron Gas Company offering was unique because it combined the legal frameworks of

⁷⁴ *Id.*

⁷⁵ *Id.* at 440–41.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 440 n.21.

⁷⁹ Ayman H. Abdel-Khaleq & Christopher F. Richardson, *New Horizons for Islamic Securities: Emerging Trends in Sukuk Offerings*, 7 CHI. J. INT'L L. 409, 422 (2007).

⁸⁰ Dominic O'Neill, *Islamic finance: Sukuk market on trial as Islamic bonds default*, EUROMONEY (July 2, 2009), <https://www.euromoney.com/article/b1322n438c4gqs/islamic-finance-sukuk-market-on-trial-as-islamic-bonds-default> [https://perma.cc/RL6X-Q7WQ].

multiple jurisdictions, including tax, bankruptcy, corporate, and securities laws.⁸¹ Purchasers of this *sukuk* were both Islamic and Western, and the debt instruments were exempt from registration under the SEC rules through a Regulation S international offering and a Regulation D private placement exemption in the U.S. market.⁸² A truly international deal, the *sukuk* offering was underwritten by London and Beirut-based banks with legal assistance from Dubai and Houston-based counsel.⁸³ The General Manager of East Cameron Partners, Campbell Evans, stated that the *sukuk* was a unique opportunity to balance investor preferences and the company's needs as an originator.⁸⁴ As an alternative to conventional oil and gas financing, *sukuk* seemed like a good alternative.

To remain Sharia-compliant, the funds raised were purported to support capital and operating costs associated with operating oil wells in the Gulf of Mexico.⁸⁵ The structure of this deal sparks an interesting discussion surrounding what qualifies as an appropriate underlying asset. In particular, the oil and gas asset in this offering is an interesting case study because it incorporates both tangible and intangible components. Here, the funds were intended to support the associated capital and operating costs of an oil rig, which is viewed as a more permissible means of circumventing the traditional Sharia prohibition of choosing an intangible asset as the foundation for an offering.⁸⁶ In order to eliminate the issue posed by *riba*, the funds were also funneled back to eliminate East Cameron's existing outstanding conventional debt, lowering the debt-equity ratio to a permissible standard by Sharia regulations.⁸⁷ The SPV used in this transaction was a limited liability Cayman Islands company,⁸⁸ and the *sukuk* holders received a fixed return of period payments apportioned as profit-sharing from the income generated from the royalty, dependent largely on the performance of the underlying asset.⁸⁹ Importantly, the investment was structured to be non-recourse, with the issuer

⁸¹ See Abdel-Khaleq & Richardson, *supra* note 79, at 422–24.

⁸² *Id.* at 419–22.

⁸³ *Id.* at 422–23.

⁸⁴ HAITHAM ZEINELDIN, EAST CAMERON GAS SUKUK – A CASE STUDY ON SUKUK DEFAULT 3 (2014), <https://www.sukuk.com/wp-content/uploads/2014/04/East-Camerron-Case-Study.pdf> [<https://perma.cc/E3JC-82J8>]; see also Kathryn Wells, *Islamic investors lap up first oil and gas sukuk*, EUROMONEY (July 3, 2006), <https://www.euromoney.com/article/27bjsstsqxhkmh1ip0lxi/banking/islamic-investors-lap-up-first-oil-and-gas-sukuk/> [<https://perma.cc/N5F7-C7CS>].

⁸⁵ See Zeineldin, *supra* note 84, at 3.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 3–4.

remaining free from liability to repay investors if the royalty was unable to generate sufficient funds.⁹⁰ Investors in this event bore the risk of poor asset performance, price risk, and risk of natural disaster, simultaneously facing a projected return over 11%.⁹¹ Despite a promising start, in Q3 2008, the East Cameron *sukuk* defaulted and declared bankruptcy.⁹²

2. *Registration Transactional Costs and Managing Compliance Risk*

Despite its recent growth in size and concentration in the Gulf and Southeast Asian nations, Islamic Finance has yet to identify one overarching institution or set of rules that it must uniformly follow. One issue raised by this lack of uniformity is that all conflicts must be resolved on a largely ad hoc basis with reference to common themes that have arisen from past deals. When looking to structure a *sukuk* offering or address possible recourse, there is no singular source of guidance that can be relied upon. Traditionally, all financial transactions require approval by a religious authority located within a financial institution. In many cases, largely at the local or regional level, this authority is a Sharia supervisory board and is responsible for ensuring that transactions are compliant with the requirements of the law.⁹³ At a high level, the approval by the supervisory board signals to a consumer or investor that a product or deal is Sharia-compliant.⁹⁴ Moreover, each deal—such as a *sukuk* offering—must be approved by a local religious leader.⁹⁵ The individual nature of each transaction, coupled with the widely stratified views of Islam held by its many followers, ultimately means that there is always the overarching concern that there is a general lack of consistency in the oversight functions of supervisory boards and approval authorities.⁹⁶ Even with the presence of established organizations such as the AAOIFI that

⁹⁰ *Id.* at 4.

⁹¹ *Id.* at 3–4.

⁹² O'Neill, *supra* note 80. The corresponding legal claim was filed in the United States Bankruptcy Court Western District of Louisiana Lafayette Division (Case no. 08-51207) because the property title was originally perfected under Louisiana laws. See Sweder van Wijnbergen & Sajjad Zaheer, *Sukuk Defaults: On Distress Resolution in Islamic Finance* (Tinbergen Institute Discussion Paper No. 13-087/VI/DSF57, 2013), <https://hdl.handle.net/10419/87493>.

⁹³ Shaykh Y. DeLorenzo, *Shari'ah Compliance Risk*, 7 CHI. J. OF INT'L L. 397, 399 (2007), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1577&context=cjil>.

⁹⁴ *Id.* at 400.

⁹⁵ *Id.* at 399.

⁹⁶ *Id.* at 398.

serve these regulatory functions, two primary shortcomings persist: (1) lack of resources; and (2) a sense of self-dealing.

First, the rapid growth of the Islamic finance industry has depleted the resources of supervisory boards that attempt to include a diverse array of scholars of various religious qualifications and jurisprudential perspectives.⁹⁷ The shortage of qualified scholars in recent years has forced some institutions to rely upon lay experts which may run contradictory to parties' desires to have perfect clarity with respect to the Sharia compliance and security of their deal.⁹⁸ Second, Sharia supervisory boards are often paid for and maintained by the same institutions that they supervise, or that hire them to provide approval, adding to concerns about independence and reliability.⁹⁹

These concerns have been mitigated by the proliferation of larger regulatory bodies, including the AAOIFI and the Islamic Finance Services Board (IFSB) located in Bahrain and Malaysia respectively. Together, these organizations provide industry-wide standards on Sharia compliance and *halal* investing, as well as generating standards on complex banking, capital markets, and insurance.¹⁰⁰ Other jurisdictions are increasingly moving towards adopting AAOIFI and IFSB guidelines as the official standards for Islamic Finance structured within their borders—a proliferation guided by market pressures for conformity.¹⁰¹ In spite of this, tensions remain among scholars in the Persian Gulf, Southeast Asia, and MENA regions when the same robust system yields different perspectives on particular products across regional lines.¹⁰²

3. *Tax Planning and Tax Implications of Foreign Assets*

The applicability of bankruptcy, tax, trust and estate, corporations, security regulations, property, and secured transactions laws of different jurisdictions is also of particular importance when *sukuk* offerings are centered outside of the Islamic world.¹⁰³ Though the other legal regimes are equally important, tax planning is particularly salient when deciding on how to structure a *sukuk* offering.¹⁰⁴ Often, a *sukuk* offering intended to be operationalized

⁹⁷ Scott R. Anderson, *Forthcoming Changes in the Shari'ah Compliance Regime for Islamic Finance*, 35 YALE J. INT'L L. 237, 240 (2010).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Who Regulates the Islamic Finance Sector?*, REUTERS (Apr. 13, 2009, at 03:49 ET), <http://www.reuters.com/article/idINKLR44252720090413> (on file with the Columbia Business Law Review).

¹⁰¹ *See id.* (describing major steps taken to standardize the industry).

¹⁰² *See* Anderson, *supra* note 97, at 240.

¹⁰³ Abdel-Khaleq & Richardson, *supra* note 79, at 417–18.

¹⁰⁴ *Id.* at 418.

outside of the Islamic world will have assets physically located in one country, investors located in another, and utilize intermediary SPVs organized in a third jurisdiction.¹⁰⁵ To organize a tax structure that is not only effective but that remains Sharia-compliant across the laws of multiple jurisdictions is a challenging puzzle that further complicates *sukuk* offerings from more conventional debt instruments. Lawyers would have to consider the withholding of taxes, characterization of income, and the categorization of the transaction itself, to name a few fundamental tax issues that arise in the context of each transaction.¹⁰⁶ Because of the relative infancy of the field of financial instruments, such issues are often resolved on an ad hoc basis,¹⁰⁷ making it difficult to resort to a well-established practice to tackle such complications when they arise in the future.

Due to the different tax structures across countries, the classification of *sukuk* under a jurisdiction's tax laws is a key aspect of ensuring that investors and issuers know the implications of structuring transactions within specific countries. In the United Kingdom, for example, Islamic Finance products are regulated in the same manner as conventional products, meaning that the existing legislative and regulatory frameworks apply as amended.¹⁰⁸ In their effort to ensure there is a level playing field for Islamic Finance products, the government responds to any unequal treatment by introducing remedial legislation.¹⁰⁹ Such legislation has resulted in equal tax treatment of debt instruments (*sukuk*), abolishment of the double Stamp Duty Land Tax charge on Sharia-compliant mortgages, and the establishment of an alternative liquidity facility structured as a *wakalah*,¹¹⁰ allowing U.K. Islamic Banks to meet their capital requirements in a Sharia-compliant manner.¹¹¹ The tax issue that *sukuk* pose stems from their payment structure; payments on *sukuk* represent profit distributions despite being functionally adjacent to interest payments, and profit distributions are not typically deductible under the laws of the United Kingdom, and in many other jurisdictions,

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ John Dewar & Munib Hussain, *United Kingdom, in* ISLAMIC FINANCE AND MARKETS 138, 138 (John Dewar & Munib Hussain eds., 2023), [united-kingdom-lexology-in-depth-islamic-finance-and-markets-law.pdf](https://perma.cc/F6YK-ASB4) [https://perma.cc/F6YK-ASB4].

¹⁰⁹ *Id.*

¹¹⁰ *Wakalah* refers to a Sharia-compliant contract under which one contracting party appoints another to act as their agent or proxy and manage the investment on their behalf. The proxy will be considered a *wakeel* (agent) of the investor and is entitled to a predetermined fixed fee, or fee as a percentage of the net asset value. See GLOSSARY: *WAKALA*, Thomson Reuters 9-500-9543 (2026).

¹¹¹ See Dewar & Hussain, *supra* note 108, at 144.

making *sukuk* a comparatively more expensive way to raise capital.¹¹² To remedy this disparity in the United Kingdom, the alternative finance regime has been extended such that for arrangements meeting certain conditions, amounts paid by issuers to bondholders are generally deductible by the issuer under the loan relationships regime.¹¹³

The treatment of *sukuk* under the American income tax regime has been a topic central to discussions about the integration of the financial instrument in Western markets. Namely, will income from *sukuk* be exempt from federal income tax?¹¹⁴ Under section 103 of the Internal Revenue Code, interest from U.S. state and municipal bonds are not included in gross income for purposes of federal income tax.¹¹⁵ Currently, only the interest on the state- and municipality-issued debt is not taxable.¹¹⁶ Islamic scholars propose that in theory, allowing *sukuk* this treatment would provide the same benefits as a government-issued bond: qualified government entities obtain lower interest rates, and bondholders realize the same post-tax income from a municipal bond as they would from a corporate bond with higher pre-tax return rates but now at lower risks.¹¹⁷ Strictly speaking, *sukuk* are not considered “bonds” under section 103’s language because *sukuk* do not generate interest, a form of *riba*. Because *sukuk* are engineered to avoid resembling interest-bearing obligations and instead resemble real estate transactions mirroring the effects of a loan, it is unclear whether they would receive the same tax treatment as a municipal bond under the federal income tax regime of the United States.

4. *The Struggle for Recourse Across Jurisdictions*

Bankruptcy law is another significant consideration when deciding how to structure *sukuk* offerings. Notably, insolvency procedures and bankruptcy laws differ widely across nations,¹¹⁸ making

¹¹² *Id.* at 139, 144–45.

¹¹³ *Id.* at 145.

¹¹⁴ Jiyeon Lee-Lim and Lisa Watts, *US Federal Income Taxation of Islamic Financing*, LATHAM & WATKINS LLP (Sep. 30, 2014), [https://www.westlaw.com/1-506-8305?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/1-506-8305?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) (on file with the Columbia Business Law Review).

¹¹⁵ 26 U.S.C. § 103(a) (“[e]xcept as provided in subsection (b), gross income does not include interest on any State or local bond.”).

¹¹⁶ *Id.*

¹¹⁷ Kareem R. Seifeldin, *On the Issuance of Islamic Securities by State and Local Governments; or, Why New Jersey Should Sell the Turnpike to the Emir of Dubai*, 16 RUTGERS J. L. & RELIG. 392, 416–17 (2015).

¹¹⁸ *See, e.g.*, Müge Adalet McGowan & Dan Andrews, *Design of Insolvency Regimes Across Countries* (OECD Econ. Dep’t, Working Paper No. 1504, 2018) [https://one.oecd.org/document/ECO/WKP\(2018\)52/En/pdf](https://one.oecd.org/document/ECO/WKP(2018)52/En/pdf).

it imperative to engage in a thoughtful discussion of the choice of applicable law with respect to the jurisdiction where the assets are located versus where any claims will be litigated. The United States Bankruptcy Code, for example, has a comprehensive and robust regime for liquidation, reorganization and litigation procedures for companies in bankruptcy.¹¹⁹ Europe, in contrast, is considerably less debtor-friendly and employs its own bankruptcy code.¹²⁰ Some Islamic nations, such as the United Arab Emirates for example, borrow heavily from the New York laws while still incorporating their elements of Sharia.¹²¹ Because of the manner in which a *sukuk* offering is structured and ideally tied to a tangible underlying asset, the location of the asset will create a need for proper documentation of attachment and perfection of security interests so that foreign investors can receive assurance that they will have proper recourse to the asset in the event of liquidation. This does suggest, however, that creditors of the *sukuk* issuer may have no recourse to any assets other than those held in trust by the issuer itself.

As discussed earlier, contracting parties can write in choice-of-law clauses that allow for disputes involving foreign assets and investors to be litigated under the laws of other jurisdictions. One such case was *Certain Funds v. KPMG*, where the investment fund applied to discover documents from domestic and international accounting firms relating to audits conducted by Middle Eastern affiliates for use in a foreign proceeding, the appeal for which was brought before the United States Court of Appeals for the Second Circuit.¹²² In this case, 28 U.S.C. § 1782 governs the assistance provided to litigants in proceedings before foreign and international tribunals, authorizing a district court to order a party to produce discovery for use in a foreign proceeding.¹²³ Plaintiffs-appellants (“the Funds”) held interests collectively amounting to USD 380 million in two Saudi-based conglomerates.¹²⁴ The largest interest was that held in the Golden Belt

¹¹⁹ See, e.g., 11 U.S.C. §§ 101–1532.

¹²⁰ See, e.g., Sylwia Morawska et al., *Bankruptcy Law Severity for Debtors: Comparative Analysis Among Selected Countries*, 23 EUROPEAN RSCH. STUDS. J. 659 (2020).

¹²¹ See *Comparative Gulf Bankruptcy Guide: What You Need to Know about the UAE, Saudi Arabia, and Bahrain*, SIDLEY AUSTIN LLP (Mar. 2025), <https://www.sidley.com/en/insights/newsupdates/2025/02/comparative-gulf-bankruptcy-guide-what-you-need-to-know-about-the-uae-saudi-and-bahrain> [<https://perma.cc/J5MW-RDQ9>].

¹²² *Certain Funds, Accts. &/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 115 (2d Cir. 2015) (“Plaintiff-appellants are certain funds, accounts, and/or investment vehicles managed by affiliates of Fortress Investment Group, LLC.”).

¹²³ *Id.* at 114. See also 28 U.S.C. § 1782.

¹²⁴ *Certain Funds, Accts. &/or Inv. Vehicles*, 798 F.3d at 115.

1 *sukuk*, a financial instrument issued by Saad and valued at USD 129 million, 20% of the *sukuk*'s aggregate value.¹²⁵ The conflict arose from financial problems reported by one of the issuers, AHAB, starting in 2009 that were traced to fraud and embezzlement of assets by the owner of the other issuer, Saad. These allegations led to a cascade of events, including the withdrawal of Moody's ratings for Saad, seizure of subsidiaries of Saad and AHAB by the Central Bank of Bahrain, and regulatory action from a number of international authorities. As a consequence, all financial instruments of Saad and AHAB were in default.¹²⁶ Five years after the default, the Funds filed an *ex parte* application in the Federal District Court in the Southern District of New York seeking documents and evidence relevant to the foreign proceedings from KPMG and PWC, accounting firms whose international affiliates in Saudi Arabia, Egypt, and Dubai audited companies owned by AHAB and Saad that were involved in the offerings.¹²⁷ The Funds contended that they intended to use this information in several legal actions they planned to initiate against the Saad group and the AHAB group before Saudi quasi-judicial committees. The district court held that the Funds "failed to meet the statutory requirements that establish the court's authority to order discovery under § 1782," and did not grant the application.¹²⁸ The Court of Appeals for the Second Circuit, in holding that the district court did not err in rejecting the application for discovery, discussed what it meant for an investment vehicle to be an "interested person" in the foreign judicial proceedings under the statutory meaning in § 1782.¹²⁹ The Court doubted that a mere financial interest in the outcome of foreign proceedings alone would be sufficient to confer "interested person" status under the statute.¹³⁰ The Court's hesitation with the Funds' argument was that that Congress could not have intended to confer such a status on all possible *amici curiae* beyond this case that have some financial stake in a proceeding, even less so when, competitors, or other various entities have no true connection to the case beyond an external financial stake.¹³¹ Without deciding on the

¹²⁵ *Id.* at 115 ("The Funds' interest in the GB1 *sukuk*... [made them] the single largest holder of its certificates. The Funds held various other investments [from the same issuers], including participation in a Cayman Islands holding corporation for [offshore Saudi Arabian assets], valued at [USD] \$35 million.").

¹²⁶ *Id.*

¹²⁷ *Id.* at 116.

¹²⁸ *Id.* at 117.

¹²⁹ *Id.* at 117–18.

¹³⁰ *Id.* at 119.

¹³¹ *See also* *Akebia Therapeutics, Inc. v. FibroGen, Inc.*, 793 F.3d 1108, 1110 (9th Cir. July 16, 2015) (rejecting argument that applicant was not "interested person" where it was "a party to the foreign proceedings underlying this case"). The United

question of qualifications required for “interested person” status, the Court held that the Funds had identified no way in which they could use the evidence sought in any ongoing foreign proceedings, which was another requirement of § 1782.¹³²

In the case of *Certain Funds v. KPMG*, a key thread to take away is the discord between interest by means of financial stake versus interest as a function of relationships to the issuer parties in foreign proceedings. *Certain Funds* here held a 20% interest in the GB1 *sukuk*, which the court deemed as insufficient to confer “interested person” status.¹³³ Yet, the Funds were the single largest holder of the GB1 certificates and had additional interests in Saad and AHAB’s assets, notably through the Cayman Islands account.¹³⁴ This case illustrates one of the fundamental shortcomings of *sukuk* offerings when structured around Western investors, assets, or legal proceedings in that there is often a struggle for recourse. New York, while it is a reasonable venue for insolvency and restructuring proceedings and offers a robust regime for various international contracting parties, comes with its own statutory restrictions on proceedings and discovery. The unanswered question of which *sukuk* issuers and holders have which bundle of rights in bankruptcy proceedings is a primary reason that there has been a slowing down of cross-border offerings, especially in the North American market.

C. *Sharia-Specific Obligations and Choice of Law*

1. *Complications of a Non Sharia-Compliant Underlying Asset*

As discussed in Part I, the concept of *halal* investing is at the core of Islamic Finance. While this encompasses restrictions on structuring debt and equity instruments to avoid incurring conventional interest returns, it also pertains to the underpinning assets and limitations as to their nature. For pragmatic purposes, this often becomes an added layer of complexity when parties attempt to structure *sukuk* deals outside of the Islamic world. *Halal* investments typically preclude assets, projects, or commodities that include the trade, sale, manufacturing or dealing in pork products, alcohol, drugs, military equipment, certain types of entertainment, and others from being the object of a *sukuk* issuance.¹³⁵ Being structured outside of an Islamic jurisdiction does not give the deal amnesty from complying

States Court of Appeals for the Second Circuit has never held that a mere financial interest confers “interested person” status under § 1782.

¹³² *Certain Funds, Accts. &/or Inv. Vehicles*, 798 F.3d at 120.

¹³³ *Id.* at 121.

¹³⁴ *Id.* at 115.

¹³⁵ See *Overview of Assets Recycling Through Islamic Finance*, *supra* note 21.

with all the traditional limitations of Sharia. Instead, these deals must face additional challenges of operating in a regulatory regime that is unfamiliar with the nuances of Sharia and the conventions of Islamic Finance techniques. To illustrate this matter, consider a deal structured within a more conservative Islamic jurisdiction where certain activities, for example gambling and the sale and consumption of alcohol, are banned outright. In that jurisdiction, the legal and financial industries are deeply accustomed to structuring deals in accordance with Islamic law and jurisprudence. Additionally, when certain industries are banned outright, it is exponentially easier to avoid making them the subject of onshore debt or equity offerings. In non-Islamic jurisdictions, however, this may not be as linear of a distinction in instances where the *sukuk* issuer has subsidiaries involved in broader industries like cable television services, casinos, or fast-food restaurants. Moreover, an issuer with a large debt load or an issuer who provides conventional financial service would also technically be barred from issuing *sukuk* because of the prohibition in *riba*.¹³⁶ This creates the added burden on foreign *sukuk* offerings to be accompanied by a thorough analysis of existing debt and leverage ratios as well as the issuer's subsidiaries and their business operations.

2. *Choice of Law Governing Securities and Trading*

Sukuk are analogized to debt offerings because they are, fundamentally, securities. However, because securities laws, like bankruptcy codes, differ across nations, how a *sukuk* is structured will implicate a unique set of securities laws and regulatory requirements based on the location of the asset, the markets it is offered to, and where, if at all, it is registered. Not only does this require input from specialized attorneys in multiple jurisdictions, but it may also trigger the heightened registration requirements of certain securities markets depending on the breadth of the marketing effort and where the *sukuk* is ultimately listed. The United States is one example of a security market with more stringent regulatory frameworks. Under the U.S. securities laws, the nature (categorization) and number of securities holders can be important factors for consideration. Generally, the offer or sale of all securities must be registered under Section 5 of the Securities Act of 1933;¹³⁷ if they are not, they must be properly exempt from registration under Section 4(a)(2) of the Act or one of the rule-

¹³⁶ See Abdel-Khaleq & Richardson, *supra* note 79, at 417.

¹³⁷ See *Exempt Offerings*, SEC, <https://www.sec.gov/resources-small-businesses/exempt-offerings> [<https://perma.cc/3PUU-9VPP>] (last updated Nov. 6, 2024) (“Every offer and sale of securities must either be registered under the Securities Act of 1933 or rely on an available exemption from registration[.]”).

based exemptions: Regulation S, D, A, CF or Rule 144.¹³⁸ Securities laws in the United States do not distinguish between conventional and Islamic products, though they do not bar Islamic financial products from being listed on U.S. exchanges.¹³⁹ When this happens, issuers must decide how to describe the structure of the *sukuk* in the registration statement for a publicly-offered Islamic Finance product. As an added layer of consideration for U.S.-based issuers making offerings to investors outside the United States, in order to avoid the complex registration and disclosure requirements, a *sukuk* offering must be structured as to incorporate detailed declarations in the offering documents and subscription agreements to ensure that investors adequately represent and warrant that they are not U.S. natural persons and are not subject to the protections of the Securities Act.¹⁴⁰ This is not to say that regulatory bodies in the European Union and United States have not been supportive of the growth of the Islamic financial industry – global *sukuk* issuance is projected by S&P Global to reach USD 160 billion to USD 170 billion in 2024, driving the total global outstanding *sukuk* market to an estimated USD 875 billion.¹⁴¹ These cross-jurisdictional regulatory hurdles are not necessarily direct impediments to the growth of *sukuk* offerings in coming years. However, they serve as a caution for future investors and financial institutions to remain aware of the possible restrictions regarding communications, promotions, sale, registration, or transfer of *sukuk* certificates. Parties attempting to structure and market their *sukuk* in jurisdictions with heightened regulatory requirements must remain aware of limitations and compliance restrictions.

3. *Accessibility of Seeking and Receiving Specialized Legal Advice.*

When making informed decisions about structuring a *sukuk* offering in light of regulatory and compliance requirements across various jurisdictions, as well as restrictions on the underlying asset itself, it is often difficult, but necessary, to reconcile the considerations that may be relevant in choosing the governing law for various *sukuk* documentation and the dispute resolution forum.

¹³⁸ See Office of Small Business Policy, *Overview of Capital-Raising Exemptions*, SEC, <https://www.sec.gov/files/2024-ospb-overview-capital-raising-exemptions-table-2.pdf> [https://perma.cc/AF7W-UUFX].

¹³⁹ See Abdel-Khaleq & Richardson, *supra* note 79, at 419.

¹⁴⁰ *Id.* at 419.

¹⁴¹ Khalid Alyafi, *In The Know: The Rise of Sukuk in Global Finance*, BAKER MCKENZIE (Oct. 3, 2024), <https://www.bakermckenzie.com/en/insight/publications/2024/10/rise-of-sukuk-global-finance> [https://perma.cc/F7WD-6BPH].

As discussed earlier, each country or regional bloc has a unique understanding of what it means for a transaction to be fully Sharia-compliant, from their individual understanding of *halal* investing to how their law treats forum selection clauses and Sharia provisions. To highlight a few examples, the English Court held that English law would take precedence over any choice of law provision in a *murabaha* agreement,¹⁴² even if the agreement provided that the governing law would be English law subject to the principles of Sharia.¹⁴³ A number of Persian Gulf countries have ruled that trading in futures or derivatives qualifies as gambling, rendering any transaction premised on derivatives trading non-compliant.¹⁴⁴ The practical limitations and obscurity of Islamic finance in general have resulted in cultural, language, and religious barriers for bankers and attorneys practicing in Europe, Asia, and the Americas attempting to structure the same Islamic finance deal.¹⁴⁵ There are additional, specific complications involving the choice of law clauses, internal conflict of laws, requirements to write Sharia into the terms of the contract, and the process of perfecting title to real estate as documented with the appropriate government authority. One method of addressing these challenges could be to employ local counsel and hire Middle Eastern bankers and lawyers to act as lead managers and arrangers, making use of their unique skills and understanding of the nuances of the regions in which they operate. Whether this additional barrier and requirement for manpower is a materially limiting factor to the growth of *sukuk* has yet to be determined.

III. PATHWAYS FORWARD AND PROPOSED SOLUTIONS

Given that *sukuk* continues to grow as a financial instrument at the intersection of law, religion, and finance, the solution to increasing its presence in Western markets is not singular or one-dimensional. Instead, there are several avenues through which *sukuk* offerings can expand in the coming years, taking advantage of investment opportunities and industry trends. For one, issuers can tap

¹⁴² *Murabaha*, as defined by the Dubai Islamic Bank, is “an Islamic financing structure that works as a sales contract, fixing the price of goods or items as required by a customer, inclusive of a pre-agreed profit margin. The bank then makes the purchase and closes the deal with the customer’s seller of choice and subsequently enters into a sale with the customer on Murabaha basis. The customer repays the bank according to predefined installments or settlement terms.” Murabaha, DUBAI ISLAMIC BANK, <https://www.dib.ae/business/products-services/murabaha> [<https://perma.cc/8E2B-NJ2H>] (last visited Jan. 9, 2025).

¹⁴³ See *Shamil Bank of Bahrain EC v. Beximco Pharms. Ltd.*, 1 WLR 1784 (CA 2004) (UK).

¹⁴⁴ See Abdel-Khaleq & Richardson, *supra* note 79, at 420–21.

¹⁴⁵ *Id.*

into the growing sustainable investing market and not only contribute to the existing, though small, market of green *sukuk*, but also adopt the sustainability-linked *sukuk* model, allowing issuers to contribute to the sustainable investing space while simultaneously funding their projects. In addition to this, two further avenues of action can be followed.

The first option, as is already commonly practiced, is to continue growing Islamic Finance within the established sectors of project finance and real estate. The second option, currently the general practice, is to attract Western investors through a pivot towards asset-based rather than asset-backed securities as the most viable pathway forward. However, for those hoping to employ this second approach, the future for asset-based *sukuk* is uncertain under the new Sharia Standard 62, drafted by the AAOIFI.¹⁴⁶

A. *Sukuk as a Sustainable Investment: Tapping into the Green Investing Market*

Over the last few years, the emergence of a new category of sustainability-linked fixed-income securities presents a new opportunity for the Islamic finance to make its mark in the green investing space through *sukuk* offerings. This transition marks a shift away from the practice of “Green *Sukuk*”¹⁴⁷ and towards “Sustainable” or “Sustainable-Linked” *Sukuk*. While these models are primarily applied in the European Union and derived from the E.U. Taxonomy,¹⁴⁸ they provide a framework for how countries such as the United States can adopt a similar model to become more inclusive spaces for *sukuk*. Marrying the concepts of *sukuk* and green investing can help overcome the obstacle that arises when non-Sharia compliant underlying assets are structured to be the basis of an Islamic Finance deal.

Environmental protection has always fallen squarely within Sharia principles,¹⁴⁹ but sustainable *sukuk* issuances before 2020

¹⁴⁶ See Proposed AAOIFI sharia’a standard may slow *sukuk* issuance: Moody’s, *supra* note 61.

¹⁴⁷ Until recently, sustainable debt securities have been largely structured in accordance with the Green Bond Principles, designed for funding dedicated sustainable projects. Sharia-compliant *sukuk* that are intended to fall within the “green” investment category also fall within this GBP umbrella. Unlike the sustainability-linked bond, proceeds from green *sukuk* could not be used for general corporate purposes and had to be tied to specific sustainable projects. See Debashis Dey et al., *Sustainability-linked sukuk: a new opportunity for the Islamic finance market*, 10 J. INT’L BANKING & FIN. L. 680 (2020).

¹⁴⁸ *Id.* at 681.

¹⁴⁹ Ahmed Al-Dawoody & Sarah Gale, *Protecting the environment during armed conflict: IHL and Islamic law*, INT’L COMM. RED CROSS: HUMANITARIAN L. & POL’Y BLOG (June 3, 2021), <https://blogs.icrc.org/law-and->

remained low.¹⁵⁰ For the European capital markets, the E.U. Taxonomy is the predominant legal classification tool aimed at investors and financial institutions, providing a set of requisite activities and standards that must be met for an investment to be considered ‘sustainable,’ as well as reporting requirements on a semi-regular basis.¹⁵¹ The E.U. Taxonomy is unique because while it is available for any market participant to use as a standard to classify their products as sustainable, it is a mandatory requirement for both financial market participants offering products within the E.U. and United Kingdom and large public interest companies.¹⁵² Most *sukuk* issuers are based in the Middle East and Southeast Asia, not Taxonomy-mandated E.U. jurisdictions. However, to avoid forcing the hand of an investor choosing between a compliant and a non-compliant product, there is great value for issuers in shrouding their *sukuk* offerings in the terminology of the E.U. Taxonomy such that it is accessible to investors in more markets. Aligning with the Taxonomy is particularly favorable for *sukuk* issuers because the disclosure and accreditation procedure may provide financial institutions and asset managers with a reliable means of identifying the underlying assets in structured finance products such as the *sukuk*.¹⁵³ If other capital markets, such as the United States’s, were to adopt standards similar to the E.U. Taxonomy, it would serve a unifying purpose in helping investors worldwide identify sustainable financial products and investments and provide an established guideline for issuers to follow.

Even in the absence of a global criteria for sustainable investing, sustainable and green *sukuk* issuances have grown substantially over the past decade in tandem with global trends.¹⁵⁴ These green bonds are designed to fund investments with direct or

policy/2021/06/03/protecting-environment-armed-conflict-ihl-islamic-law/
[https://perma.cc/HYD7-TF5C].

¹⁵⁰ See Michael Bennett & Henry Coyle, *State of the Sukuk Market and Prospects for Growth*, WORLD BANK BLOGS (Mar. 4, 2025), <https://blogs.worldbank.org/en/allaboutfinance/state-of-the-sukuk-market-and-prospects-for-growth> [https://perma.cc/5RRM-ALUN] (describing the growth of green and sustainable *sukuk* offerings, especially since the first green *sukuk* in 2017).

¹⁵¹ Dey et al., *supra* note 147, at 681.

¹⁵² *Id.*; see also THE POTENTIAL GROWTH AND FUTURE TRENDS OF GREEN SUKUK AS A TOOL FOR SUSTAINABLE FINANCING, UN DEV. PROGRAM 41 (2024) (giving an overview of the EU Taxonomy system).

¹⁵³ See UN DEV. PROGRAM, *supra* note 152, at 29 (citing “[t]he lack of a universally accepted taxonomy in green finance,” as a “major barrier to the Green *Sukuk* market’s development.”).

¹⁵⁴ Timucin Engin et al., *Credit FAQ: What Are The Prospects For Green Sukuk Issuance?*, S&P GLOBAL (Sep. 17, 2018), <https://www.spglobal.com/ratings/en/research/articles/180917-credit-faq-what-are-the-prospects-for-green-sukuk-issuance-10693998> [https://perma.cc/B2XE-YHXG].

indirect environmental or social benefits, including renewable energy projects or social infrastructure.¹⁵⁵ In 2017, Malaysia issued what has since been identified as the first green *sukuk*,¹⁵⁶ which has since gained traction across the globe.¹⁵⁷ Following in these footsteps, the Egyptian Minister of Finance declared in 2024 the Egyptian government's ongoing efforts to develop financial policies designed at stimulating economic activity, production, and export while boosting industries such as renewable energy, information technology, and export more broadly.¹⁵⁸ Egypt's efforts to achieve comprehensive and sustainable development have led them to explore diverse funding sources to reduce the debt burden and the debt-to-GDP ratio, one solution being to possibly issue green bonds and green *sukuk* in the coming years with the support of the United States Government.¹⁵⁹ Once again, because these comply with Islamic Law as well as the international requirements for sustainable finance, they open themselves up to a broader investor class than other instruments would. Since the rise of green investing, a new category of asset has also emerged, further expanding the scope of environmentally conscious financial instruments. Sustainability-linked bonds (SLBs) are debt securities structured like traditional bonds but with additional features, which may include agreements the issuer has made to meet sustainability-

¹⁵⁵ Laura Slater & Shamaila Khan, *Portfolio diversification with Sukuk*, UBS ASSET MGMT. (Sept. 23, 2024), <https://www.ubs.com/au/en/assetmanagement/insights/asset-class-perspectives/fixed-income/articles/portfolio-diversification-with-sukuks.html> [<https://perma.cc/M2PD-MES7>].

¹⁵⁶ See Bennett & Coyle, *supra* note 150; see also Faris Hadad-Zervos, *Malaysia launches the world's first green Islamic bond*, WORLD BANK BLOGS (July 31, 2017), <https://blogs.worldbank.org/en/eastasiapacific/malaysia-launches-the-worlds-first-green-islamic-bond> [<https://perma.cc/K3PR-JMHG>].

¹⁵⁷ A prime indication of the success of the Malaysia green *sukuk* has been the subsequent posting of various other investment opportunities mirroring the sustainable investment model of the original Tadau Energy project. Specifically, Quantum Solar, PNB Merdeka, and Sinar Kamiri all issued green energy project *sukuk*, some valued considerably higher than Tadau. See WORLD BANK TREASURY, HELPING MALAYSIA DEVELOP THE GREEN SUKUK MARKET (2017) <https://thedocs.worldbank.org/en/doc/21c2fb7dfb189f10a0503004757b03f4-0340012022/original/Case-Study-Malaysia-Green-Sukuk-Market-Development.pdf> [<https://perma.cc/326W-RW6Q>].

¹⁵⁸ *Egypt considers issuing green bonds, sukuk to diversify investor base: Finance Minister*, DAILY NEWS EGYPT (Sept. 2, 2024), <https://www.dailynewsegyp.com/2024/09/02/egypt-considers-issuing-green-bonds-sukuk-to-diversify-investor-base-finance-minister/> [<https://perma.cc/UYC8-32N9>].

¹⁵⁹ See Aamer Yaqub, *Egypt Pioneers Sustainable Finance with Local Green Islamic Bond*, HALAL TIMES (Dec. 11, 2024), <https://www.halaltimes.com/egypt-to-launch-first-ever-green-islamic-bonds-in-local-market-driving-sustainable-finance/> [<https://perma.cc/K8UJ-5FJB>].

related targets, key performance indicators (KPIs), the debt security changes with respect to the degree to which the KPIs are met.¹⁶⁰ The changes to the debt security typically relate to the coupon and impact the interest due over the specified repayment period.¹⁶¹

Shifting from the green *sukuk* to sustainability-linked bond (or sustainability-linked *sukuk*) has yielded a number of benefits for the scope of the financial instrument. Primarily, it shifts the core requirement of the debt instrument from requiring investing in a specific project to allowing for the investment returns to generally work towards achieving sustainability strategies.¹⁶² Allowing for the proceeds to apply to a general corporate purpose rather than requiring them to continue servicing a specific asset opens the market up to issuers who are not financially positioned to allocate entire funding amounts to specific green projects or investments.

In light of the E.U. Taxonomy and the shift from green *sukuk* to sustainability-linked *sukuk*, the following solution could provide a high-level framework for the expansion of sustainable *sukuk* offerings beyond existing markets such as the Middle East, Southeast Asia and European Union, and into the United States and North America more generally. First, Islamic regulatory authorities such as the AAOIFI would have to work together with global financial and regulatory institutions to create a universally acceptable framework for ‘sustainability’. Any regulations would have to align Sharia-compliant principles with the E.U.’s often-heightened requirements for environmental protection and sustainability and the complex United States securities laws.¹⁶³ Second, taking inspiration from the KPIs, this new global standard would require adaptation in the form of short but comprehensive targets that could be folded into the offering documents for a *sukuk*. Finally, new *sukuks* would have to adopt the sustainability-linked model, allowing proceeds from the debt offering

¹⁶⁰ KPIs can include reducing greenhouse gas emissions to a certain level, increasing usage of renewable energy to a certain proportion, or achieving a certain “sustainability rating” from an external rating provider, within a certain time. *See* Dey et al., *supra* note 147, at 683.

¹⁶¹ *See id.*

¹⁶² *Id.* at 684.

¹⁶³ One such example of an effort to standardize and create a global framework for sustainable investment are the Global ESG Disclosure Standards for Investment Products, which are “the first global voluntary standards for disclosing how an investment product considers ESG issues in its objectives, investment process, and stewardship activities.” They seek to address current gaps in various global regulations and help harmonize the disclosure practices and requirements across the global markets. *See Global ESG Disclosure Standards for Investment Products*, CHARTERED FIN. ANALYST INST.: RSCH. & POL’Y CTR., <https://rpc.cfainstitute.org/esg-standards> [<https://perma.cc/Y29W-3PTX>] (last visited Jan. 12, 2025).

to serve general sustainability-related corporate objectives while simultaneously or independently meeting the funding requirements of the project at large. Overall, this framework would enable the *sukuk* market to shift from purely green *sukuk* to sustainability-linked *sukuks* that could be registered in one jurisdiction's capital markets but appeal to a global investor base. Uniformity across global standards and investor expectations could help increase the appeal of such products to investors hoping to invest large sums in the environmental investing space and allow issuers to design their products without fear of walling off certain investor bases.

B. *Growth Opportunities in Project Finance and Real Estate*

Outside of debt financing, Islamic Finance has seen massive success in its other forms, including Project Finance and Real Estate transactions, with considerable growth prospects in both real estate and oil and gas assets.¹⁶⁴ Given that Project Finance and Real Estate are more common forms of Islamic Finance deal structures both in the Middle East and elsewhere, there is a more seamless transition between the various markets for these types of products. Namely, pivoting towards this bucket of assets more broadly helps address various issues of integration including seeking specialist legal counsel, transaction costs, tax treatment, and regulatory uncertainty. Moreover, the arrival of financial technology aimed at making investing far more accessible to the ordinary consumer and individual investor, often referred to as FinTech, is projected to mobilize the large global Muslim population,¹⁶⁵ consisting of nearly 25% of the global population.¹⁶⁶ Despite such a large investor base, only 1% of total global financial assets are said to qualify as Sharia-compliant, suggesting that the hypothetical demand far exceeds the current supply of products and services.¹⁶⁷

C. *Asset-Based Sukuk as the New Global Standard*

In Part I of this note, the difference between asset-based and asset-backed *sukuk* was discussed, highlighting the difference between various religious schools of thought in the broader Sharia

¹⁶⁴ See *Unlocking growth: Islamic finance sees global expansion*, *supra* note 7.

¹⁶⁵ See Yuki Lee, *Fintech Innovation Widens Access to Islamic Finance*, THE ASSET (Oct. 23, 2025), <https://www.theasset.com/article/55179/fintech-innovation-widens-access-to-islamic-finance> [<https://perma.cc/3D72-N7PN>].

¹⁶⁶ See Kata Fustos, *The Global Muslim Population*, POPULATION REFERENCE BUREAU (June 3, 2011), <https://www.prb.org/resources/the-global-muslim-population/> [<https://perma.cc/W17R-2SFU>] (noting that the predicted Muslim population is expected to exceed one-quarter of the world population by 2030).

¹⁶⁷ Ghani, *supra* note 15.

jurisprudence. To re-emphasize the difference, an asset-backed *sukuk* involves the true sale and transfer of the assets from the originator to *sukuk*-holders, involving effective registration of a physical asset (often property or relating to real estate) in the name of the new investor-owners. Asset-based *sukuk*, however, resembled unsecured bonds that still have an asset that meets the Sharia requirements. In these instances, perfection of ownership interest does not have to happen, notably when the investor class is too large. Instead, beneficial or constructive ownership is permissible. The asset-based *sukuk* more closely resembles the conventional western debt instrument, or bond.¹⁶⁸ Additionally, to help with lowering barriers to access and facilitating global integration, there are fewer administrative requirements and transaction costs of perfecting transfer of ownership and requiring the asset to be indivisible. These qualities make asset-based *sukuk* offerings far more appealing than their asset-backed counterparts, which are seen by certain Islamic and Sharia scholars as the only form of Sharia-compliant *sukuk*.

D. *The Uncertain Future under Sharia Standard 62*

A new proposed draft standard, the AAOIFI's Sharia Standard 62, may change the entire *sukuk* landscape as we know it, placing additional pressure on new products to conform with heightened requirements. Standard 62 mandates that "Islamic *sukuk* be effectively backed by underlying assets rather than merely referencing such assets in their structure, as has been the case until now."¹⁶⁹ Requiring that all *sukuk* pursuant to the Standard be asset-backed would constitute a transfer of ownership to the *sukuk* holders rather than allowing issuers to retain ownership of the asset, which is a move projected to chill the market. Such a move would not only expose the holders to the performance risk of the *sukuk* asset but also increase the complexity of the *sukuk* structure as well as transaction costs. Additionally, the issuing company, in situations of corporate distress, would no longer be able to sell the underlying asset to raise cash given that they will no longer have title to it. Implications of this change would include "the formalities of transfer and registration of assets, extra documentation compared with asset-based structures, direct risk taken on by the investor in the base asset and increased fees and time spent structuring

¹⁶⁸ Özgür Kocabaşoğlu, *Asset Backed Versus Asset Based Sukuk and their Application in Türkiye*, ERDEM & ERDEM (Dec. 31, 2022), <https://www.erdem-erdem.av.tr/en/insights/asset-backed-versus-asset-based-sukuk-and-their-application-in-turkiye> [https://perma.cc/WM2B-MJNQ].

¹⁶⁹ See *Proposed AAOIFI sharia'a standard may slow sukuk issuance: Moody's*, *supra* note 61.

the transaction.”¹⁷⁰ This change cuts both ways. Investors prefer to have as limited liability with respect to the asset as possible, while issuers would prefer to have the asset in the case of a liquidity event.¹⁷¹ At a large and global scale, the adoption of Sharia Standard 62 could have severe implications for cross-border *sukuk* issuances more than domestic ones, making the issuer and transfer costs seemingly not worth the returns for issuers and investors alike.

However, there is some hope that Sharia Standard 62 will not entirely change the Islamic Finance landscape. Despite widespread calls for unification of regulation in Islamic Finance, only twelve countries have fully adopted the AAOIFI Sharia Standards.¹⁷² Issuers based in these twelve countries, in aggregate, account for only 13% of the total local currency *sukuk* issuances as of 2023.¹⁷³ In the event that more issuers are domiciled in jurisdictions that fully adopt the AAOIFI Standards, or more jurisdictions begin to adopt these draft laws, the percentage of issuers bound by these rules will begin to increase, potentially with lasting impacts on the *sukuk* market.

CONCLUSION

Sukuk remains a truly international phenomenon, much like the rest of Islamic Finance more broadly, occupying a significant portion of the market and representing a major source of funding for Middle East-based corporations and sovereigns even today. As late as Q3 2024, the Riyad Bank announced their plans to issue a dollar denominated Tier 1 sustainable *sukuk* as part of its additional capital *sukuk* program which had been established in September of the same year.¹⁷⁴ For Riyad Bank, Tier 1 capital is the primary funding source,

¹⁷⁰ Adil Hussain, *United Arab Emirates: Shariah Standard 62 - Much ado about nothing?*, BAKER MCKENZIE (Sept. 6, 2024), https://insightplus.bakermckenzie.com/bm/banking-finance_1/united-arab-emirates-shariah-standard-62-much-ado-about-nothing [https://perma.cc/2EYJ-8UAK].

¹⁷¹ *See id.* (stating that “[i]nvestors typically wish to avoid taking on such direct risk from the underlying asset while originators tend to prefer retaining full control of the asset for their own business continuity.”).

¹⁷² *Proposed AAOIFI sharia’a standard may slow sukuk issuance: Moody’s*, MUSCAT DAILY (Oct. 29, 2024), <https://www.muscatdaily.com/2024/10/29/proposed-aaofi-shariaa-standard-may-slow-sukuk-issuance-moodys/> [https://perma.cc/Q6QL-QH23]. *See also Adoption of AAOIFI Standards*, AAOIFI, <https://aaofi.com/adoption-of-aaofi-standards/?lang=en> [https://perma.cc/24BJ-L2FG] (last visited Jan. 23, 2026).

¹⁷³ *Proposed AAOIFI sharia’a standard may slow sukuk issuance: Moody’s*, *supra* note 172.

¹⁷⁴ Chantal Fouad, *Riyad Bank issues sustainable sukuk or bond offerings in US dollar*, GULF NEWS (Sept. 24, 2024), <https://gulfnews.com/business/banking/riyad->

making this *sukuk* issuance a core capital-raising mechanism.¹⁷⁵ By choosing to offer in the U.S. dollar, the *sukuk* aims to be offered to qualified investors both domestically in Saudi Arabia as well as internationally, appealing to the United States investor base. It is no surprise that Saudi Arabia continues to be a leader in *sukuk* offerings through 2024. In addition, the Saudi oil and gas giant, Aramco, recently tapped the global debt and equity markets in 2021, raising USD 6 billion from a three-tranche *sukuk*.¹⁷⁶ Then between July 9th and July 17th, 2024, Aramco offered U.S. dollar-denominated international bonds under its global medium-term note program, which had a minimum subscription of USD 200,000.¹⁷⁷ The bonds were announced as being “direct, general, unconditional and unsecured obligations of the company,” targeting qualified institutional investors in the regulatory environments where it was permissible.¹⁷⁸ Other Middle Eastern countries such as the United Arab Emirates are similarly building out the market with comparably large *sukuk* offerings, including the pre-existing Nakheel *Sukuk* Plan of 2011 and the Arada Developments LLC *sukuk* worth USD 400 million, expected to be due in 2029.¹⁷⁹ Similarly, *sukuk* offerings have been widespread in the United Kingdom for a long time, solidified by the government’s issuance of a second sovereign *sukuk* by 2021 valued at GBP 500 million with a five-year maturity.¹⁸⁰ With strong demand from investors in the Middle East, Asia, and the United Kingdom, this has solidified the country’s reputation as a truly inclusive, global financial center.¹⁸¹

bank-issues-sustainable-sukuk-or-bond-offerings-in-us-dollar-1.1727166373037 [https://perma.cc/QN5Y-5SE3].

¹⁷⁵ *See id.*

¹⁷⁶ Indrajit Sen, *Aramco starts issuing US dollar-denominated bonds*, MEED (July 9, 2024), <https://www.meed.com/aramco-starts-issuing-us-dollar-denominated-bonds> [https://perma.cc/SNA8-L82L]. *See also* *Saudi Arabia taps debt markets with three-part dollar sukuk sale*, BLOOMBERG (May 28, 2024), <https://www.bloomberg.com/news/articles/2024-05-28/saudi-arabia-taps-debt-markets-with-three-part-dollar-sukuk-sale?embedded-checkout=true> (on file with the Columbia Business Law Review).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See* Tracy Alloway, *Nakheel and the sukuk legal spook*, FIN. TIMES (Dec. 4, 2009), <https://www.ft.com/content/3dbe721e-7b0f-3c6f-ba18-71072c9a7a19> (on file with the Columbia Business Law Review); *see also* Alex Roussos, *Dentons advises Arada Developments LLC on its US\$400 million sukuk due 2029*, DENTONS ONLINE (June 27, 2024), <https://www.dentons.com/en/about-dentons/news-events-and-awards/news/2024/june/dentons-advises-arada-developments-llc-on-its-usd400-million-sukuk-due-2029> [https://perma.cc/6B9D-E924].

¹⁸⁰ HM Treasury, *UK Bolsters Islamic Finance Offering with Second Sukuk*, GOV.UK (Mar. 25, 2021), <https://www.gov.uk/government/news/uk-bolsters-islamic-finance-offering-with-second-sukuk> [https://perma.cc/68XA-5WT4].

¹⁸¹ *See id.*

As evidenced above, *Sukuk*, which began as a cornerstone of Islamic finance, are growing to become increasingly widespread financial instruments that have become key for corporations and sovereign nations in raising debt in million-dollar offerings that have popularized over the course of the 21st century. Currently, they have the largest impact in the Middle East and Southeast Asia, used frequently by the governments of Saudi Arabia, United Arab Emirates and Malaysia to raise finances for government-funded projects. But in recent years, *sukuk* offerings have become increasingly international, with issuers, investors, and SPVs all centered in different countries. Due to this globalization, various challenges have emerged—ranging from administrative and regulatory to cultural and religious. However, as evidenced by recent case studies, these challenges have not proven insurmountable.

Despite the barriers to access, pathways forward can include increasing the number of asset-based securities as compared to asset-backed securities, which appeal to foreign investing markets because of their resemblance to the conventional bond. However, the adoption of Standard 62 may pose a challenge to this if integrated into the laws of more jurisdictions as the ruling deems asset-based *sukuk* as *haram*, requiring all offerings to comply with stricter ownership transfer regulations. Instead, an emerging but viable pathway forward is to tap into the green investing market, using sustainability-linked *sukuk* to marry green finance with Islamic finance.