

Kuwait: Another Major Stride in Securities' Regulations

In its second decade of operation and after significant institutionalization of market oversight, the Capital Markets Authority (the “CMA”) overhauled its “Dealing in Securities” Module. The Dealing in Securities Module is one that regulates, amongst other things, the issuance, offering, marketing and subscription of securities. It applies to the “securities’ activities” of publicly listed and private shareholding companies together with foreign issuers marketing or offering their securities in Kuwait. Most importantly, and after November 2015, the CMA has been an active listener to market participants and professionals. This is exemplified by the CMA’s efforts in reducing regulatory/procedural overlap between it and other relevant regulators/overseers such as the Central Bank of Kuwait (the “CBK”), Boursa Kuwait, and the Clearing Agencies. Of note are (i) the MoU between the CMA and CBK entered into on 17 January 2018 which sets a coordination framework and delegates regulatory oversight responsibilities between the respective authorities through a comprehensive structure in support of an integrated regulatory system; and (b) the Market Modernization Project comprising of four (4) phases (of which two (2) phases have been completed) aimed at revamping the local securities market and in which the CMA, Boursa Kuwait and the Kuwait Clearing Company are partnering to achieve a better practical environment in line with the project’s goals.

On 22 February 2022 with effect from the date thereof, the CMA issued Resolution No. 28 of 2022 (the “**Amendments**”). The Amendments are built on the recent and continuous positive interface between the regulator and the market and necessarily codifies the majority of the market’s practical realities and practices which emerged since 2015.

This note reflects in stylized format on the effects of some (but not all of the Amendments). In particular, this note focuses on debt capital market instruments and discusses the Amendments’ effect on (i) regulatory/transactional timelines; and (ii) documentation procedure.

Overview of the debt capital securities market in Kuwait

The securities market in Kuwait, specifically its debt capital market, has seen increasing activity during the past few years, these included local and international issuers, direct and indirect issuances, locally guaranteed issuances aimed for the international markets and local issuances for local markets. The activity was dominated by simple instruments (senior unsecured) and regulatory capital issuances (additional tier 1 and tier 2 capital securities) by banking institutions. Publicly listed and private companies have issued bonds and *sukuk* at an encouraging level mostly aimed to finance their growth and expansion projects. What is truly encouraging is that the Amendments, summarised the practical experiences of Kuwait’s debt capital market reform and development in a simple code.

Key amendments

Some of the pivotal changes achieved through the Amendment are as follows:

1. Recognition of programmes and series’

The Amendment has established new rules regarding the establishment of debt issuance programmes and drawdowns thereunder. Each transaction is structured either as a stand-alone issuance or an issuance under an existing programme. Setting up a debt capital markets programme¹

¹ Module 1 “Definitions” of the CMA Bylaws provides a definition for programmes.

allows the issues to utilise market opportunities through pre-approving the programme's debt ceiling and permutations of possible terms and conditions for a set period of time (subject to extension and update). A drawdown² (in one or more series) under the programme incorporates the "shopping list" of terms and conditions into final terms for each series. For example, a programme's terms and conditions can include provisions for a senior unsecured offering and a subordinated offering and the final terms of each series would pick and choose which terms would apply (i.e. as special terms). Programmes have existed in Kuwait prior to the Amendments with issuers such as EQUATE Petrochemical Company K.S.C.C., Burgan Bank K.P.S.C., Boubyan Bank K.S.C.P. and the National Bank of Kuwait S.A.K.P.'s issuing securities under their U.S.\$4,000,000,000, U.S.\$1,500,000,000, U.S.\$U.S.\$1,000,000,000 and U.S.\$5,000,000,000 programmes respectively. The transaction model was simply not recognised and regulatory approvals in Kuwait were required for each issuance under the programme adding more uncertainty as to when issuance could capitalize on market opportunities for which the flexibility under a programme structure were set up.

This has now changed. Not only does the Amendments recognise the concept of programmes and series but offers a revised, and much more streamlined, regulatory process. Ultimately, this means that the CMA's approval of a programme is an approval of all issuances under such programme. An issuer is now simply asked to notify the CMA at least two (2) days prior to issuing the relevant securities³ whilst enclosing certain required documents/information, including the size of the contemplated issuance and a statement regarding the then-current status of the programme. If implemented correctly, issuers should enjoy a more productive and efficient regulatory process when issuing notes/*sukuk* by allowing issuers to quickly tap under a programme. This change should also have positive ramifications on market activity in the debt capital market as well as market opportunism given the inherent volatility in the international debt capital markets.

Furthermore, the CMA expects the first issuance under the approved programme to take place within six (6) months' from the CMA's approval of the relevant programme.⁴ The issuer is expected to revert back to the CMA and obtain an 'updated approval' in the event there are any change to the programme's terms and conditions.⁵ The degree of change triggering such "pre-approval" is not expressly mentioned. Rather, the new provision indicates that 'any change' made warrants an updated approval. Just like in the past, practice would shape how these provisions are interpreted unless the CMA issues an advisory note.

Apart from having to obtain the CMA's prior approval on the issuance of securities, an issuer is obliged to obtain a 'prospectus approval' to the extent it wishes to market its securities in Kuwait. The Amendments are silent on whether a single prospectus approval would be procured for all issuances under a programme or whether a prospectus approval is expected to be obtained in respect to each series separately. Further, unlike in equity securities, the rules do not appear to provide for exemptions from regulatory approvals in respect of privately placed securities to sophisticated investors and expects pre-approval, filing, and notice (as the case may be) in relation to each debt issuance.

² Module 1 "Definitions" of the CMA Bylaws provides a definition for a series.

³ Article 1-2 of Module 11 "Dealing in Securities" of the CMA Bylaws.

⁴ Article 13-2 of Module 11 "Dealing in Securities" of the CMA Bylaws.

⁵ Article 12-2 of Module 11 "Dealing in Securities" of the CMA Bylaws.

2. Recognition of different types of debt instruments

The recent Amendments enumerate new and different types of debt instruments including short-term, perpetual, green and sustainable bonds and *sukuk*.⁶ This introduction might add a layer of complexity for an issuer in terms of the CMA application process. However, it nonetheless signals the CMA's willingness to develop its regulatory regime in providing the necessary oversight in line with market practice and the issuance of various breeds of debts instruments. The submission process in terms of timeline is not expected to change. However, additional documents appear to be required to be enclosed in support of each type's application depending on the nature of the debt instrument. For example, a submission to the CMA in connection to the issuance of a green bond should further enclose including, but not limited to, a framework prepared in accordance with certain international principles.

Furthermore, similar to what is previously required in relation to regulatory capital instruments (e.g. additional tier 1 and tier 2 capital instruments), the Amendments have limited the offering and marketing of short-term bonds and *sukuk* to sophisticated investors only. The CMA's reasoning behind the limitation is not expressed but it is encouraging to see the rules expand the differentiation between the offering regime to sophisticated vs. retail investors whereby the former entails less burdensome disclosures.

3. Recognition of the pricing phase of an issuance

The pricing and book-building process is now explicitly considered in the Amendment.⁷ The Securities Regulations were previously silent on this process and therefore lacked regulatory guidance causing many local issuers to enter the local market with a pre-determined price and interest / profit rate. Now, securities may be priced through a book-building process so that orders are recorded by registering requests for those wishing to subscribe.⁸ The book-building process is to be carried out by a CMA qualified subscription agent and strictly to sophisticated investors.⁹ Retail investors can be approached only after the said process has been completed and the price and interest / profit rate has been fixed.¹⁰

The Amendments now permit sophisticated local investors to participate in such process in the context of cross-border issuances. Moreover, this introduction specially affects local issuances offered to the local market where the book-building process was not regulated and a line between permissible pre-marketing and impermissible offering were blurred. Such issuers are now afforded with an opportunity to test the market prior to deciding on the price and interest/profit rate.

4. New pre-submission and post-submission requirements

⁶ Module 1 "Definitions" of the CMA Bylaws provides a definition for each of the above-mentioned types of debt instruments.

⁷ Module 1 "Definitions" of the CMA Bylaws provides a definition for book-building.

⁸ Article 37-5 of Module 11 "Dealing in Securities" of the CMA Bylaws.

⁹ Article 43-5 of Module 11 "Dealing in Securities" of the CMA Bylaws.

¹⁰ Article 42-2 of Module 11 "Dealing in Securities" of the CMA Bylaws.

Slight changes have been made to the documentation expected to be submitted to the CMA for its issuance approval which vary depending on the: (i) request itself (i.e. approval of a programme vs. issuance); and (ii) the type of debt instrument.

The most significant change, from a practical perspective, is that the CMA no longer requires an Arabic prospectus and is satisfied with the submission of an English prospectus only. This follows and codifies the CMA's tolerated practice since 2016 which materially reduces transactions' timeline and costs of the issuer with respect to translation.

With regards to post-submission documentation, the CMA expects to receive, amongst others, the pricing sheet referred to above and the final issuance credit rating.

Conclusion

The Amendments offer long-awaited developments to the Securities Regulations. More importantly, it demonstrates the CMA's acknowledgment and active dialogue with market participants' practices and its desire to develop the Securities Regulations in line with such practical developments without compromising its robust regulatory oversight.

The CMA has put forward solutions to the issue of regulatory/transactional timeline and documentation procedure. However, in terms of persons under the supervision of the CBK, the dual burden rules between the regulators still exist. The CBK should consider a similar exercise to reflect market realities and expressly codify its process to alleviate such dual regulatory burdens. A streamlined process between the two regulators should be contemplated, perhaps one consisting of a "negative approach". In other words, the approach would be along the lines of "silence is deemed approval if an X number of days have elapsed". Such approach is in line with the Kingdom of Saudi Arabia and many other jurisdictions.

Moreover, a multitiered exemption regime depending on a market-risk-analysis should be entertained. This would consider a distinction in risk and requisite regulatory oversight in relation to sophisticated vs. retail investors and/or private placement vs. public offering. To the extent an issuer maintains a certain creditworthiness and the issuance targets sophisticated investors, regulatory approvals should not be required and a post-issuance compliance and enforcement regime should otherwise be considered. If the offering targets retail investors, then the negative approval process mentioned above would be implemented to avoid extensive delays in a transaction's timeline. Such change would encourage debt capital market activity and support deal-flow across numerous sectors. Moreover, these changes in Kuwait's securities market would yield it more attractive to both issuers and investors alike.

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