

Regulatory Hotline

July 12, 2017

DIPP ISSUES STANDARD OPERATING PROCEDURES TO DECIDE FATE OF FDI UNDER APPROVAL ROUTE

- System of approving foreign investment proposals in India by an inter-ministerial body is now officially replaced with approval by distinct administrative ministries / departments in accordance with the standard operating procedure issued by DIPP.
- Foreign investment proposal proposed to be approved within 8 to 10 weeks from the date of filing on the online portal.
- Competent Authorities to hold regular monthly review with respect to the foreign investment proposals pending with them followed up a joint quarterly review by DIPP.

INTRODUCTION

The process of phasing out the Foreign Investment and Promotion Board ("FIPB") has finally come to an end with the release of Standard Operating Procedure ("SOP") for processing the FDI proposals by the Department of Industrial Policy and Promotion ("DIPP") on June 29, 2017. The SOP has been prepared by DIPP in consultation with administrative ministries / departments / sector regulators to guide the administrative ministries / departments ("Competent Authority") in processing of the FDI proposals and ensure consistency of treatment and uniformity of approach across sectors. The focus of the SOP is to process such applications in a time bound manner so that the new regime for foreign investments may be simpler in execution and expeditious in disposal. The SOP shall come into effect from the date of its publication.

ON-LINE FILING THROUGH FOREIGN INVESTMENT FACILITATION PORTAL

As per the SOP, proposals for foreign investment in sectors/activities requiring Government approval under the Consolidated FDI Policy Circular of 2016, as amended from time to time ("FDI Policy"), would be filed online on the revamped FIPB portal, rechristened as Foreign Investment Facilitation Portal ("FIFP"). Under the revised framework, applications filed on the FIFP are no longer required to be submitted in physical copy with the Competent Authority, provided the application has been digitally signed. For applications which are not digitally signed, one signed physical copy would have to be submitted with the respective competent authority within 5 days of the receipt of communication from DIPP in this regard on the FIFP.

The SOP further prescribes a list of documents at Annexure 1 of the SOP that are required to be uploaded on the FIFP, eight of which are mandatory documents¹, whereas other documents may be uploaded on a case to case basis.

PROCESSING OF FDI PROPOSALS

Identification of Competent Authorities

As and when the proposals for foreign investment are e-filed on the FIFP, DIPP is required to identify the Competent Authority for such proposals and accordingly e-transfer the proposals to the respective Competent Authority within 2 days from the date of filing of the online application. For full list of Competent Authorities for grant of approval, please refer to our hotline, [FIPB soon to become history](#) and for list of nodal officers of respective Competent Authority, please refer to the list provided on the FIFP at <http://fipb.gov.in/Forms/ListofNodalOfficer.pdf>. However, in cases where there are doubts as to which is the concerned administrative ministry / department, the onus in such cases would be on DIPP to identify the Competent Authorities where the application may be processed for decision.

Inter-ministerial / departmental consultations

Even though the Government has abolished the inter-ministerial body i.e. FIPB, for the purposes of processing the FDI applications, it is nearly impossible to imagine clearing these proposal without seeking necessary consultations from the relevant administrative ministries / departments due to their inter-dependency in the ordinary course of business. Therefore, the SOP has laid down certain guidelines for the Competent Authorities to seek necessary consultations in a time bound manner.

All proposals received on the FIFP shall, in addition to the concerned Competent Authority, also be circulated within 2 days, to Reserve Bank of India ("RBI") and to Ministry of External Affairs ("MEA") and Department of Revenue ("DoR"). Further, specific proposals requiring security clearance² or FDI Policy related clarifications would have to be additionally referred to the Ministry of Home Affairs ("MHA") or DIPP respectively for their comments or clarifications, as the case may be. Pursuant to the timeline prescribed by the SOP, the relevant administrative ministries / departments consulted for comments are required to upload their comments on the FIFP within the stipulated

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Investment proposals requiring approval worth more than INR 5,000 crores (approx. USD 770 million) shall have to be placed by the Competent Authority before the Cabinet Committee on Economic Affairs ("CCEA") for its consideration within the prescribed timelines. Accordingly, the concerned Competent Authority shall issue the approval letter to the applicant within a week of receipt of the favourable decision of CCEA.

Further, for timely clearance of investment proposals, the Competent Authorities are required to hold regular monthly review with respect to the foreign investment proposals pending with them. In addition to that, a joint quarterly review meeting shall be convened by DIPP under the chairmanship of Secretary, DIPP and Secretary, DEA in relation to pendency of investments proposal with the Government.

TIMELINE FOR DECISION MAKING PROCESS

Timeline for the purpose of processing the FDI proposals shall be computed from the date of filing the online application on FIFP and any delay by the applicant in addressing the queries raised by the Competent Authority will be excluded from the time limits for disposal of the investment proposal. Table below highlights an indicative timeline with respect to processing of the foreign investment proposal where physical copy submission is required in accordance with the SOP.

S. No.	Action Points	Time Period	No. of days
1	Filing of the investment proposal on FIFP	-	X
2	Dissemination of investment proposal received on FIFP by DIPP to the Competent Authorities, RBI, MEA and DoR	2 days	X + 2
2A	Submission of signed physical copy of the investment proposal with the Competent Authority*	5 days	X + 7 [^]
3	Initial scrutiny of the investment proposal by Competent Authority, and seeking relevant information / document from the applicant	1 week	X + 14
4	Applicant to provide relevant clarification/information/ document to the Competent Authority in relation to investment proposal	1 week	X + 21
5	Submission of comments / clarifications by consulted administrative ministry / departments / regulatory bodies or DIPP [@] or RBI or any other relevant authority	4 weeks from 2A	X + 35 [#]
6	Grant of approval by the Competent Authority on the FIFP for proposal not requiring security clearance	6 weeks from 2A	X + 49
Or			
6A	Submission of comments by MHA on proposals requiring security clearance in strategic sectors such as aviation and telecom	6 weeks from 2A	X + 49 [§]
7	Grant of approval by the Competent Authority on the FIFP for proposal requiring security clearance	2 weeks from 6A	X + 63

* Physical copy is required to be submitted only for applications which are not digitally signed.

[^] If the signed physical copy is not filed with the Competent Authority within 7 days of the communication from DIPP, the date of filing of the physical application would be reckoned as the reference date for the calculation of time limits.

[@] Submission of clarification by DIPP on specific issues related to FDI Policy will be required to be made within 15 days.

[#] In case the comments of consulted ministries/departments/regulatory bodies are not received within 4 weeks, it would be presumed that they have no comments to offer.

[§] In cases where MHA is not in a position to provide its comments within 6 weeks, it shall intimate the Competent Authority of the expected time frame within which MHA would be able to give comments.

GRANT OF APPROVAL, WITH CONDITIONS

While examining the investment proposals, the Competent Authority is required take adequate care and decide each proposal on its merits. During the process if the Competent Authority proposes to reject any proposal or grant approval subject to conditions not otherwise prescribed under the FDI Policy or any other sectoral laws/regulations, it is required to seek concurrence of DIPP within 8 – 10 weeks from the receipt of such proposal and accordingly decide on such application. Prescribed timeline for the clearing an investment proposal in such cases may extend by 2 weeks in addition to the usual timeline (as indicated in 6 & 7 above).

In order to ensure uniformity in terms of the conditions to be imposed by the Competent Authority while granting its approval on the investment proposal, the SOP prescribes a format for the letter of approval at Annexure 2 of the SOP that can be issued to all applicant subject to permissible deviation/modification.

ANALYSIS

The SOP issued by DIPP formally replaces the decades old system of approving foreign investment proposals in India by an inter-ministerial body i.e. FIPB. While DIPP in consultation with administrative ministries / departments / sector regulators has attempted to set out a comprehensive set of guidelines and operating procedures, there are certain ambiguities which may lead to possible confusion once the processing of investment proposals starts in full throttle.

Special emphasis has been given to the time limits regarding processing of foreign investment proposals. However it

is not clear for several action items whether the days to be considered for computing the time limits are working days or calendar days. Further, the process of e-filing of foreign investment proposal has been aligned with other similar regulatory filing services such as on e-biz portal, where if the application has been digitally signed it would not be required to be submitted in physical copy. However the existing portal is yet to be equipped with features required for e-filing using digital signatures.

Moreover, the list of documents as prescribed at Annexure 1 of the SOP are sector/activity agnostic and considering that the intent of the SOP is to make the process of approving foreign investment proposal simpler, the respective Competent Authority should consider prescribing a sector/activity specific list of additional information / documents that it may require to process the application expeditiously.

– Prashant Prakhar, Kishore Joshi & Pratibha Jain

You can direct your queries or comments to the authors

¹Certificate of incorporation, memorandum of association, articles of association, financials, relevant board resolutions, affidavit stating the validity and correctness of the information provided, diagrammatic representation of the flow of funds and particulars of the foreign collaborators along with a passport copy / identification proof.

²The proposals that require security clearance from MHA include investments in broadcasting, telecommunication, satellites – establishment and operation, private security agencies, defence, civil aviation and mining & mineral separation of titanium bearing minerals and ores, its value addition and integrated activities and investments from Pakistan and Bangladesh.

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