Bonds and Sukuk Under the New CMA Regime in Kuwait

Abdullah Masud - Associate - Banking and Finance
- Kuwait City

August 2016

In order to incorporate an SPC for the purpose of issuing bonds or sukuk, the relevant party or parties should submit an application, in the form outlined under Annex 2 of Book 11, to the CMA. The CMA will also approve the memorandum of association of the SPC, which will be a shareholding company subject to the Kuwait Companies Law, prior to the incorporation of the same. The duration of the SPC shall be shorter than the term of the bonds or sukuk issued by it. The number of shareholders of the SPC may not be increased while it is in existence and the capital shares of the company should be registered with the CMA under the name of persons that the CMA approves, namely an Authorised Person, a law firm or an obligor or originator of the bonds or sukuk. Once approved by the CMA, the SPC may issue bonds or sukuk for public subscription or private placement, in accordance with a decree issued by the shareholders of the SPC. However, the SPC may not offer its shares for public underwriting and cannot use public underwriting to increase its capital or borrow funds.

The new CMA Bylaws outline several benefits of creating an SPC for the purpose of issuing bonds or sukuk. The SPC will not be subject to the same requirements that other companies are subject to under Kuwait law. For example, the SPC will not be required to have any personnel working for it and will not have to create a file with the Kuwait Ministry of Social Affairs and Labour. Also, the SPC will be exempt from having to hold ordinary or extraordinary generally assembly meetings as required under the Kuwait Companies Law, but rather will have decisions made for it via written approval from its shareholders.

Chapter 11 of Book 11 outlines the new rules and regulations regarding the issuance of sukuk inside Kuwait. Chapter 11 identifies which parties are allowed to issue sukuk, which are the government of the State of Kuwait, its ministries, public authorities and institutions, and public or closed shareholding companies. In order to issue sukuk, a company must have its issued capital paid in full, approval from an ordinary general assembly to issue the sukuk, an auditing by an external Shari'a auditing office approved by the CMA, approval from the CMA for the issuance of the Sukuk and an approval from the Central Bank of Kuwait ("CBK"). The external Shari'a auditing office will review the structure of the sukuk and express an opinion with regards to the Shari'a compliance of the sukuk structure, which the CMA will take into consideration during its approval process.

All sukuk structures must be in accordance with the provisions of the Shari'a and approved by an external Shari'a auditing office. Sukuk structures may be based on various forms of Shari'a compliant transactions, such as Ijara, Istisna, Musaraka, Mudharaba and Murabaha. The Sukuk may be either asset based or asset backed.

Only public shareholding companies, or SPCs which have an underlying obligor that is a public shareholding company, may offer sukuk for public subscription. If the sukuk are issued through a SPC and the SPC is incorporated outside of Kuwait, the issuer must submit documentation to the CMA indicating that it has properly incorporated the SPC. Furthermore, if a sukuk is issued through an SPC, the assets linked to the sukuk may be more than the paid up capital of the issuer.

Chapter 12 of Book 11 outlines the rules applicable to the issuance of bonds in the State of Kuwait. The bonds rules are very similar to the sukuk issuance rules of Chapter 11. The bonds rules allow for SPCs to issue bonds in the State of Kuwait. Along with SPCs, governmental entities, public and closed joint stock companies and foreign issuers are allowed to issue bonds in the State of Kuwait. As is the case with sukuk, company issuers must have their issued capital paid in full, obtain approval from the ordinary general assembly, obtain approval from the CMA and obtain approval from the CBK. Bonds issued for public subscription shall not be redeemed prior to the lapse of one year, must have a periodical return, and should not include any type of financial derivatives.