

The new Kuwait foreign Investment law

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If the business is in the form of a Kuwait commercial entity, the Kuwaiti partner(s) must own at least 51% of the company. Alternatively, if a foreigner will not engage with a Kuwaiti partner to establish a commercial entity, that foreigner may only do business in Kuwait through the use of a Kuwaiti agent. Such agents receive favorable treatment under the Commercial Law in respect to termination of the agency relationship and other matters which can act as a disincentive for foreign investors.

The Foreign Investment Law

In 2001 Kuwait passed the Foreign Direct Investment Law No. 8 of 2001 (the "FDI Law") to encourage and secure direct foreign investment into the Kuwait market. The FDI Law was established as part of the Kuwait 2035 Plan which seeks to transform Kuwait into a financial and commercial regional hub by diversifying the economy, reducing its dependence upon the oil industry and inviting the private sector to drive economic activities.

The FDI Law created an exception to the Commercial Law by allowing foreigners to own up to 100% of a commercial entity in Kuwait where the entity operates in select industrial sectors such as infrastructure, insurance, hospitals, housing, tourism and entertainment.

Under the FDI Law, foreign investors are incentivized to invest in Kuwait including property incentives in the form of a land grant and a tax holiday for up to 10 years. These incentives are linked to the proportion of Kuwaiti nationals that are employed.

The FDI Law was introduced with much anticipation and optimism given its alignment with the 2035 Plan. However, to date, the FDI Law has arguably not had the desired impact that was envisaged at the outset. This is primarily due to the difficulty foreign investors have faced in obtaining a license from the Kuwait Foreign Investment Bureau (KFIB), the entity established to implement the FDI Law. Further, where a license was granted by the KFIB it can often take many months to process and there have also been delays in obtaining land grants.

Until fairly recently, the FDI Law was largely viewed as ineffective by the private sector, leading many to abandon pursuing their own license and instead focusing their efforts on participation in Kuwait through other means (e.g. the use of SPVs within the GCC). This is not entirely attributable to the FDI Law as inward investment has been affected by political turmoil and the delay of many anticipated projects in Kuwait which were also designed to boost economic diversification and foreign investment.

Changes to the Foreign Investment Law

In line with the recent modernization of legislation in Kuwait, the KFIB and government officials sought to revise the FDI Law after discussing the various concerns with investors. Due to the critical need for change, the FDI Law was repealed and replaced by Foreign Direct Investment Law No. 116 of 2013 (the "New FDI Law") in June 2013. The intent of the New FDI Law is to address flaws in the repealed FDI Law,

encourage more direct investment in Kuwait and make it much easier for investors to obtain a license.

As a starting point, the KFIB is replaced with the Direct Investment Promotion Authority (“DIPA”), which is essentially created with the same mandate as the KFIB. DIPA will assume all assets and liabilities attributed to KFIB, which will be subsequently dissolved. KFIB is enthusiastic about the issuance of the New FDI Law and deems this as a promising step towards achieving the objectives of the 2035 Plan.

It should be noted that the New FDI Law will be accompanied by executive regulations (the “Regulations”) which we anticipate will be introduced in December of this year. Accordingly, the New FDI Law will become effective upon the issuance of the Regulations. The Regulations should shed light and provide further detail as to the implementation of the New FDI Law. Nonetheless, there are a few improvements, which can already be seen in the New FDI Law.

First, the New FDI Law provides a “One-Stop Shop” whereby a DIPA license application is considered by a specialised unit comprising of all relevant officials from the various relevant government departments. This unit will hopefully deal with the issuance of commercial, employment and all other licenses required for operations and avoid or reduce bureaucratic delays. Additionally, this specialized unit is expected to deal with the grant of land required for many projects, a role typically held by the Public Authority for Industry. Whilst the concept of a “One-Stop Shop” is not new, the New FDI Law formalizes its creation and should hopefully reduce ‘red tape’ for foreign investors.

Another improvement is the use of a “Negative List” in Article 11 of the New FDI Law to identify the sectors available to foreigners for investment. The repealed FDI Law specifically identified 14 available sectors for foreign investment. The New FDI Law expands the available sectors by stating that the Council of Minister shall prepare a list of those sectors which are excluded from foreign investment within the scope of the New FDI Law. This implies that investment in any sector not identified by this list would be permissible.

Another likely improvement is the reduction of time required to receive a license from the DIPA. Unlike the KFIB who could take up to 8 months to issue a license, the New FDI Law establishes that the DIPA must respond within 30 days of receipt of the license application. This brings Kuwait closer to its GCC neighbors with respect to the length of time ordinarily required to process a foreign investment license.

The New FDI Law is certainly in need of the Regulations in order to be able to establish how the proposed improvements will be implemented. However, to meet the objectives of the 2035 Plan, we consider it crucial that the New FDI Law proves effective in attracting foreign investment to the Kuwaiti market.

We look forward to the introduction of the Regulations to enable a further analysis of the implementation of the New FDI Law and its likely impact.