

The Marketing of Foreign Funds in Kuwait

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Recent years have witnessed a considerable increase in local and GCC investments in Kuwaiti funds due to their long and short term relative investment stability. Driven by this growth, many offshore/foreign funds are looking to expand their investment sphere into Kuwait for the purposes of marketing their units to local investors. In doing so, foreign funds usually come across the following issue: does the offshore marketing of funds to investors in Kuwait require licensing by the concerned Kuwaiti authorities, specifically the Capital Market Authority (the "CMA")?

The relevant law in Kuwait on this issue is Law No. 7 of 2010 (Promulgating the Establishment of Capital Markets Authority), and the Regulation of Securities Trading Activity ("CML") and its implementing regulations. These legal provisions govern the marketing, offering and sale of securities and financial services in Kuwait. Article 63 of the CML restricts the offering and selling of foreign securities in Kuwait unless through a 'licensed person'. A 'licensed person' is defined pursuant to the CML's Executive Regulations (the "Regulations") as "a natural or corporate person who holds a license from the CMA to practice one of the securities activities stipulated under the CML. There are a wide range of activities that fall under the scope of the CMA's licensing requirements, among which are the following:

- brokerage, buying and selling securities for the account of another person in exchange for commission;
- a person buying or selling securities for their own account (subject to certain exceptions);
- offering investment advice on securities in exchange for commission;
- managing an investment portfolio;
- establishing and managing collective investment schemes;
- safeguarding assets formed for collective investment schemes;
- offering or selling securities for the interest of the issuer or their allied party, or obtaining securities from the issuer or their allied party for the purpose of remarketing them;
- credit rating agency; and
- any other activity which the Authority decrees should be defined as a securities activity.

In addition, Article 158 of the Regulations prohibits any person, whether of natural or legal personality from drawing up or sending any invitation or announcement of securities to any person in the State of Kuwait unless they are a licensed person.

Generally, a 'licensed person' as defined above is a Kuwaiti shareholding company subject to several restrictions, most notably, minimum capital requirements, foreign ownership restrictions and corporate governance regulations.

Under the former Securities Law, the Ministry of Commerce and Industry was known to take a more lenient stance at times by deeming that offshore marketing did not constitute an offer or sale of securities in Kuwait and thereby did not require a license to conduct such activities.

Recently however, the CMA appears to be taking a more stringent stance with regard to the licensing requirement. The CMA may consider that sending specific information and documents (such as a

prospectus/Private Placement Memorandum or a presentation) in relation to a foreign fund, even in response to an enquiry from Kuwait, is a violation of Article 158 of the Regulations. Foreign funds seeking Kuwaiti investors should therefore take a conservative approach in order not to fall foul of the law. It is recommended that all marketing activities should be conducted outside of Kuwait, and that the following guidelines be followed:

1. No public/mass marketing campaigns in Kuwait.
2. All communications with potential investors should be carried out outside Kuwait.
3. Product specific materials should not be distributed when inside Kuwait and no marketing activities when inside Kuwait should be carried out even when on a brief visit.
4. All relevant documentation relating to the foreign securities should be executed outside of Kuwait.

The more the foreign fund can structure the contemplated transactions to occur outside of Kuwait, the more likely it will be able to avoid the application of the CML and the CMA bylaws in relation to the transactions.

While the above conservative approach may not necessarily appear to be practical, it remains advisable for the purposes of mitigating any risks that may arise in the event the CMA strictly enforces its licensing requirement. If the marketing of a foreign fund is found to have breached the law, the transaction/investment will be rendered invalid for the purposes of Kuwaiti law, which may entitle the investor to retrieve the invested amounts.