

FOREIGN DIRECT INVESTMENT: REGULATIONS AND PROCEDURE

1) Foreign Direct Investment

1.1 According to the United Nations Conference for Trade and Development (UNCTAD), FDI is **‘investment made to acquire lasting interest in enterprises operating outside of the economy of the investor**

1.2 FDI is a cross border investment in which an investor resident in one economy establishes a lasting interest in and a significant degree of influence over an enterprise resident in another economy.

2) Acts and Regulations/Policy governing FDI

FDI is governed by following applicable statutes or Regulations

- ★ Foreign Exchange Management Act, 1992
- ★ Foreign Exchange Management (Non-Debt Instrument) Rule, 2019
- ★ Foreign contribution (Regulation) Act, 2010
- ★ Foreign Trade (Development and Regulation) Act, 1992
- ★ Other applicable regulations made under these statutes.
- ★ Consolidated FDI Policy dated 15.10.2020

3) Persons or entities eligible to make FDI investment

The following persons or entities are competent/eligible to make FDI

- ★ Non-resident individual (NRI)/Entity
- ★ Company, trust or partnership firm incorporated outside India and owned and controlled by NRIs
- ★ Foreign Institutional Investors (FII) and Foreign Portfolio Investors (FPI)
- ★ Registered FIIs/ FPIs/ NRIs as per Schedules 2, 2A and 3 respectively of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.
- ★ SEBI registered Foreign Venture Capital Investor (FVCI) in any activity mentioned in Schedule 6 of Notification No. FEMA 20/2000

4) Prohibited Sectors wherein FDI is not permitted

Foreign Direct Investment (FDI) is prohibited or not allowed by the Government of India in the following sectors:

- ★ Lottery Business (Government/Private, including online lotteries)
- ★ Gambling and Betting including Casinos etc.

- ★ Business of Chit Funds
- ★ Nidhi Company
- ★ Trading in Transferable Development Rights (TDRs)
- ★ Real Estate Business or Construction of Farm Houses (except townships, commercial projects),
- ★ Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.
- ★ Atomic Energy

5) Legal ways for making FDI

Foreign Direct Investment (FDI) can be made through following two routes:

- ★ **Automatic Route:** A Non-resident investor or the Indian company does not require any approval from Government of India for the investment. The RBI can be informed after the investment has taken place.
- ★ **Government ApprovalRoute:** Under this Route, prior to investment, mandatory approval from the Government of India is required. The FDI proposal is also examined by concerned department/Ministry.

6) Competent Authority to approve FDI Proposal

- ★ RBI
- ★ Department for Promotion of Industry and Internal Trade ("DPIIT")
- ★ Cabinet Committee of Economic Affairs
- ★ Ministry of Home Affairs (in case of required security clearance for certain activities)
- ★ Ministry of External Affairs (in case FDI Investment is to made from Pakistan, Bangladesh or other neighbouring countries) and
- ★ The concerned Departments or Ministries.

7) Essential documents required to be submitted along with application for approving FDI proposal

- ★ From both Investee & Investor Companies/Entities:
 - a. Certificate of Incorporation
 - b. Memorandum of Association (MOA)
 - c. Board Resolution
 - d. Audited Financial Statement of Last Financial Year
 - e. Article of Association
- ★ List of Names, addresses and identification proof of all foreign collaborators of the Investor Company/Entity.

- ★ Pre-and Post-investment shareholding pattern of the Investee Company.
- ★ An Affidavit stating that all information provided in hard copy and online is the same and correct.
- ★ In case of existing ventures, copy of joint venture agreement/shareholders' agreement/ technology transfer/trademark/brand assignment agreement (as applicable).
- ★ Copy of Downstream Intimation.
- ★ Copy of relevant past FIPB/SIA/RBI approvals, connected with the current proposal.
- ★ Relevant Foreign Inward Remittance Certificate (FIRC) in case investment has already flowed in.
- ★ Copy of NCLT order in case of scheme of arrangement, compromise, Merger or acquisition of entities.
- ★ Valuation certificate as approved by a certified Chartered Accountant.
- ★ Non-compete clause certificate of the investor and investee entities (in case of investment in pharmaceutical sector)

8) FDI proposal approval procedure

The following procedure is adopted for approving FDI proposal

- ★ **Online submission of FDI proposal** at single window Foreign Investment Facilitation Portal (FIFP) along with required documents.
- ★ **Submission of hard-copy** of application for seeking FDI proposal approval along with copy of the required submitted documents within 5 days(extendable up-to 7 days) on the request of Department for Promotion of Industry and Internal Trade (DPIIT).
- ★ **DPIIT assigns the matter within two days after identifying concerned Ministry or Dept.** In addition to this, FDI proposal is also circulated online within two days to RBI for seeking its review from FEMA perspective.
- ★ DPIIT will give its comment within 4 weeks in case proposed **investment to be made from Pakistan, Nepal, China and Bangladesh**, which requires **clearance of Ministry of External Affairs**, who will give its comment within 6 weeks. MEA may request to the applicant to other useful information/Clarification and he has to do so within 1 week.
- ★ In case of **foreign equity inflow is more than Rs 5000 Crore**, the competent authority is required **to place the same to Cabinet Committee on Economic Affairs** for consideration within fixed time limit.

- ★ DPIIT has to **communicate its final decision of approving or rejecting FDI Proposal** to the applicant within 8-10 weeks after getting required comments from the concerned departments/Ministries. In case the competent authority rejects the FDI proposal, a period of two weeks is provided to DPIIT for additional consideration on the same and decided on the proposal.

9) Legal Remedy of Judicial Review in case of arbitrary or unreasonable rejection of FDI proposal by the Central Govt (in case of government approval route)

Although there is no provision of making appeal against arbitrary and unreasonable rejection of FDI proposal by the Central Govt, yet constitutional remedy of Judicial Review can be exercised by the applicant by filing writ either under Article 32 or Article 226 of the constitution of India.

- ★ The SC in **M.P Oil Extraction v. State of Jammu and Kashmir AIR 1989 SC 1899** held that the courts, while exercising their power of judicial review of Executive actions, must be cognizant of the 'doctrine of separation of powers'
- ★ The Apex court in **M. L. Sharma v. Union of India MANU/SC/OJ20/2013**, wherein the validity of FDI Policy on multi-brand retail trading was challenged under Article 32, held that in relation to policy matters, courts cannot interfere, unless the same is "unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power."