

kcmFlash

Exchange Control Regulations

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Approval Process for FDI from Neighbouring Countries - Revised SOP

Snapshot

Vide Press Note No. 3 of 2020 dated April 17, 2020 brought changes to Consolidated FDI Policy whereby fresh investments from an entity from a country that shares land border with India ("neighbouring country") or investments (including transfer cases), where a beneficial owner is situated in or is a citizen of a neighbouring country, are now been brought in the Government Route.

While the erstwhile Department of Industrial Policy & Promotion (DIPP) had issued Standard Operating Procedure (SOP) on June 29, 2017, it was not amended to factor the changes pursuant to the aforesaid Press Note. Department for Promotion of Industry & Internal Trade (DPIIT) has now issued revised SOP ¹ dated November 09, 2020 wherein changes have been brought factoring Press Note 03 including further clarifications for certain grey areas like requirement of security clearance, declaration of beneficial ownership, documentation requirement, etc. The revised SOP will help process the FDI applications that have been pending (especially from China & Hong Kong) with the Government for quite some time now.

¹ No. 1/8/2016-FDI Policy

Background

In order to curb opportunistic takeovers/ acquisitions of Indian companies due to current COVID-19 pandemic, on April 17, 2020, the Department for Promotion of Industry and Internal Trade (DPIIT) came up with a Press Note (Press Note 3 of 2020) whereby new restrictions were brought in the Foreign Direct Investment (FDI) Policy. This change saw a paradigm shift in the manner in which the government looks at foreign investments from neighbouring countries. The amendments proposed by Press Note 3 of 2020 were incorporated in Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ("NDI Rules") by way of amendment to proviso/s to Rule 6(1).

*Further details in this regard are available in **kcmSpark** dated May 31, 2020.*

Government of India has now come up with revised SOP for processing FDI Proposals. This should throw more light on the nuances of the process and will provide clarity on certain areas which were hitherto unclear.

Key Changes

Following are the key changes in the updated SOP as compared to SOP issued dated June 29, 2017:

- In cases wherein the online applications are not signed digitally, the erstwhile SOP provided for a time period of five (05) days from the date of communication from DPIIT. Under the updated SOP, the time period has been extended to seven (07) days.

- In case an applicant misses the seven days' timeline, it may be provided with an additional time of further seven (07) days to submit the physical application. Such extended timeline was not available earlier
- Clearing the uncertainty, it has now been clarified that Competent Authority for grant of approval / rejection of the proposal in cases pertaining to Press Note 3 of 2020 shall be "Concerned Administrative Ministry / Department as identified by DPIIT". DPIIT shall accordingly determine the relevant Ministry / Department on a case to case basis.
- There was a lack of clarity if Security Clearance from Ministry of Home Affairs (MHA) would be required for cases falling under Press Note 3 of 2020. It has now been clarified that such cases would also be referred to MHA for clearance.
- Cases involving mergers / demergers/ amalgamations, etc. would require approval from NCLT / competent authority
- Incomplete applications may be closed by Secretary of concerned Administrative Ministry / Department without concurrence of DPIIT whereby the Applicant still continues to have a right to re-apply with all requisite details. Closure of FDI application shall not amount to rejection.
- In cases where an amendment of an earlier approval is sought, not all details are to be resubmitted and an application filed through FIFP seeking amendment to earlier approval(s) is to be considered as a valid application
- The overall time limit for approving of proposals has been increased from eight (8) weeks to ten (10) weeks in cases not requiring security clearance and from ten (10) weeks to twelve (12) weeks in cases requiring security clearance. This

time limit excludes time that may be taken by applicants for removing deficiencies / providing additional information, etc.

- If an applicant wishes to withdraw / surrender an approval letter, a declaration is to be submitted with explanation about the reasons for such withdrawal / surrender.

Documentation requirement

- (a) The list of mandatory documents continues to remain the same except for one additional mandatory document viz. Details of ownership and control of Investee & Investor Companies / Entities. Details of significant beneficial owners of the Investee & Investor Entities **as prescribed under the Companies Act, 2013 and rules thereunder**. It is important and interesting to note that while the NDI Rules have not yet been amended so as to define what would constitute "Beneficial Owner" or "Significant Beneficial Owner", the documentation requirement as per the updated SOP now requires details of Significant Beneficial Owner as per Companies Act, 2013 read with Rules²
- (b) It has been clarified that in cases pertaining to unincorporated investee entities, declaration should be submitted by the applicant regarding the same along with a statement that the entity would be incorporated after obtaining approval and certificate of incorporation would be submitted within sixty (60) days of the approval letter. Similarly, the documentation requirement mandates certain other declarations
- (c) Further, it has been clarified that in case foreign investor/s do not have documents like Certificate of Incorporation / Memorandum of Association / Articles of Association, etc. they should provide document equivalent to these

² We have undertaken a detailed analysis / discussion around the concept of Beneficial Ownership under Companies Act, 2013 in KCM Spark dated May 31, 2020

documents and a declaration along with necessary regulation / circular / order to that effect

(d) The updated SOP clarifies that in case documents are in foreign language, the said document / language should be apostilled and translated into English language

of significant beneficial owner/s, declaration in cases where certain documents are unavailable, translation and getting documents apostilled, etc. It is expected that necessary amendment shall be carried out in NDI Rules to factor the concept of beneficial ownership.

Conclusion

The updated SOP is a step forward in the new regime of FDI Applications from countries that share land border with India. This should give some confidence to investors from China and other neighbouring countries who now expect the Government of India to take up pending proposals at the earliest. The SOP also provides clarity on certain grey areas like details

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For further analysis and discussion, you may please reach out to us.

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