What to be Aware of Regarding Treasury Shares in Kuwait

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Treasury shares are the portion of shares that a company keeps in its own treasury. They may have come from a re-purchase or buyback from shareholders, or they may have never been issued to the public in the first place. Treasury shares do not pay dividends, have no voting rights and should not be included in shares outstanding calculations.

The concept of treasury shares is an accounting concept and the debate over how to treat them goes back for decades. In 1946, the California Law Review published an article by Henry W. Ballantine entitled 'The Curious Fiction of Treasury Shares'. Ballantine is quoted as saying: '*Treasury shares are indeed a masterpiece of legal magic, the creation of something out of nothing. They are no longer outstanding shares in the hands of a holder.*'

Under Decree No. 287 of 2016 Promulgating the Executive Regulation of Law No.1 of 2016 Promulgating the Companies Law ('Companies Law'), the Kuwaiti legislator has defined treasury shares as: "*the shares acquired and resold by the company and used on its issued shares traded in the stock exchange within the limit of the decreed percentage*". However, the Kuwaiti legislator did not address treasury shares in the Companies Law with any deeper or clearer research.

In November 2015, the Kuwaiti legislator issued the new executive bylaws by way of Law No. 7 of 2010 Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities and its Amendments ('Executive Bylaws'), which define treasury shares as a company's shares which the issuing company re-purchases or buys back or otherwise makes use of. At this time, the legislator devoted a full chapter clarifying and regulating treasury shares and stipulated that such provisions shall apply to public and closed shareholding companies, except that units subject to the supervision of the Central Bank shall be excluded.

The Executive Bylaws limit the use of treasury shares to the following cases:

- Maintaining stability of the company's share price;
- Reduction of the company's paid-up capital;
- Settlement of a company's account receivables;
- Repayment of a company's outstanding debt;
- Distribution of bonus shares to shareholders without an increase of the capital or the number of shares issued;
- Swap deals in the event of merger with or an acquisition offer of other companies;
- Distribution of all or some of the treasury shares to the company's workers in the context of the employees' share option plans conditional upon the general assembly's approval, and in accordance with the regulatory rules approved by the general assembly of the company; and
- Other cases determined by the Capital Markets Authority (CMA).

Furthermore, the Executive Bylaws stipulate that unlisted companies may not dispose of shares in the circumstances set out at (1), (3) and (4) above.

One of the most significant issues in this regard is that the percentage of shares owned by the company and its subsidiaries may not exceed 10% of the total of the number of shares issued by the company. Moreover, the Executive Bylaws set out the guidelines, procedures and accounting treatment of treasury shares and provide that the constitutional documents of the company shall state that, at most, 10% of the issued shares of the company may be purchased at their market value and that partners may not purchase or sell the company's shares unless they obtain the written approval of the CMA, which is given pursuant to an application submitted to the CMA.

In addition to the above, the Executive Bylaws include obligations on companies listed with the Kuwait Stock Exchange and stipulate that listed companies may not deal in shares thereof through financial derivatives. Any deals in shares must take place in accordance with the rules applicable on the exchange. Cases specified at (3), (4), (5), (6) and (7) above, and other cases approved by the CMA, shall be excluded. Furthermore, listed companies shall disclose the CMA's approval for purchasing or selling treasury shares upon issuance and in accordance with the provisions and procedures stated in Module No. 10 (Disclosure and Transparency) of the Executive Bylaws and a listed company shall not deal in shares for 10 business days before disclosing its financial statements (reviewed quarterly financial statement or audited annual financial statements) or any other significant information that may affect the value of the company's shares.

In conclusion, treasury shares do not have voting rights or dividend rights. In addition, a company may only acquire the number of shares which equals or is less than 10% of its issued share capital according to the market value of the company's shares and it may acquire its shares only if the company's memorandum and articles of association provide that it may do so. Furthermore, a company wishing to buy or sell treasury shares must seek and obtain the approval of the CMA. It is worth noting that a sale or purchase by the company of its treasury shares can only be effective upon approval by the company's general assembly and, in the event that the sale of the treasury shares is to particular shareholders, those shareholders are prohibited from participating in any general assembly vote. Finally, it is important to note that all shareholding companies have an obligation to report and disclose treasury shares issues to the CMA.