

Regulatory Hotline

November 16, 2023

GOVERNMENT ISSUES NEW SOP FOR FDI PROPOSALS

BACKGROUND:

The Department for Promotion of Industry and Internal Trade ("DPIIT") vide its circular dated August 17, 2023 has issued a new Standard Operating Procedure ("New SOP")¹ for processing foreign direct investment ("FDI") proposals replacing the erstwhile standard operating procedure which was issued by the DPIIT vide its circular dated November 9, 2020 ("SOP 2020")². These standard operating procedures contain the process and procedure for filing and processing of FDI proposals, time limits and internal mechanisms for monitoring the processing of such proposals.

It may be noted that SOP 2020 had earlier replaced the initial standard operating procedure issued by the DPIIT on June 29, 2017 ("SOP 2017")³. As a background, the Union Cabinet, through its press release dated May 24, 2017⁴, abolished the Foreign Investment and Promotion Board ("FIPB") by announcing that the concerned Administrative Ministries or Departments ("Competent Authority") would start handling the FDI applications falling under the approval route under the extant FDI Policy⁵ and Foreign Exchange Management Act, 1999 ("FEMA"), in consultation with DPIIT. Pursuant to this press release, SOP 2017 was issued. For our detailed analysis of SOP 2017, please visit this [Link](#).

KEY CHANGES UNDER NEW SOP COMPARISON WITH ERSTWHILE SOPs

a) **National Single Window System ("NSWS"):** Under SOP 2020, online applications for FDI proposals were filed on the Foreign Investment Facilitation Portal ("FIFP")⁷. Now, with effect from August 5, 2023, such proposals are to be filed through NSWS online portal⁸. This is a new initiative by the DPIIT and as the name suggests, it is a single window to ease filing and clearance of regulatory approvals and registrations. While FDI proposals are to be filed on NSWS, the Competent Authority would continue to examine FDI proposals.

b) **Paperless Application Process:** New SOP is aimed at rendering the process of filing FDI application completely paperless and therefore, unlike Erstwhile SOPs, New SOP has entirely discontinued the option of filing physical application. The application is now required to be digitally signed and uploaded on NSWS. That said, in case authenticity of any scanned documents is in doubt then the Competent Authority may call for physical copy of original documents. Further, New SOP specifically requires the Competent Authority to raise all the queries to the applicant, to the extent possible, in the initial communication itself thus, to avoid any unnecessary back and forth.

Importantly, New SOP provides guiding principles as to what all details the FDI proposal should include. It has also introduced a format for corrigendum which can be issued by the Competent Authority, upon the request made by the applicant in order to rectify any grammatical or typographical errors in the approval letter.

As per New SOP, any documents executed outside India are now to be authenticated as per Foreign Exchange (Authentication of Documents) Rules, 2000⁹ which mean such documents should now be certified by a person authorised under Section 3 of Diplomatic and Consular Officers (Oaths and Fees) Act, 1948¹⁰. Such persons include any diplomatic or consular officer in the foreign countries who are authorised to administer any oath and take any affidavit and also, the notarial act done by the public notary officers. With this change, technically, all the supporting documents which are executed outside India requires notarisation i.e., certification from the foreign notaries.

c) **Approval Procedure:** Once the online application is made on NSWS, the DPIIT is responsible to identify and assign it to the relevant Competent Authority. Further, the proposal should also be circulated online to the Reserve Bank of India (RBI) from FEMA standpoint, to the Ministry of Home Affairs (MHA) where such proposals are subject to security clearance and all the proposals also have to be forwarded to Ministry of External Affairs (MEA) for information. All the comments, if any, of RBI, MHA and MEA should be provided directly to the Competent Authority. Any proposals requiring clarification by the Competent Authority under FDI Policy may be referred to DPIIT with the approval of secretary of the Competent Authority. Where any other Ministry/Department needs to be consulted for a proposal, full justification and approval of secretary of the Competent Authority shall be required. Further, New SOP (as similar to SOP 2020) also mandates to seek concurrence of DPIIT while rejecting any proposal or for inserting any additional conditions (such concurrence is not required for inserting conditions pertaining to compounding under FEMA or to comply with the laws or court orders) while granting approvals.

d) **Timelines:** New SOP prescribe a timeline of 12-weeks from the date of filing an application for the Competent Authority to communicate the decision to the applicant. This excludes the time taken by the applicant to provide any clarifications / documents or to remove any deficiencies in the application, as required by the authorities.

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e) **Inter-Ministerial Committee (IMC)**¹¹ and **CCEA**: For delayed FDI proposals or those escalated by the Competent Authority for quicker disposal, as SOP 2020 had provided earlier, the IMC shall continue to examine and guide the Competent Authority for timely disposal of such proposals under New SOP. Further, as similar to Erstwhile SOPs, the FDI proposals worth more than INR 50 Billion (approx. USD 600 million) will continue to be placed before the Cabinet Committee on Economic Affairs ("CCEA").

f) **Monitoring and Review**: New SOP prescribes that each Ministry / Department should have a dedicated FDI Cell with a nodal officer not below the rank of Joint Secretary. Further, for timely clearance of FDI proposals, the Secretary, DPIIT should convene a regular review meeting on pendency of FDI proposal with the Competent Authority periodically say every 4 to 6 weeks.

g) **Enhanced Documentation Scrutiny**: Apart from the documents which were required to be filed as per Erstwhile SOPs for seeking FDI approvals, a few additional documents would be required under New SOP. This includes an undertaking that the investee and investors (including promoters and officers) are not subject matter of any negative or caution or debarred or sanction list of any Government or International bodies or regulators or enforcement / tax agencies.

In respect of proposals filed for seeking approval under Press Note 3 of 2020 ("PN3")¹², New SOP has enhanced the level of checks (as compared to Erstwhile SOPs) and accordingly, apart from the details of significant beneficial ownership under the Companies Act 2013, it specifically requires an applicant to furnish entity-wise details of the existing shareholders/investors/directors/investment committee members/general partners/limited partners/key managerial personnel of all the upstream entities (till the ultimate beneficial owner) of the investor(s) and details of other/public shareholders; who are either from a country sharing land border with India or having beneficial ownership vested in such country, along with their respective degree/percentage of ownership/shareholding/stake and control in the relevant entity(ies), clearly indicating the place of incorporation/existing citizenship/residency of all such entities/individuals. It is pertinent to note that, apart from the details of immediate holding entity and ultimate beneficial owner (which were only furnished under Erstwhile SOPs), the entity-wise ownership and management details pertaining to all the intermediate holding entities until the ultimate beneficial owner also need to be furnished mandatorily as per New SOP. This would apply irrespective of the nature of intermediate holding vehicles (such as company or firm or trust or fund etc), registered under the home country laws.

Further, in case of non-PN3 proposals, a separate declaration confirming that the proposal does not fall under purview of PN3 is required as per New SOP.

h) **No fresh approval for further FDI Infusion**: Notably, the FDI Approval Letter format prescribed under New SOP explicitly clarifies that no prior approval of the Competent Authority is needed for further FDI infusion so long as there is no change in FDI percentage holding already approved, subject to a ceiling limit of INR 50 Billion (approx. USD600 million). Any further infusion requires only an intimation to the Competent Authority by the investee company.

OUR VIEWS:

With the complete withdrawal of option of submitting physical application, the application process has been made fully digitalised and paperless task under New SOP. It has tried to address some of key procedural difficulties by way of – offering one single clearance window i.e., NSWS online portal; providing an option to get mistakes in the approval letter rectified within the shortest period; explicitly exempting any fresh approval for further FDI infusion when no change in the earlier approved FDI percentage holding has occurred.

Though a timeline of 12-weeks is set for disposal of cases, currently, it is taking on an average 6 to 8 months' time to hear from the authority, depending upon the nature of sector, activity, investor background and the MHA's security clearance applicable in certain cases. Having a dedicated FDI cell within every Competent Authority pursuant to New SOP is expected to significantly reduce DPIIT's involvement by providing quick guidance on FDI Policy matters to such Competent Authority and is likely to speed-up the overall proposal clearance process. However, with such dedicated cell now in place, certain internal formalities like seeking approval of the secretary of the Competent Authority to refer the matter to the DPIIT for FDI Policy related clarifications or seeking DPIIT's concurrence to reject (or to insert additional conditions while granting approvals) which still exist and may cause unnecessary delays, should be eliminated.

Overall, New SOP is aimed at making the entire process of clearing FDI proposals even more efficient and at the same time, has explicitly increased the level of scrutiny for the proposals (like, PN3) which are sensitive in nature.

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You can direct your queries or comments to the authors.

¹Available at <https://ffip.gov.in/Forms/SOP.pdf>

²Available at <https://dpiit.gov.in/sites/default/files/SOP-dated-09112020-for-processing-of-FDI-Proposals-10Nov2020.pdf>

³Available at <https://www.fdi.finance/front-assets/images/pdf/SOP.pdf>

⁴Available at <https://pib.gov.in/newsite/printrelease.aspx?relid=162097>

⁵Available at https://dpiit.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_0.pdf

⁶SOP 2017 and SOP 2020 together known as Erstwhile SOPs

⁷Available at <https://ffip.gov.in/>

⁸Visit NSWS portal at <https://www.nsws.gov.in/>

⁹Available at [https://upload.indiacode.nic.in/showfile?actid=AC_CEN_2_45_00004_199942_1517807323986&type=rule&filename=FEM%20\(Authentication%20of%20Documents\)%20Rules,%202000.pdf](https://upload.indiacode.nic.in/showfile?actid=AC_CEN_2_45_00004_199942_1517807323986&type=rule&filename=FEM%20(Authentication%20of%20Documents)%20Rules,%202000.pdf)

¹⁰Available at https://www.mea.gov.in/Uploads/PublicationDocs/154_The-Diplomatic-Consular-Officers-Oaths-And-Fees-Act-1948.pdf

¹¹This IMC has been constituted, consisting of Secretaries from DPIIT, Department of Economic Affairs (DEA), Ministry of Corporate Affairs (MCA), MHA, concerned administrative Ministry/Department and representatives from RBI and NITI Aayog.

¹²Available at https://dpiit.gov.in/sites/default/files/pn3_2020.pdf which mandates to seek Government's approval for receiving FDI from the countries sharing land border with India.

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