

Compliances under FEMA

Intensive Course on FEMA

Chamber of Tax Consultants
MUMBAI

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Structure



- Importance of filings
- Background
- FIRMS
- Forms Covered
- Approach to filing
- Approval Route
- Questions

Importance of filings

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- To be compliant with Law
- Repatriation of money at the time of sale of shares
- Short window – 30 days including the time required by the Bank
- Need to re-file the entire form in case of rejection
- Late Submission Fees

Background

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- Foreign Investment Reporting and Management System (‘FIRMS’)
- Till February, 2016 – physical forms were submitted with Form ARF and Form FC-GPR (UIN was allotted)
- W.e.f. February 2016, filings of Form ARF and Form FC-GPR and Form FC-TRS were on ebiz portal
- Other forms were submitted with the AD Bank
- Check which Forms are covered
 - Recently, AD Bank asked us to submit Form APR through FIRMS and refused to accept the Form

Reporting (1/2)

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□ Forms

- Form FC-GPR: Issue of capital instruments by Indian Companies within 30 days from the date of issue of equity instruments
- Form FC-TRS: Transfer of capital instruments within 60 days of transfer of equity instruments or receipt / remittance of funds, whichever is *earlier*
- Form LLP-I: FDI in LLP through capital contribution and profit shares within 30 days from the date of receipt of amount of consideration
- Form LLP-II: Disinvestment/ transfer of capital contribution and profit shares in LLP within 60 days from the date of receipt of funds
- Form ESOP: Issue of ESOPs / sweat equity shares/ shares against exercise of ESOP by an Indian company within 30 days from the date of issue of ESOPs / sweat equity
- Form CN: Issue or transfer of convertible notes by Startup within 30 days of issue of the CN
- Form DRR: Issue/transfer of Depository Receipts
- Form DI – Reporting of downstream investment (indirect foreign investment) in a company or LLP within 30 days from the date of allotment of the capital instruments
- Form InVi- Reporting of investment by a person resident outside India in an Investment vehicle – not available on SMF
- Forms covered today – Form FC-GPR, Form FC-TRS, Form ESOP, Form CN, Form DI

Reporting (2/2)

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- SMF
 - Form ARF is not required to be filed
 - First register on EMF
 - Shareholding pattern from EMF is shown in SMF
- Filing Forms on SMF
 - Advisable to file Forms at the earliest since if Form is rejected, it cannot be resubmitted and has to be refiled
 - Date of filing Form is considered as the date on which the final form is approved
 - Late filing fees is payable even if original form was filed in time but was rejected and final approved form was filed thereafter – Form should be complete in all respects
 - Best to write to the Bank in advance for their checklist and submit accordingly

LSF

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| Amount involved in reporting (in INR) | Late Submission Fees (LSF) as % of the amount involved* | Maximum amount of LSF applicable |
|--|--|---|
| Up to INR 1,00,00,000 | 0.05 % | Lower of: INR 10,00,000 or 300% of the amount involved |
| More than INR 1,00,00,000 | 0.15 % | Lower of: INR 1,00,00,000 or 300% of the amount involved |
| *Note: 1. The %age of LSF will be doubled every 12 months 2. Minimum applicable LSF shall be INR 100. | | |

FIRMS

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- Foreign Investment Reporting and Management System ('FIRMS')
- The website <https://firms.rbi.org.in/>
- Login as Business User for Single Master Form
- Opens in Dashboard which shows a summary of all forms filed whether approved, rejected or pending approval
 - Forms cannot be accessed from the dashboard
- On the left hand side, you select Menu, File Return, Single Master Form
 - Access Forms filed from here
 - Search Return
 - Add new return
- Help
 - User Manual for Entity Master
 - Revised User Manual for FIRMS
 - Contact details
 - FAQs

Dashboard

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The screenshot displays the Reserve Bank of India (RBI) Firms Dashboard. The page is titled "Dashboard" and features a navigation menu on the left. The main content area is divided into three sections: "Approved Forms", "Rejected Forms", and "Pending Approval Forms". Each section contains a grid of colored boxes representing different form types and their counts. The counts for all form types are currently zero.

| Form Type | Count |
|------------|-------|
| FCGPR FORM | 0 |
| FCTRS Form | 0 |
| LLP1 Form | 0 |
| LLP2 Form | 0 |
| Cn Form | 0 |
| ESOP Form | 0 |
| DRR Form | 0 |
| DI Form | 0 |
| INV1 Form | 0 |

© 2018 | Powered by - HTC Global Services Pvt. Ltd. | www.htcinc.com | Version 1.0 | FIRMS Application Helpdesk (Monday to Friday 10:30 am to 6:00 pm) | Email- helpfirms@rbi.org.in

5:37 PM
22-Jan-19

Foreign Direct Investment and Indirect Foreign Investments

Form FC-GPR

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- Mode of payment
 - More than 1 FIRC?
 - Different options depending on mode of payment selected
 - Remitter is different from Foreign Investor
 - KYC Reports
 - NOC from the remitter with their relationship
 - Reason from the remitter explaining the reason
 - Copy of agreement / board resolution
 - In case of non-cash allotment like Bonus, select others, enter non-cash transaction; date of remittance can be date of allotment; amount of remittance zero; FIRC Number – not required to be entered
- Always enter nature of issue before entering details of Investor – it gets erased if entered subsequently
- Valuation Certificate should include Valuation report with Schedules
- Confirm Pre and Post Shareholding Pattern

Form FC-GPR

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- Other attachments
 - Cover letter
 - Details of the allotment
 - Copy of earlier Form FC-GPR in case of partly paid-up shares
 - NOC in case of remittance form joint account and allotment to first holder
 - Refund of excess share application money with swift advice; if not refunded please provide declaration that it shall be refunded within 60 days
 - Utilisation of excess funds – previous allotment, subsequent allotments
 - Board Resolution
 - CS Certificate as per Format
 - Declaration(s)
 - Any other information / documents as requested by the AD Bank
 - Ask the AD Bank in advance – Banks may have different requirements
 - Give as much information as could be needed
 - Can be 1 MB – so need to check and compress files but should be clear

Form FC-GPR

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- Can be saved as draft and submitted later
- Reset will reset the entire form
- Back will go to the Dashboard
- Always Save as Draft after each Tab
- Take screenshots of the entire form
- Take screenshots of the submission time stamped
- Should receive notification from Bank – save the email
- Website gets logged out after 10 minutes or so
- If you file after 30 days, you need to submit a condonation of delay letter
 - If you have submitted the first form prior to 30 days, please give explanation especially if reasons are valid
- File your Form on the date of the allotment – that way the Bank has 5 days to reject – you still have at least 25 days to refile (the Banks even take longer)

Form FC-GPR

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- In case of rejection, entire form has to be filed again
- If the form goes to RBI (if filed beyond 30 days), it can take much longer
 - Some forms have been approved by the Bank but pending for approval with the RBI
- If RBI approves with LSF, it is a conditional acknowledgment subject to payment of LSF
 - Demand draft
 - Letter from the RBI to confirm
 - Form FC-GPR does not get updated with the final acknowledgment
- Fresh acknowledgment letter after payment of LSF
- Keep email received and screenshots for your record
- Form LLP-1 similar to Form FC-GPR

Form FC-GPR

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- Partly paid-up shares
 - Partly paid-up shares that have been issued to a person resident outside India shall be:
 - Fully called-up within twelve months of such issue; and
 - Twenty- five per cent of the total consideration amount (including share premium, if any) shall be received upfront
 - Date of receipt of funds: 16 October 2018
 - Amount received: 50% of the total consideration (including premium)
 - Date of Allotment: 19 October 2018
 - Date of filing initial Form FC-GPR: 24 October 2018, which was rejected and re-filed on 3 November 2018 and was approved
 - Date of receipt of balance 50% consideration: 14 June 2019
 - Date of Board Resolution: 16 June 2019
 - Date of filing 2nd Form FC-GPR: 20 June 2019
 - AD Bank rejected Form FC-GPR twice because it seemed that they were not familiar with them
 - Levied LSF from November 2018 stating that date of allotment was 19 October 2018 and there has been a delay
 - We provided the DD for the entire amount and explained the matter in a cover letter to the RBI
 - RBI returned our DD and took the transaction on record without the LSF

Form FC-TRS

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- New login as Business User in SMF
 - ▣ Reporting by Resident Transferor / Transferee or PROI holding Capital Instruments on non-repatriable basis
- To be filed within 60 days of transfer / remittance whichever is earlier
- Always get SMF registration in advance since that itself can take a week or so
- Transfer by Sale / Gift
- New / Subsequent (cant be selected)
- Deferred Sale Consideration – to be filed for each tranche of payment
- Date of transfer – in case after the date of application, mention date of application with explanation in other attachments

Form FC-TRS

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- Other attachments
 - Complete details of the transaction
 - In case date of transfer is after date of application, details to be provided
 - Declaration
 - All explanations
 - PAN /Passport of the Transferee / Director of the Transferee
 - In case of difference in spelling of name, please provide a name declaration letter
- In case no upfront conversion ratio, mention maximum permissible conversion as per pricing guidelines
- If more than one capital instrument is being transferred, enter fair value of one capital instrument and clarify in the attachment
- Form LLP-II similar to Form FC-TRS

Form FC-TRS

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- One Form FC-TRS for each transaction
 - Indian Resident purchasing shares of I Co from 8 Non-Resident Sellers
 - Need to file 8 Form FC-TRS
 - No option to file for more than one transaction as in Form FC-GPR
 - If possible, recommend that payments be made over sometime and not altogether since time limit of 60 days starts from the date of payment / transfer, whichever is earlier
 - In that case, there will be additional time available

Form CN

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- Other attachments
 - Start Up Registration
 - All explanations
 - Resolutions
 - In case of transfer, provide copy of initial investment
 - Provide complete explanation since Bankers are not generally familiar with Form CN

Form ESOP

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- Relevant Extracts of the Scheme
- Will need to file Form ESOP when ESOPs are exercised
- Other attachments
 - All explanations
 - Resolutions
 - Declarations
 - CS Certificate
 - Valuation certificate

Form DI

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- To be filed by Indian Entity making downstream investment
- Business User Registration by Indian Entity making the DI
- Other attachments
 - All explanations
 - Resolutions
 - Declarations
 - Declaration that funds not borrowed from domestic markets and regarding source of funds
 - CS Certificate
 - Valuation certificate

Downstream Investment

- Compliance Obligations
 - First level Indian company making downstream investment to be responsible for ensuring compliance with provisions of these regulations for the downstream investment made by it at second level and so on and so forth
 - Such first level company to obtain a certificate to this effect from its statutory auditor on an annual basis
 - Such compliance of these regulations to be mentioned in the Director's report in the Annual Report of the Indian company
 - In case statutory auditor has given a qualified report, the same needs to be immediately brought to the notice of the Regional Office of the Reserve Bank in whose jurisdiction the Registered Office of the company is located and shall also obtain acknowledgement from the RO

KYC

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- KYC could be time-consuming and hence it is suggested that the Remitter Bank and the Recipient Bank be informed in advance
- KYC to be provided as a Swift Message from the Overseas Remitting Bank to Indian Bank and then provided by the Indian Bank in the format
- KYC should include Registered Name of the Investor;
- Unique Identification Number (Passport Number, Social Security number etc);
- Permanent Address;
- Name of Overseas Remitting Bank;
- Non-Resident Investor's Bank Account Number;
- Period of Banking Relationship with the Non-Resident Investor
- Need to work closely with the Banks to ensure timely submission

Summary

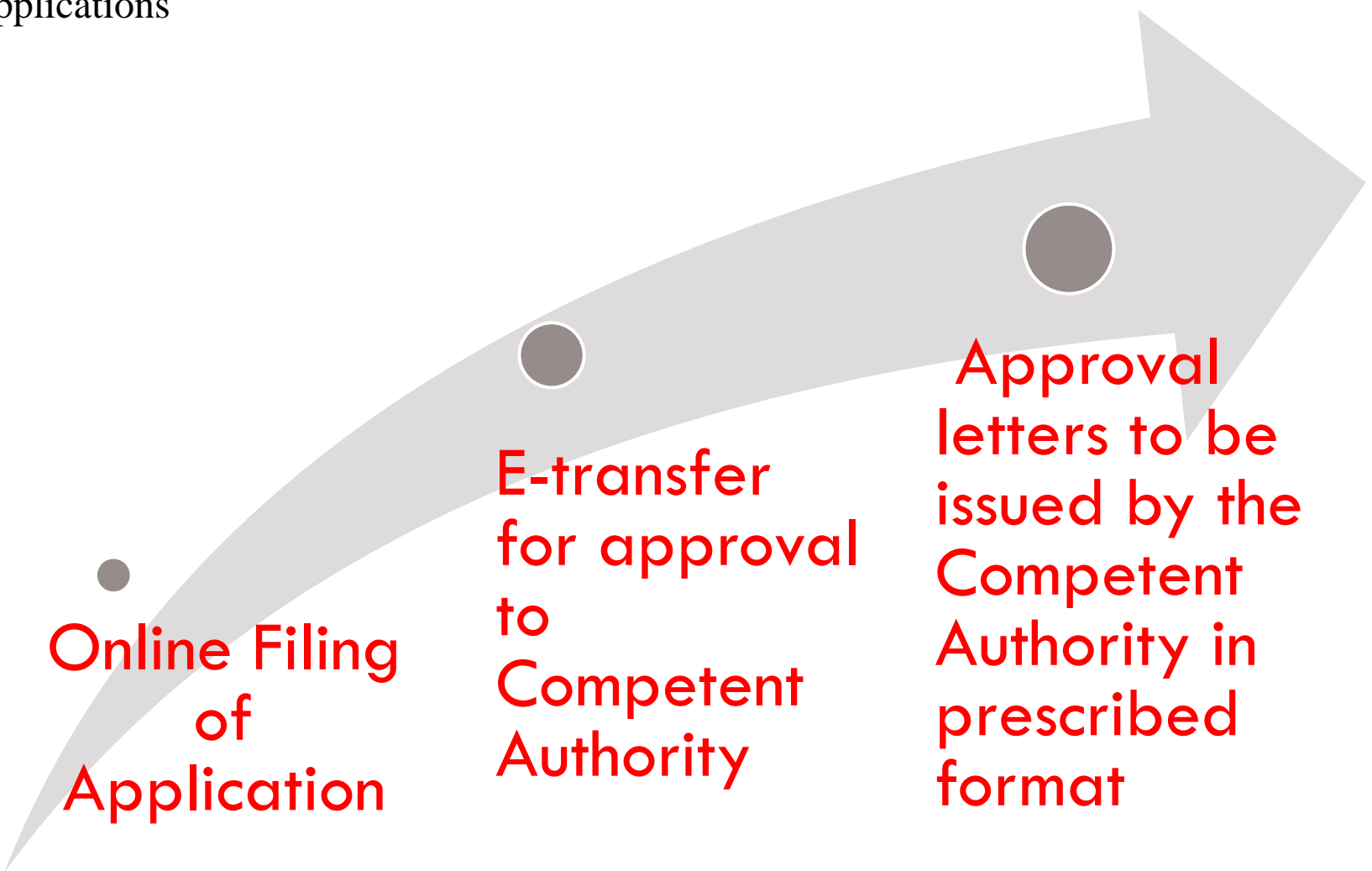
- Identification of the AD Bank
 - If possible, meet the AD Banks in advance and understand how they will help
 - Select the AD Bank based on the above
 - If required, open a new Bank account if AD Bank seems more helpful
- Process of KYC to be started in advance
- List of documents required to be taken in advance from the AD Bank
- Some AD Banks offer to check the documents prior to final submission
- Ensure timely and accurate submissions

New Procedure for Government Approvals

- Foreign Investment Promotion Board (FIPB) has been abolished
- ‘Foreign Investment Facilitation Portal’ (FIFP), an administrative body to facilitate FDI applicants has been introduced from June 2017
- New online single point interface and clearance of applications from the Government of India for investors to facilitate FDI for approval route
- Upon receipt of the FDI application, it shall be forwarded to the concerned ‘Competent Authority’ which shall process the application as per the ‘Standard Operating Procedure (SOP)’
- Application shall be forwarded to the Reserve Bank of India within 2 (two) days
- Proposals requiring security clearance (in sectors such as defence and telecommunication) shall also be forwarded to the Ministry of Home Affairs

Standard Operating procedure ('SOP')

SOP sets out a detailed procedure and timeline for applications



Online Filing
of
Application

E-transfer
for approval
to
Competent
Authority

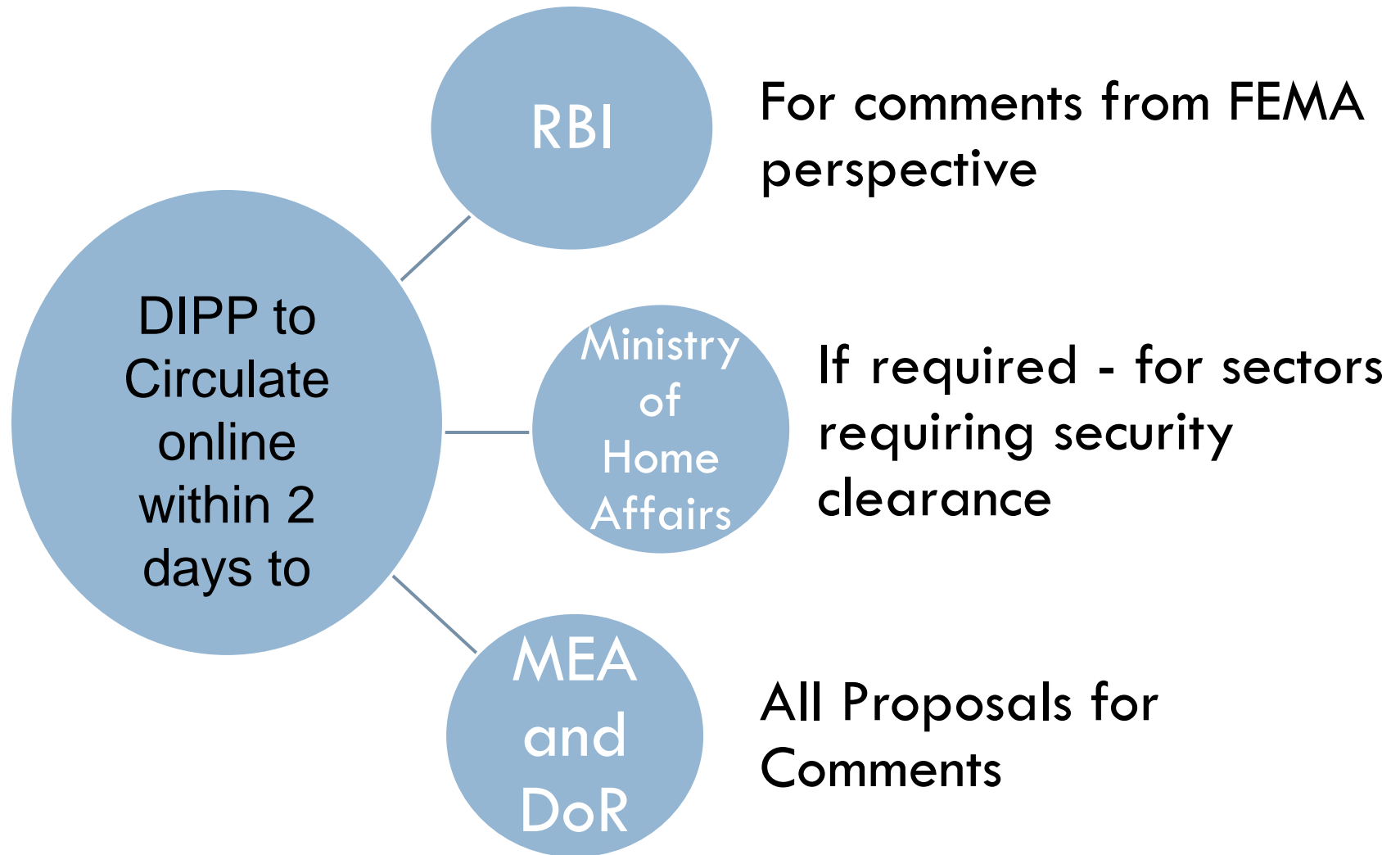
Approval
letters to be
issued by the
Competent
Authority in
prescribed
format

Filing of Application

- ▶ Online registration
- ▶ One registration per application
- ▶ Proposal for foreign investment, along with supporting documents to be filed online, on the Foreign Investment Facilitation Portal, at the following url: www.fifp.gov.in/
- ▶ Application form has eight tabs - Proposal details, Application Details, Investee, Investee activities, Investor, Downstream, Shareholding and Documents Upload (provided)
- ▶ Once the first tab (Application Details) is completed, system generates an application no. and can be saved as draft and continue to work on the same and add/modify/delete details as per requirements
- ▶ Once the application is submitted to FIFP, it cannot be edited



INTER-MINISTERIAL / DEPARTMENTAL CONSULTATIONS



Internal Procedure for Approvals

- DIPP will identify the concerned Ministry/ Department and thereafter, circulate the proposal within 2 days
- For Digitally signed applications, physical copy is not required to be submitted
 - If not digitally signed, one signed physical copy to be submitted to the Competent Authority within 5 days of communication from DIPP
- Time limits calculated from date of filing of online application
 - If the signed physical copy is not filed with the Competent Authority within 7 days, date of filing of the physical application would be considered
- Ministries/Departments consulted shall upload their comments on the portal within 4 weeks from the online receipt of the proposal
 - In case comments are not received within the stipulated time, presumed that they have no comments to offer
- Comments by Ministry of Home Affairs on proposals for investment in sectors requiring security clearance to be provided within 6 weeks from the online receipt of such proposals
 - In cases where MHA is not in a position to provide its comments with 6 weeks, it will intimate the concerned administrative Ministry/Department of the expected time frame within which MHA would be able to give its comments
- Additional information/ clarifications may be asked from the applicant which are to be provided within 1 week

Internal Procedure for Approvals - continued

- ▶ If the Competent Authority proposes to reject the proposals or in cases where conditions for approval are stipulated in addition to the conditions laid down in the FDI policy or sectoral laws/regulations, concurrence of DIPP shall compulsorily be sought by Competent Authority within 8 weeks/10 weeks (in cases where comments of Ministry of Home Affairs have been sought from security clearance point of view) from the receipt of the proposal.
- ▶ Proposals involving FDI exceeding INR 5000 Crores (approx. \$ 700 mn) shall be placed before the Cabinet Committee of Economic Affairs – after the decision, approval letter shall be issued within 1 week
- ▶ Time taken by the applicant in addressing the queries raised by the Competent Authority will be excluded from the time limits for disposal of proposal
- ▶ Additional time of 2 weeks will be given to DIPP for consideration of those proposals which are proposed for rejection or where additional conditions which are not provided in the FDI policy are proposed to be imposed by the Competent Authority
- ▶ Approval/rejection letters will be sent online by the Competent Authority to the applicant, consulted Ministries/Departments and DIPP in the format provided
- ▶ Complete proposals get approved within 8-10 weeks



TIMELINES

| S. No. | Action Points | Time Period |
|--------|--|-------------|
| 1 | Filing of the investment proposal on FIFP | - |
| 2 | Dissemination of investment proposal to Concerned Ministry / Department | 2 days |
| 2A | Submission of signed physical copy with the Competent Authority, if needed | 5 days |
| 3 | Initial scrutiny of the investment proposal by Competent Authority, and seeking relevant information / document from the applicant | 1 week |
| 4 | Time limit for Submission of clarification by DIPP on specific issues of FDI policy | 2 weeks |
| 5 | Time limit for Submission of Comments by Consulted Ministry/ Department/ RBI/ Any Other Stakeholder | 4 weeks |
| 6 | Time limit for Submission of Comments by Ministry of Home Affairs on proposals requiring security clearance | 6 weeks |
| 7 | Approval on proposals by Competent Authority | 2 weeks |
| | For Proposals not requiring security clearance | 2 weeks |
| | For Proposals requiring security clearance | 2 weeks |
| 8 | Cumulative Time for Proposals not requiring security clearance | 8 weeks |
| | Cumulative Time for Proposals requiring security clearance | 10 weeks |

LIST OF DOCUMENTS

| S. No. | Mandatory Documents |
|--------|--|
| 1 | Certificate of Incorporation of the Investee & Investor Companies/Entities (Investee company may be a proposed entity and may not be incorporated) |
| 2 | Memorandum of Association (MOA) of the Investee & Investor Companies/Entities |
| 3 | Board Resolution of the Investee & Investor Companies/Entities |
| 4 | Audited Financial Statement of Last Financial Year of the Investee & Investor Companies/Entities |
| 5 | Article of Association of the Investee & Investor Companies/Entities |
| 6 | List of Names and addresses of all foreign collaborators along with Passport Copy/ Identification Proof of the Investor Company/Entity |
| 7 | Diagrammatic representation of the flow and funds from the original investor to the investee company and Pre and Post shareholding pattern of the Investee Company |
| 8 | Affidavit stating that all information provided in hard copy and online are the same and correct |

LIST OF DOCUMENTS - continued

| S. No. | Other Documents |
|--------|--|
| 9 | Signed copy of the JV agreement/shareholders agreement/ technology transfer/trademark/brand assignment agreement (as applicable), in case there are existing ventures |
| 10 | Board resolution of any joint venture company |
| 11 | Certificates of Incorporation and charter documents of any joint venture/company which is a party to the proposed transaction |
| 12 | Copy of Downstream Intimation |
| 13 | Copy of relevant past FIPB/SIA/RBI approvals, connected with the current proposal (in case of amendment proposal) |
| 14 | Foreign Inward Remittance Certificate (FIRC) in case investment has already come in and in case of post-facto approval |
| 15 | In the cases of investments by entities which themselves are pooled investment funds, the details such as names and addresses of promoters, investment managers as well as all the contributors to the investment fund |
| 16 | List of the downstream companies of the Indian company and the details of the equity held by the Indian Company along with the details of the activities of the companies |

COMPETENT AUTHORITIES FOR APPROVAL UNDER GOVT ROUTE

| SR NO. | Activity / Sector | Administrative Ministry / Department |
|----------------|---|---|
| (i) | Mining | Ministry of Mines |
| (ii) | a) Items requiring Industrial Licence under the Industries (Development & Regulation) Act, 1951, and/or Arms Act for which the powers have been delegated by Ministry of Home Affairs to DIPP | Department of Defence Production, Ministry of Defence |
| (ii) | b) Manufacturing of Small Arms and Ammunitions covered under Arms Act | Ministry of Home Affairs |
| (iii)& (iv) | Broadcasting & Print Media | Ministry of Information & Broadcasting |
| (v) | Civil Aviation | Ministry of Civil Aviation |
| (vi) | Satellites | Department of Space |
| (vii) | Telecommunication | Department of Telecommunications |

COMPETENT AUTHORITIES- Continued

| SR NO. | Activity / Sector | Administrative Ministry / Department |
|----------------------------------|---|--|
| (viii) | Private Security Agencies | Ministry of Home Affairs |
| (ix) (a) | Applications involving investments from Countries of Concern which presently include Pakistan and Bangladesh, requiring security clearance as per the extant FEMA 20, FDI Policy and security guidelines, amended from time to time | DIPP as per PN 1/2018 (earlier Ministry of Home Affairs) |
| (ix) (b) | Cases pertaining to Government approval route sectors / activities requiring security clearance as per the extant FEMA 20, FDI Policy and security guidelines, amended from time to time | Nodal Administrative Ministries/ Departments |
| (x) (xi) (xii) & (xiii) | Trading (Single, Multi brand and Food Product Retail Trading); FDI proposals by NRIs/EOUs requiring approval of the Government; Issue of equity shares for import of capital goods/ machinery/ equipment (excluding second-hand machinery); Issue of equity shares for pre-operative/pre-incorporation expenses (including payments of rent etc.) | Department of Industrial Policy & Promotion |

COMPETENT AUTHORITIES - Continued

| SR NO. | Activity / Sector | Administrative Ministry / Department |
|--------|---|--|
| (xiv) | Financial services which are not regulated by any Financial Sector Regulator or where only part is regulated or where there is doubt regarding the regulatory oversight | Department of Economic Affairs |
| (xv) | Investment into a Core Investment Company or an Indian company engaged only in the activity of investing in the capital of other Indian Company/ies | |
| (xvi) | Banking (Public and Private) | Department of Financial Services |
| (xvii) | Pharmaceuticals | Department of Pharmaceuticals |
| Note | Where there is doubt about Administrative authority | DIPP shall identify the Administrative Ministry/Dept |

Queries

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**YOUR
QUESTIONS
PLEASE !!!**





THANK YOU
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