

Regulatory Hotline

June 19, 2017

FIPB SOON TO BECOME HISTORY

- Born as an outcome of the New Economic Policy of 1991, FIPB is now all set to be abolished after more than two decade of its service, to further boost the foreign investments in the country by eliminating an extra layer of scrutiny.
- Administrative departments under various ministries of Government of India have been put in charge to process the FDI applications in consultation with DIPP.
- DIPP to prescribe a detailed Standard Operating Procedure in consultation with administrative ministries / departments / sector regulators so as to guide the process of approving FDI proposals.

INTRODUCTION

The Union Cabinet of India chaired by Prime Minister Shri Narendra Modi on May 24, 2017 approved the proposal to phase out Foreign Investment Promotion Board ("**FIPB**"), the inter-ministerial body for processing FDI proposals and making recommendations to the Government thereof for its approval. Consequently, a formal communication for necessary actions was issued by Department of Economic Affairs, Ministry of Finance ("**DEA**") through an Office Memorandum dated June 5, 2017 ("**FIPB OM**"). Pursuant to FIPB OM, the administrative departments under various ministries of Government of India have been put in charge to process the FDI applications in consultation with Department of Industrial Policy and Promotion, Ministry of Commerce ("**DIPP**"). DIPP has also been entrusted with issuing a Standard Operating Procedure ("**SOP**") for processing of the FDI applications in accordance with the extant Consolidated FDI Policy ("**FDI Policy**") and Foreign Exchange Management Act, 1999 and the regulations issued thereunder ("**FEMA**").

BACKGROUND

FIPB was established by the Government of India pursuant to the Statement of Industrial Policy tabled before both houses of the parliament on July 24, 1991. The aforementioned Statement of Industrial Policy prescribed for constituting a Special Empowered Board to negotiate with a number of large international firms and approve direct foreign investment in selected areas, which led to the formation of FIPB. FIPB was initially constituted under the aegis of Prime Minister's Office and was subsequently transferred to DIPP in 1996 with a newly constituted board, specified levels of approval notified vide Order dated July 1, 1996 and fresh set of guidelines for consideration of foreign direct investment proposals by FIPB prescribed vide Press Note No.3 of 1997 Series. FIPB recommendation was required to be considered by the Industry Minister before approving each proposal involving a total investment of Rs.600 Crore or less.

In 2003, FIPB was once again transferred from DIPP to DEA vide a Presidential Order dated January 30, 2003 ("**Presidential Order**"). The aforementioned Presidential Order amended the second schedule of the Government of India (Allocation of Business) Rules, 1961 to include "Foreign Investment Promotion Board" under heading "Ministry of Finance" and sub-heading "DEPARTMENT OF ECONOMIC AFFAIRS".

In recent years, there has been a significant decline in number of proposals that are brought before the FIPB for its approval owing to liberalization of the FDI regime across various sectors. Currently, more than 90% of the total FDI inflow in India is under the automatic route. Accordingly, the Finance Minister Shri Arun Jaitley announced on February 1, 2017 that considering the FIPB has successfully implemented e-filing and online processing of FDI applications, it has now reached a stage where FIPB can be phased out.

ABOLITION OF FIPB

Government of India conducted several rounds of discussion between a group of senior officers and industry experts to prepare a roadmap to phase out FIPB. One of the challenges with phasing out an institution which has existed for more than two decades and has already been transferred inter-se different ministries twice is to effectively eliminate bureaucratic hurdles that may arise due to overlapping functions. To overcome the aforementioned challenge, DEA issued the FIPB OM envisaging the following:

Substitute for FIPB

Subsequent to abolition of the FIPB, the work of granting government approval for foreign investment under the extant FDI Policy and FEMA, shall be entrusted to the concerned administrative ministries / departments. The concerned administrative ministries / departments shall, among others, will also be responsible for monitoring of the compliances / conditions imposed under the FDI approval, including past cases approved by the FIPB, and seeking the approval of the minister-in-charge / cabinet committee on economic affairs (CCEA), as the case may be, as per the extant FDI Policy. Further, with respect to the applications which are proposed to be rejected by the competent authority or where the approval is proposed by the competent authority subject to additional conditions that are not

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provided in the FDI Policy, the competent authority must seek concurrence of DIPP prior to rejecting or granting such approval with additional conditions.

Processing of the Applications

Upon receipt of the application, the concerned administrative ministries / departments shall process the same in accordance with the SOP to be laid down by DIPP in consultation with the administrative ministries / departments / sector regulators. In respect of the applications in which there is a doubt about the administrative ministry concerned, the DIPP shall identify the administrative ministry / department where the application will be processed. Further, the applications requiring Government approval shall continue to be received by the existing FIPB portal (i.e. <http://fipb.gov.in>) ("**FIPB Portal**"), the oversight of which shall be transferred to the DIPP from DEA within four weeks from the date of the FIPB OM.

Sector / Activity under Government Approval Route

The sectors/activities requiring government approval along with their concerned administrative ministry / department are listed below:

| Sl. No. | Sector / Activity / Proposal category | Administrative Ministry / Department |
|---------|---|--|
| 1. | Mining | Ministry of Mines |
| 2. | Defence | Department of Defence Production, Ministry of Defence |
| 2A. | Cases related to FDI in small arms | Ministry of Home Affairs |
| 3. | Broadcasting | Ministry of Information and Broadcasting |
| 4. | Print Media | Ministry of Information and Broadcasting |
| 5. | Civil Aviation | Ministry of Civil Aviation |
| 6. | Satellites | Department of Space |
| 7. | Telecom | Department of Telecommunications, Ministry of Communications |
| 8. | Private Security Agencies | Ministry of Home Affairs |
| 9. | Trading (Single & multi brand and food products retail trading) | DIPP |
| 10A. | Financial Services not regulated by a regulator or DEA where there is more than one regulator or in respect of which there is a doubt about the regulator (<i>as per FDI Policy</i>) | |
| 10B. | Banking (Public and Private) (<i>as per FDI Policy</i>) | Department of Financial Services, Ministry of Finance |
| 11. | Pharmaceuticals | Department of Pharmaceuticals, Ministry of Chemicals and Fertilizers |
| 12. | Proposals by Non Residential Indians (NRI)/Export Oriented Unit's (EOU's) | DIPP |
| 13. | Cases relating to issue of equity shares for import of capital goods / machinery / equipment (excluding second hand machinery) (<i>as per FDI Policy</i>) | DIPP |
| 14. | Cases relating to issue of equity shares for pre-operative / pre-incorporation expenses (including payments of rent etc.) | DIPP |
| 15. | Cases involving investments under automatic from <i>Countries of Concern</i> requiring security clearance (<i>as per extant FEMA, FDI Policy & security guidelines as amended</i>) ¹ | Ministry of Home Affairs |
| 16. | Core Investment Company or an Indian Company engaged only in the activity of investing in the capital of other Indian companies | DEA |

Standard Operating Procedure (SOP)

SOP with detailed guidelines is to be developed and laid down by the DIPP in consultation with administrative ministries / departments / sector regulators so as to guide the administrative ministries / departments in processing of the FDI proposals and ensure consistency of treatment and uniformity of approach across sectors. The SOP shall involve the process of inter-ministerial consultations for the examination of FDI proposals, where necessary. It shall further prescribe for FDI applications, including those related to NRI, EOU, single brand retail trading and multi brand retail trading, to be decided within sixty days under ordinary circumstances.

Transfer of Administrative Responsibilities

All administrative responsibilities including maintenance of records, representation for Government in present and future litigations and liabilities in various courts and adjudicatory forums in relation to the approval of the Governments and related filings thereof, processing of RTI application and appeal pending with FIPB and access to the FIPB Portal shall be transferred to respective administrative ministry / department. All application pending with the FIPB Portal as on date of abolition of FIPB shall be transferred to the respective administrative ministry / department

by the DIPP immediately upon receipt thereof.

ANALYSIS

The bureaucratic hurdles faced by the investors before investing in India has been a major counteracting factor. Moreover, we have seen that FIPB decisions often get caught up because of discord between different ministries, which lead to delays in projects/proposals getting approved. With this decision of the Government to abolish FIPB, investment in various sectors that needed prior Government Approval through FIPB, will now be streamlined.

One of many functions of FIPB was to coordinate between different administrative ministries / departments for receiving comments on the FDI proposals. Subsequent to the abolition, this function would be replaced with the SOP that will essentially perform the function of the defunct board, thereby eliminating an extra layer of scrutiny. Success of this move of the Government depends a lot on a comprehensive and unambiguous set of guidelines and operating procedures to be laid down by DIPP in consultation with administrative ministries / departments / sector regulators.

Another test for the aforementioned SOP would be its ability maintain uniformity in approval process considering that the involvement of different administrative ministries / departments may lead to differential approach towards approving FDI proposals i.e. some departments of the Government may be more liberal in comparison to others. Moreover, the respective administrative ministries / departments may also have to prescribe a standard list of information / documents that it may require to process the application filed FDI approval keeping in mind the distinct nature of sectors/activities involved.

Pursuant to the Citizens / Client Charter of DEA, the prescribed time for deciding on the administrative ministries / departments and dispatching a copy of the FDI proposal to them and to the permanent members of FIPB is five working days, followed by another five working days for detailed scrutiny of the proposal. Therefore, subsequent to the abolition of FIPB, atleast in terms of timeline for grant of Government approval for FDI proposals, we may expect for a relatively quicker response time considering that the SOP will mandate for a time bound disposal of all applications besides saving time due to elimination for first layer of scrutiny which was to be conducted at the FIPB secretariat.

– **Prashant Prakhhar, Kishore Joshi & Pratibha Jain**
You can direct your queries or comments to the authors

¹ Sectors/activities under Government approval route requiring security clearance may be processed by the nodal administrative ministries / departments in consultation with Ministry of Home Affairs.

DISCLAIMER

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