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Revised Standard Operating Procedure issued by Department for Promotion of Industry and Internal Trade for processing the FDI proposals requiring government approval

The Department for Promotion of Industry & Internal Trade (“DPIIT”), Government of India (“GOI”) has, on 9 November 2020, issued the revised Standard Operating Procedures (“SOP”) for processing FDI proposals requiring government approval.

Background:

The GOI through its SOP dated 29 June 2017 (“erstwhile SOP”) had provided detailed procedure for processing the FDI proposals for investment in sectors/activities requiring government approval as per the Consolidated FDI Policy Circular of 2016, as amended from time to time. Subsequently, GOI has notified Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 (“FEMA NDI Rules”) on 17 October 2019.

DPIIT, had also issued Press Note no.3 (2020 series) on 17 April 2020 (“Press Note 3”), whereby, foreign investment from entities based in countries which share land border with India (or) where the beneficial owner of an investment in India is situated in or is citizen of such country, shall be under government approval route. Further, GOI, has issued the Consolidated FDI Policy of 2020 (“FDI Policy 2020”) effective from 15 October 2020.

With an aim to expedite the process of clearances of FDI proposals and to align erstwhile SOP with FEMA NDI Rules, Press Note.3 and FDI Policy 2020, the GOI has issued revised SOP on 9 November 2020 (“revised SOP”) which provides further clarity, mentions the documents required, timelines for processing the FDI proposals requiring government approval, including for cases covered under Press Note. 3.

Highlights of the revised SOP:

Charter Documents (MOA/AOA):

- In case investee company is yet to be incorporated:
 - **At the time of filing application**
 - To provide additional declaration that the Indian company will be incorporated upon obtaining government approval for FDI.
 - To provide draft Memorandum of Association (‘MOA’) stating proposed business activities and draft Articles of Association (‘AOA’) stating bye-laws of the proposed Indian company.

- **Post incorporation of Indian company**

- To submit copy of Certificate of Incorporation (COI), MOA and AOA to DPIIT within 60 days of issuance of FDI approval letter.

The above amendment will require incorporation of the Indian Investee entity in a timebound manner post receipt of government approval for FDI. Consequently, the Indian investee company will also have to be capitalised within specified timeline in view of other applicable provisions of FEMA and Companies Act.

- In case of foreign investor:

- **At the time of filing application**

- If the laws of the home country of foreign investors does not have requirement of COI, MOA and AOA; then equivalent documents to be furnished along with declaration and necessary regulations, circular/order in support thereof.

The above amendment provides clarity on charter / foundation / incorporation documents to be provided by the foreign investor.

Audited financials:

- In case investee company which is yet to be incorporated/non-completion of audit period:

- **At the time of filing application**

- A declaration to be given stating that investee company is yet to be incorporated/ Investee entity has not completed a single audit period while filing FDI application.

- In case of foreign investor:

- **At the time of filing application**

- A declaration along with the necessary regulations, circular/order to be given in case foreign investor(s) is/are exempted from the audit requirement under any special law of the home country.

NCLT approval must in case restructuring with FDI:

In case of FDI proposals where government approval are required and which involves scheme of mergers / demergers / amalgamations of companies in India, the Indian company is required to submit copy of approval of NCLT under Companies Act, 2013 as a pre-condition for FDI approval.

The above amendment will lead to increase in overall timelines for scheme of merger etc. implementation in case of companies where government approval is required for FDI.

Details of Significant Beneficial Ownership (“SBO”):

In addition to providing details of ownership and control of investee and investor companies / entities, it is now mandatory to also provide details of Significant Beneficial Owners (“SBO”) of the Investee and Investor Entities as per the provisions of the Companies Act, 2013.

This amendment provides clarity on details to be provided regarding ownership/control of investee and investor companies / entities.

Authentication of documents if in foreign language:

In case the documents of the foreign investors are in a foreign language, then such documents should be apostilled in a foreign country - and translated into English language before submitting to GOI for approval.

The requirements in SOP introduced for above is consistent with the provisions of the Companies Act 2013 relating to process for registration of foreign companies in India and is likely to expedite approval process.

Pre-Security clearance from Ministry of Home Affairs:

Following applications arising out of Press Note no.3 (2020 series), issued by DPIIT on 17 April 2020 read with FEMA NDI Amendment Rules, 2020 dated 22 April 2020 will require pre-clearance from the Ministry of Home Affairs ("MHA") of the GOI.

- investments from an entity of a country which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.; and/or
- transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction/purview of Para 3.1.1(a) of the FDI Policy.

The revised SOP now clarifies that FDI applications arising out of Press Note. 3 dated 17 April 2020 read with FEMA NDI Rules, would require pre-clearance from the MHA.

Submission of incomplete FDI applications:

The concerned Administrative Ministry/Department will close the FDI application if the applicant has not submitted the requisite documents/information or not submitted the physical copy of the proposal in timely manner.

It has been clarified that closure of FDI application will not amount to rejection of proposal and applicant may be advised to apply afresh along with all requisite documents, if applicant so desires.

Due care to be taken while submitting the FDI application and to ensure that the same is complete as per the revised SOP issued by DPIIT to avoid closure/rejection of the FDI application for non-submission of mandatory details/documents required.

Conclusion:

The revised SOP issued by GOI is aimed at smoothening the FDI application review process in a time bound manner and is aligned with FEMA Non-Debt Rules 2019 and FDI Policy, 2020. Inter-ministerial

coordination is key for review of FDI proposals and the revised SOP provides clarity on timelines, documents to be furnished and accountability and would facilitate ease of doing business in India.

Source: Standard Operating Procedure (SOP) for processing the FDI Proposals issued by Department for promotion of Industry & Internal Trade dated 9 November 2020 (<https://fifp.gov.in/Forms/SOP.pdf>)



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