An Overview of the Issuing and Offering of Securities in Kuwait

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While the regulatory reform covers many areas, the Capital Market Authority (the "Authority") has recently issued new by laws, which arguably remain one of the most significant legislative changes Kuwait has witnessed in a generation.

The new bylaws were issued in early November 2015 and, for most part, repeal the previous bylaws issued in 2010 and most of the resolutions and circulars issued by the Authority's Board of Commissioners from 2011 to 2015. The new bylaws are broken down into 16 'Books' covering many aspects of the capital markets and securities regulatory system. One of the most important books of the bylaws however, is Book 11, which addresses the dealing and trading in securities, among several other issues that pertain to the issuance and offering of securities in Kuwait.

One of the most important characteristics of Book 11 is that it bifurcates the issuance process (chapters 1 and 2) from the offering process (chapter 5). The requirements for each, as will be further illustrated below, depend on a number of factors, including the nature of the issuer (i.e. a Kuwaiti or foreign entity), the issuance mechanism (i.e. directly by the issuer or indirectly through a special purpose vehicle), and the targeted investors (i.e. the public or to certain qualified/professional investors).

While Book 11 contains 14 chapters, we shall focus on chapters 1,2 and 5.

Chapters 1 and 2

Generally speaking, Book 11 applies to the issuance of any "security" whatever its nature or purpose of issuance. Companies may not issue "securities", whether directly or indirectly (i.e. through a special purpose vehicle) or offer the same for subscription by any third party unless the approval of the Authority has been secured.

It is important to note that "securities" is defined under the bylaws as any deed or instrument of whatever legal form evidencing a share in a tradable funding process that is licensed by the Authority, such as:

- Shares issued by or proposed to be issued in a company's capital.
- Any instrument creating or declaring a debt issued or to be issued by a company.
- Loans, bonds, sukuk and other instruments transferrable into shares in the capital of a company.
- All general debt instruments which are tradable, issued by various government bodies, public authorities or institutions.
- Any right, option or derivatives related to any securities.
- Units in collective investment schemes.
- Any paper or deed which the Authority considers as a security for the objectives of implementing the law and regulations.

It is worth noting, however, that commercial papers such as cheques, bills of exchange and bearer bonds are not considered securities, as well as documentary credits, cash transfers and instruments traded exclusively by banks, insurance policies and rights of beneficiaries arising from retirement funds.

For the purposes of issuing securities, Kuwaiti entities, specifically shareholding companies, must secure the Authority's approval for such issuance. The issuance approval process is necessary whether the issuance of the securities is direct or indirect. Bonds and sukuk may be issued by shareholding companies directly, or indirectly through a special purpose vehicle that is established either onshore or offshore. Chapter 7 of Book 11 promulgates the rules and regulations regarding the establishment and governance of onshore special purpose vehicles in more detail.

For the purposes of the issuance approval process, a template application outlining the necessary information regarding the particulars of the underlying securities must be completed and submitted to the Authority. Along with the said application, a set of documents, most notably, the constitutional and financial documents of the issuer, evaluation of the real estate assets backing the securities (if any) and a rough draft of the prospectus (where applicable) are also submitted to the Authority for review and approval. The Central Bank of Kuwait's approval is required by the Authority as a prerequisite for banks and financial institutions licensed by the Central Bank.

The expected timeline for the Authority to review and accept or decline the issuance approval application is 30 days from receipt of all necessary documents and information to the Authority. The Authority's approval of the application, however, does not necessarily mean that the securities may be offered immediately. While that may be the case in instances where the issuance is exclusively taking place outside of Kuwait, the offering of securities in Kuwait, whether on public or private placement basis, requires an approved prospectus that is compliant with the rules and regulations of the Authority.

Chapter 3

This chapter sets out the evaluation of in-kind shares, whether tangible or intangible. In the event that the share capital of an entity, upon incorporation or upon the increase in the issued capital, includes in-kind shares, or in the event the subscription consideration in a security is in-kind and non-cash, the in-kind share must be evaluated by a company licensed by the Authority to undertake "asset evaluation" activities. The rules and regulations pertaining to the licensed activities in general, and asset evaluation in particular, are set out in Book 5 of the byelaws.

The evaluation of in-kind assets could be requested by the issuer of the securities and the shareholders thereof, or by the court in the event of asset foreclosure.

Chapter 4

For the purposes of issuing bonds and sukuk, the issuer, in the event of direct issuance, or the obligor, in the event of indirect issuance through a SPV, must provide to the Authority one or more reports issued by a credit rating agency. The rating itself is also an activity that requires prelicensing by the Authority. The rules and regulations pertaining to rating agencies are also included under Book 5 of the bylaws.

With the exception of public offerings of bonds and sukuk, the Authority may exempt the issuer or obligor from the rating agency report requirement.

Chapter 5

Chapter 5 sets out the requirements for the offering of securities in Kuwait by Kuwaiti or foreign entities, when such offering targets certain qualified or professional investors. In essence, no securities may be offered in Kuwait, whether by a Kuwaiti or foreign issuer, on a public or private placement basis, unless the securities were offered pursuant to an approved prospectus that is prepared in accordance with the rules and regulations of the Authority.

The Authority's requirements for the prospectus differs according to the nature of the targeted investors. For instance, the requirements for a prospectus in the context of public offering, where the securities are offered to members of the public, is different than the requirements of the prospectus in the context of a private placement offering, where the securities are offered to qualified/professional investors.

Due to the nature and scale of the public offering, the information required by the Authority in relation to the prospectus is quite detailed and exhaustive. The required information is outlined under Chapter 5 and includes, the particulars of the securities being offered and rights assimilated thereto, the redemption mechanics of the securities, and extensive information regarding the issuer. It is worth noting that the public offering prospectus must be prepared and submitted to the Authority in Arabic (or translated into Arabic). Generally speaking, the detailed nature of the information required for a public offering, in addition to the requirement for an Arabic translation of the same, lengthens the approval process.

The Authority's requirements for the private placement's prospectus are less onerous. It is worth noting that while the Authority also requires an Arabic version of the private placement prospectus, the required information in is not necessarily as extensive and detailed. However, the private placement prospectus must, at minimum, provide the necessary information required under clauses 5-11 of Chapter 5 (additional information in the prospectus will be required in relation to offering of bonds and sukuk).

A "qualified investor" or "professional investor" is defined under the bylaws as:

- A government, public authority, central bank or international organisation (e.g. the World Bank or International Monetary Fund).
- Entities licensed by the Authority, and other financial institutions subject to supervisory bodies inside or outside the State of Kuwait.
- A company whose paid up capital is not less than one million Kuwaiti dinar or the equivalent.
- An investor who has dealings or trading in securities in large or medium volumes is not less than 250,000 Kuwaiti dinar in each quarter for the past two years.
- The volume of funds and assets of the investor in one authorised person or more is not less than the value of 100,000 Kuwaiti dinar.
- The investor is working or worked previously in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services to be provided to him.

Finally it is also worth noting that, with exception to premium shares, shareholding companies may issue or offer shares for subscription without the need to obtain approval of their prospectus in any of the following circumstances:

- An invitation to no more than 50 persons in the State of Kuwait to subscribe in shares.
- An issue or offer shares of a total value not exceeding 1,000,000 Kuwaiti dinar within a period of 12 months from the date of the last issue.
- An issue of shares representing not more than 10% of the last issue of the same category of shares within a period not exceeding 12 months.
- An issue of bonus shares to be distributed in the form of dividends to the shareholders.
- An issue of shares within a personnel shares purchase option system.
- An issue of shares to the issuer's creditors for the purpose of restructuring its debts.
- Any other cases determined by the Authority.

In any event, no promotional advertisements may be addressed to the public to subscribe in the said shares by using means available to the public.

To the extent that the necessary information and documents are duly submitted to the Authority, the prospectus shall be effective after the lapse of 30 days, unless the Authority issues in writing its approval or rejection to the same. We note that in reality, however, the said timeframe may be extended.