# Review

## January – December 2008

Foreign Investment Promotion Board
Department of Economic Affairs

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## ACKNOWLEDGEMENT

We owe the second review of Foreign Investment Promotion Board (FIPB) proposals to the former Finance Secretary, Dr. D. Subbarao and the former Additional Secretary, Smt. Sindhushree Khullar. Both of them advocated the need to document the working of the FIPB for it to become a more consistent and transparent apex inter-ministerial body for expeditious clearance of foreign investment proposals that require government approval.

The current profile of the document is the result of the guidance of Dr. Anup K. Pujari, Joint Secretary (FT). We are grateful for the encouragement given by Shri Ashok Chawla, Secretary, Department of Economic Affairs (DEA) and Smt. L.M. Vas, Additional Secretary. The FIPB Secretariat is thankful to Shri P.K. Bagga, Officer on Special Duty (CM&I) for being our friend, philosopher and guide. The FIPB Section is one of the heaviest in the DEA and works through a continuing series of meetings. Despite the rigorous routine, the analysis of proposals from the policy point of view was completed due to enthusiastic and strenuous effort by Shri. R. Prasad, Under Secretary (FIPB), who collated the information, presented it diagrammatically, and contributed in the analysis. I acknowledge his contribution with a deep sense of appreciation.

Prabodh Saxena
Director (FIPB and Investment)

# INTRODUCTION

The FIPB considers proposals for Foreign Direct Investment (FDI) within approved policy parameters. The members of the Board are:

- Secretary to the Government of India, DEA, Ministry of Finance - Chairman
- Secretary to the Government of India, Department of Industrial Policy and Promotion (DIPP).
- Secretary to the Government of India, Department of Commerce (DOC).
- Secretary to the Government of India (Economic Relations), Ministry of External Affairs (MEA).
- Secretary to the Government of India, Ministry of Overseas Indian Affairs (MOIA).

The Board may co-opt other Secretaries to the Government of India and officials of financial institutions, banks and professional experts in industry and commerce, when required. The Secretary to the Government of India, Ministry of Small, Medium and Micro Enterprises and the Secretary to the Government of India, Department of Revenue have been co-opted on the Board. The composition of the Board is provided in Annexure I. It functions in accordance with the Allocation of Business Rule (Annexure II). The guidelines for processing of proposals are available in Annexure III.

The first review of FIPB decisions, procedures and processes was done in November 2007 covering the period February 2003 to September 2007. The proposals considered from January 2008 to December 2008 are covered in the present review.

This Review is organized into three sections. Section A presents the fact sheet of the proposals considered by the FIPB during the period under review. Section B discusses the policy issues identified during the last review and documents those that have been resolved.

Section C gives an account of issues identified during the period under review and the Board decisions that reflect on issues that need to be clarified in the FDI policy enabling the FIPB to evolve a consistent approach that is uniformly applicable to similar proposals. Section C is followed by Conclusion.

# *SECTION - A*

# Fact Sheet (February 2003 - December 2007)

The details of the proposals considered and approved by FIPB from February 2003 to December 2007 are given below in Table 1

**Table 1**

| Period | No. of Meetings held | No. of proposals considered | Proposals approved | Proposed inflow of FDI (*Rs. in crore*) |
|---|---|---|---|---|
| February, 2003 to March, 2003 | 05 | 183 | 110 | 18.18 |
| April, 2003 to March, 2004 | 34 | 1191 | 875 | 7,492.00 |
| April, 2004 to March, 2005 | 23 | 921 | 728 | 13,723.00 |
| April, 2005 to March, 2006 | 15 | 616 | 473 | 12,315.98 |
| April, 2006 to March, 2007 | 18 | 422 | 336 | 39,612.00 |
| **Total** | **95** | **3333** | **2522** | **73861.16** |
| April, 2007 to September, 2007 ( Period of previous review) | 11 | 229 | 158 | 9241.00 |
| April, 2007 to September, 2007 ( Period of previous review) | 11 | 229 | 158 | 9241.00 |
| October, 2007 to December, 2007 ( Period not covered in Review I) | 05 | 128 | 83 | 3270.78 |
| **Total** | **16** | **357** | **241** | **12511.78** |
| **Grand Total** | **111** | **3690** | **2763** | **86372.94** |

# Fact Sheet (January – December 2008)

The details of the proposals considered and approved by FIPB from January 2008 to December 2008 are given below in Table 2 and Figure 1. Category wise details of approved proposals are at Figure 2.

**Table-2**

| Month | No. of Proposal considered | Approved | Auto Route | Deferred | Rejected | With-drawn | Inflow (Rs. in crore) |
|---|---|---|---|---|---|---|---|
| January | 42 | 35 | - | 4 | 3 | - | 2899.88 |
| February | 31 | 27 | - | 3 | - | 1 | 7254.32 |
| March | 66 | 41 | - | 16 | 7 | 2 | 13685.31 |
| April | 40 | 28 | - | 9 | 3 | - | 965.58 |
| May | 55 | 34 | 2 | 15 | 2 | 2 | 2796.59 |
| June | 57 | 41 | 1 | 15 | - | - | 2852.42 |
| July | 61 | 36 | - | 19 | 5 | 1 | 1107.24 |
| August | 51 | 27 | 2 | 16 | 6 | - | 26386.24 |
| September | 50 | 30 | 2 | 17 | 2 | - | 2209.02 |
| October | 57 | 43 | - | 7 | 7 | - | 4353.16 |
| November | 41 | 32 | - | 4 | 3 | 2 | 845.70 |
| December | 56 | 35 | 1 | 13 | 4 | 3 | 2568.90 |
| **Total** | **607** | **408** | **8** | **138** | **42** | **11** | **67924.40** |

# Figure 1

**Fig 1**- Proposals approved/rejected/deferred/withdrawn/advised auto route

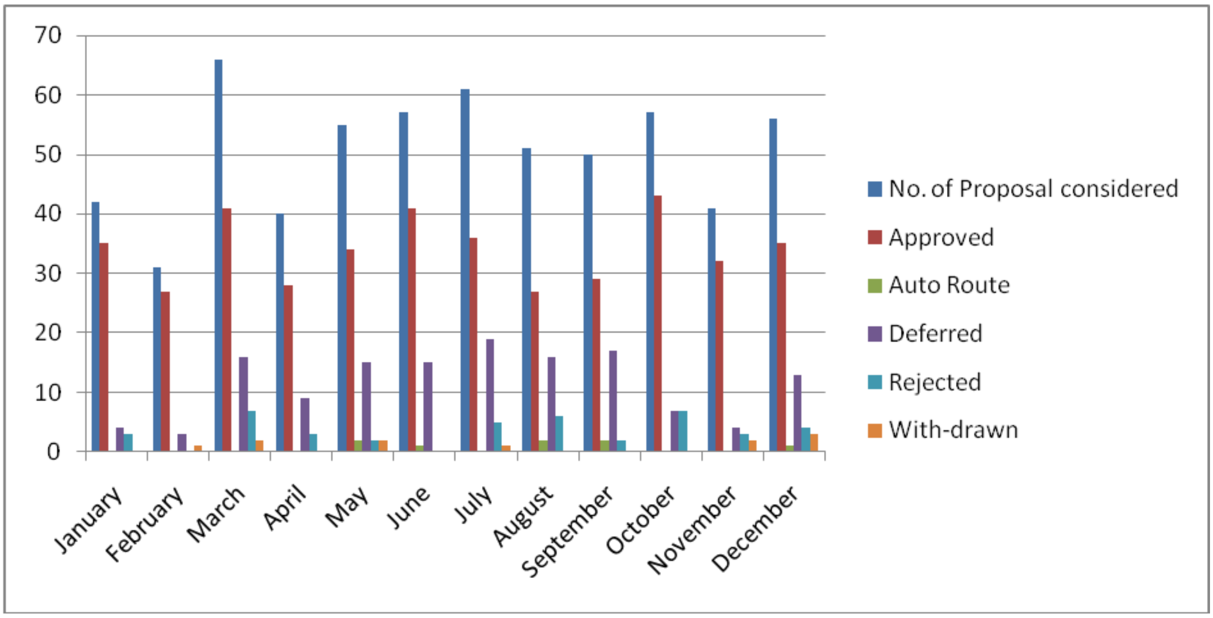
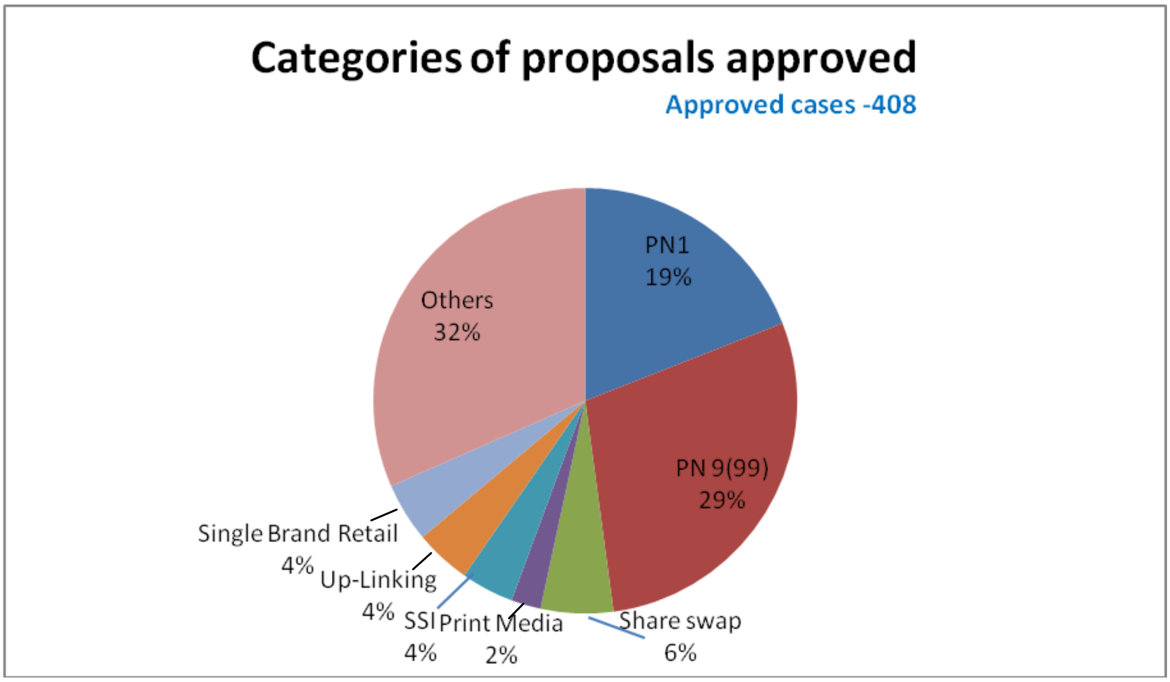


**Fig. 2**- Categories of proposals approved




* PN 1 refers to proposals under Press Note 1 of 2005 read with Press Note 3 of 2005 wherein the applicant had a JV/technology Transfer Agreement with an Indian partner as on January 12, 2005.

** PN 9 refers to Press Note 9 of 1999 permitting downstream investment by acquiring the status of holding company.

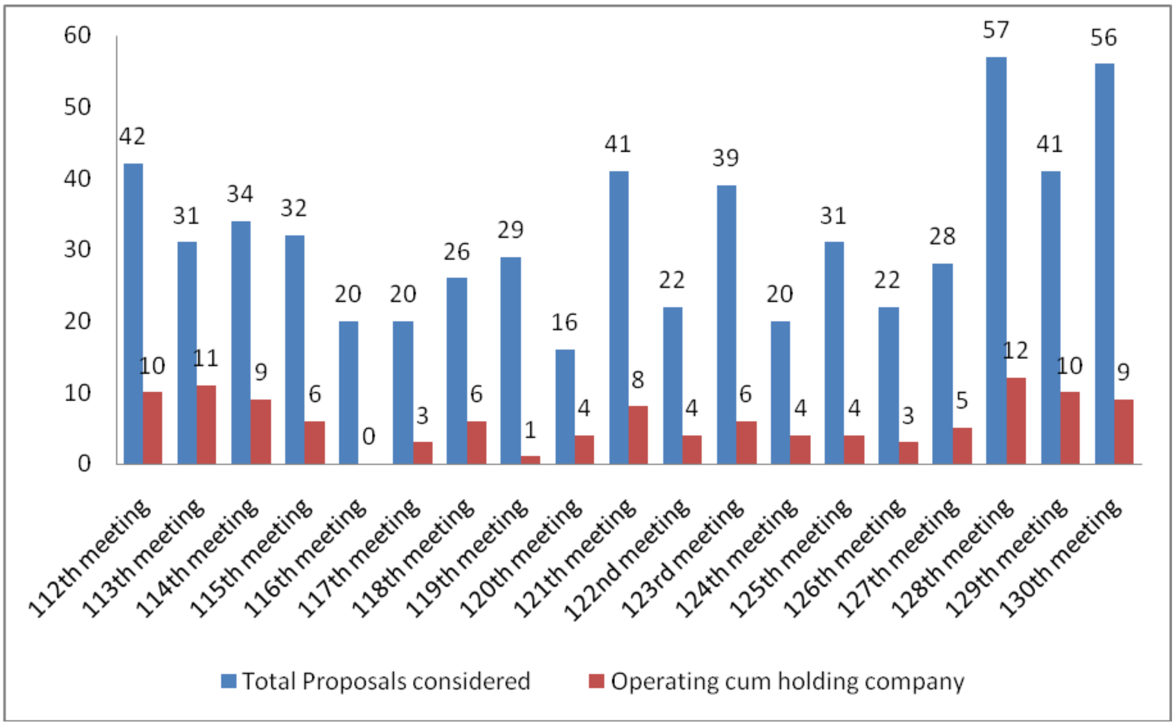
## Proposals of Press Note 9 (1999 Series)

The Press Note (PN) 9 (1999 Series) deals with the policy applicable to foreign-owned Indian holding companies that requrie prior approval of the FIPB and the government for downstream investment in Annexure III activities eligible for automatic approval.

For the proposal considered by the FIPB during the period under review, the position was as follows:

1. Out of the 607 proposals, in 115 proposals the applicants wanted to change the status to a holding company that would enable them to make downstream investments (Figure 3).

Fig 3- Holding Company proposals




2. The FIPB believes there is not much value addition in PN 9 proposals. Currently, FIPB is taking up all proposals seeking approval for downstream investment irrespective of

percentage of foreign equity in the holding company and even when both the holding and downstream companies are on the automatic route. This needs urgent clarification.

3. Out of the 607 proposals, the FDI inflow was nil in 136 proposals (22.4 percent), an analysis of which shows that:

a) Twenty-one proposals came to the FIPB because a share swap was involved.

b) Thirty-five proposals relate to applicants wanting to change to the status of holding company. These include nine proposals where the change was granted ex *post facto.*

c) The remaining 71 proposals include cases of: (i) deletion of divestment condition; (ii) conversion of loan into preference shares/equity shares; (iii) conversion of advance paid into equity shares; (iv) merger or de-merger; (v) undertaking additional activities; (vi) conversion of non-repatriable equity to repatriable equity; (vii) issue of shares in lieu of value of capital goods imported; (viii) amendment of royalty clause; (ix) regularization of investment already made; (x) issue of shares in lieu of import of machineries; and (xi) issue of shares against remittances already received.

4. The main countries, in terms of the number of investment proposals, are as follows:

a) Mauritius

b) USA

c) UK

d) Netherlands

e) Singapore

f) Japan

g) Germany

h) France

5. The important sectors covered, in terms of the number of proposals, were as follows:

a) Automobiles

b) Information and Broadcasting sector (including publication and print media)

c) Infrastructure

d) Single brand retail trade

e) Software development (through on automatic route, such proposals came to the FIPB because of share swap).

# *SECTION - B*

# Policy Issues Identified During Last Review

Various policy issues have been identified in the last review done by FIPB secretariat. The review was mainly based on the experiences from processing of proposals by the FIPB Secretariat. These issues required further rationalization. The progress achieved on these policy issues is summarized as under: -

| | | |
|---|---|---|
| 1 | Default Clause in PN 4 of 2006 : scope of ambiguity and misinterpretation in other sectors<br><br>"In Sectors/Activities not listed below, FDI is permitted up to 100 percent on the automatic route subject to sectoral rules/regulations applicable" | No Clarification has been issued. In fact the same clause finds place at the end in the new PN 7 of 2008 which is the latest overall statement of the FDI policy |
| 2 | Decisions taken by the FIPB should initiate a policy discussion and culminate in a statement to ensure transparency and consistency | No clear enunciations have resulted except for a clarification on "Single Brand retail". In that case, however, the FIPB decision was not correctly reflected in the Press release. |
| 3 | Approval given to Mortgage Guarantee Company | The regulatory framework has been notified by RBI on February 12, 2008. The FDI Policy in respect of such companies has not yet been notified |
| 4 | Treatment of trading as a principal on the commodity exchange at par with 'wholesale cash and carry trading'. In respect of "Commodities" following three distinct areas were identified for clarification.<br><br>a. FDI in Commodity Exchanges<br>b. FDI in Commodity broking<br>c. Trading in the Commodity Exchanges as a principal | The policy in respect of Commodity Exchanges has been notified vide Press Note 2 (2008 Series) dated March 12,.2008.<br><br>Commodity Broking and Trading as a principle on the commodity exchange akin to Wholesale cash and carry. |
| 5 | Investment by foreign owned holding company through internal accruals | This requires a modification of PN 9 (1999 Series). |

| | | |
|---|---|---|
| 6 | Induction of FDI in a Trustee company | This needs to be notified as clarification to the FDI Policy on NBFCs/ Financial services. To be done in consultations with RBI /DFS. |
| 7 | Issue of shares to non-residents on considerations other than those specified in Press Notes 3 and 5 of 2003. | This issue has not been clarified. In fact more such proposals (detailed later in the review) have been decided by FIPB on the same principle. The Press Notes 3 and 5 (2003 Series) were based on findings by a technical committee under RBI. The scope for issue of shares on considerations other than inward remittance of cash needs to reviewed afresh and expanded. |
| 8 | Treatment of single brand retail and franchisee in services | DIPP was requested to formulate the policy in this regard. There has been no progress in the matter since then. |
| 9 | Clarification on indirect foreign equity | Clarification has not been issued by DIPP |
| 10 | Calculation of indirect FDI across all sectors (e.g. Insurance and MIB) | As a follow up to the FIPB review, a special meeting of the FIPB was called on November 28,.2007 where the important findings of the review were placed for discussion. The only item taken up in the Meeting was the calculation of the direct and indirect equity. Various options were discussed and a follow up meeting was also held in with AS (EA) in the chair. The discussions were inconclusive. However, a practical formulation has been arrived at for calculating indirect equity in specific I & B proposals and these have been deliberated and cleared in the FIPB meetings. This needs to be documented |
| 11 | Ambiguity in FDI in holding company | There have been no advices from DIPP on the subject. However, a discussion paper on the subject has been floated. |
| 12 | Requirement of taking FIPB/Government approval in case of acquisition of shares from residents through holding company, or if the non-resident transferring shares | This is one of the conditions laid down in PN 9 (1999 Series) and the guidelines issued after OCBs were derecognized in 2003. These need to be revisited by DIPP and RBI. No progress |

| | | |
|---|---|---|
| | is an erstwhile OCB. | has been achieved on this. |
| 13 | FDI in NBFCs and other financial services | Please also see Item 6 above.<br>No progress has been achieved on this |
| 14 | Inadequate provisions in the policy for payment of royalty and use of trademarks & brand name in respect of service sector | No progress has been achieved on this |
| 15 | Use of consistent terminology across Press Notes , Acts , Regulations<br><br>Use of NIC codes of the year 1987 | No progress has been achieved on this |
| 16 | Non compliance of the conditions of approval / FDI Policy - Concerned administrative ministries to play a role | No progress has been achieved |
| 17 | Clarification related to FDI in holding companies proposing to make downstream investments in construction development activities | Clarifications / Review of PN 2 of 2005 Series have not been undertaken by DIPP. |
| 18 | Inadequate provisions in the policy in respect of 'retail trade in services' | No progress has been achieved on this |
| 19 | Provision of requiring prior Government approval in case of induction of more than 24 percent foreign equity in manufacture of items reserved for small scale sector. | DIPP has advised that since this requires a legislation change, the process is underway. |
| 20 | The rationale of retaining Sl. No. 26(c) of PN 4 of 2006 requiring FIPB approval for 'trading of items sourced from small scale sector'. | No progress has been achieved on this |
| 21 | Inclusion of the activity of 'down linking' (in broadcasting sector) in the policy. | Has since been included in the DCN moved by DIPP on FDI in the Broadcasting sector, but has not yet been announced as a Press Note. |

# FIPB Policy: Review and Modification
## (January-December 2008)

During the period under review, the following eight policy press notes were issued by the Department of Industrial Policy and Promotion:

1. **Press Note 1 of 2008 (FDI in Credit Information Companies)**: This allows FDI up to 49 percent with prior approval of the government in credit information companies (CICs) with certain conditions. Only 18 activities are now permitted as non-banking financial company (NBFC) activities.

2. **Press Note 2 of 2008 (FDI in Commodity Exchanges)**: This allows foreign investment (FDI + FII) up to 49 percent in commodity exchanges with prior approval of the government. Investment by registered FIIs under the Portfolio Investment Scheme will be limited to 23 percent and investment under the FDI Scheme will be limited to 26 percent. The FII purchases have been restricted to secondary markets and no foreign investor or entity, including persons acting in concert, may hold more than five percent of the equity in these companies.

3. **Press Note 3 of 2008 (FDI in Industrial Parks):** This allows FDI up to 100 percent through the automatic route for setting up and establishing industrial parks and is not subject to the conditions in Press Note 2 (2005 Series). However, each industrial park must meet the following requirements:

   a) It should have a minimum of 10 units and no single unit should occupy more than 50 percent of the allocable area;

   b) At least 66 percent of the total allocable area should be provided for industrial activity.

4. **Press Note 4 of 2008 (FDI in Civil Aviation):** Prior to this Press Note, FDI in the civil aviation sector covered only airports and air transport services. This Press Note provides the FDI policy for other areas in the civil aviation sector as well.

5. **Press Note 5 of 2008 (Rationalization of FDI Policy for the Petroleum and Natural Gas Sector):** This deletes the condition that 26 percent foreign equity in the petroleum and natural gas sector would be divested in favour of an Indian partner or the public within five years. In addition, the FDI sectoral cap in petroleum refining by public sector undertakings has been increased from 26 percent to 49 percent.

6. **Press Note 6 of 2008 (FDI in mining of titanium-bearing minerals and ores):** This allows FDI up to 100 percent with prior government approval in mining of titanium-bearing minerals and ores.

7. **Press Note 7 of June 16, 2008:** This consolidates the FDI policy, together with a summary of the policy and regulations for various sectors and activities after incorporating policy changes till March 31, 2008.

8. **Press Note 8 of August 19, 2008:** This allows Commodity Exchanges the time till September 9, 2009 for transition, complying and correction, subject to the conditions stipulated in Press Note 2 (2008).

# *SECTION - C*

# Issues Identified during the Period of Review (January-December 2008)

The FIPB has always taken a proactive and constructive approach to facilitate foreign investment in the country even where there are gaps in the FDI policy or where the policy is silent. Such an approach is consistent with its role as a board tasked with promotion of investment. During the period under review, the FIPB was required to decide on many proposals and this threw up new issues. Some of these are illustrated below:

## A. Issues related to Press Note 1 (2005 Series)

### 1. Definition of a sick unit:

In the proposal submitted by M/s. Sumitomo Heavy Industries Ltd., Japan,[1] there was an existing joint venture (JV), namely M/s. Windsor Machines Ltd. (WML). The applicant claimed that since the JV was declared sick by the Board for Industrial and Financial Reconstruction (BIFR) on June 29, 2006, a No Objection Certificate (NOC) was not required under the provisions of PN1 (2005 Series) even when technically there was an investing JV in existence on January 12, 2005. The Board in its meeting on April 25, 2008 decided that the Sick Industrial Companies (Special Provisions) Act (SICA) defines a sick industrial company as one with the following profile at the end of any financial year:

a) accumulated losses exceeding 50 percent of the average net worth during four years; or

b) failure to repay debts to creditors in three consecutive quarters on demands made in writing for such repayment.

During the financial year 2003-2004, the net worth of WML was completely eroded. The financial statements as on June 30, 2004 revealed that its net worth was Rs. 3,356.15 lakhs

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[1] *Item No. 4 of 115th FIPB meeting held on March 28, 2008 and item No. 19 of 117th FIPB meeting held on April 25, 2008.*

and its accumulated loss till that date was Rs.7,423.02 lakhs. Hence, in accordance with the provisions of Section 3(1) (o) of the SICA, WML was a sick company as on June30, 2004.

The Board therefore recommended the proposal without insisting on an NOC from the JV partner.

**2. New JV with old partners:**

For the proposal of M/s.CY Myutec Automotive India Pvt. Ltd. Chennai,[2] the Board enquired whether an NOC is necessary under the provisions of Press Note 1 (2005 Series) when the partners are the same in both the existing and new ventures. This requires clarification.

**3. NIC codes:**

For the proposal of M/s. Russell Square Holding B.V., Netherlands[3] and M/s. Mediacom Worldwide Incorporated, USA, [4] the applicant contended that, in the advertisement sector, activities within the same code compete with each other and hence there is need to look afresh at the requirement of NOC in such cases. The Board therefore directed that DIPP to examine policy issues concerning the NIC code and dimensions of all activities and products falling within the same NIC code.

## B. <u>Issues related to Transfer of Shares</u>

**1. Issue of shares for consideration other than cash:**

The existing policy[5] allows the issuing of shares of the Indian company for a consideration other than cash in three instances, namely: (i) issue of shares against lump-sum fee; (ii) issue of shares against royalty for technology collaboration; and (iii) issue of shares

*[2] Item No. 2 of 116th FIPB meeting held on April 9, 2008.*
*[3] Item No. 18 of 121st FIPB meeting held on June 24, 2008.*
*[4]Item No. 20 of 121st FIPB meeting held on June 24, 2008.*
*[5] Para 1.26 at Page 5 of "A Comprehensive Manual for FDI Policy and Procedures published by DIPP" in 2006. See also PN No. 5 of 2003.*

against external commercial borrowings. Since the term “other than cash” is not clearly defined in the policy guidelines, the Board took the following decisions:

(a) In the proposal of M/s. DE Diamond Electric India Pvt. Ltd.,[6] the conversion of advance paid by the foreign company for equity shares of the Indian company towards allotment of equity shares was considered. In the proposal of M/s. Birladp Carpets Pvt. Ltd., Mumbai,[7] issuing of shares against second-hand machinery was allowed, subject to: (i) compliance with the Exim Policy regulation matters such as import of second-hand machinery and valuation certification; and (ii) the stipulation governing the estimation of capitalization value.

(b) Conversion of pre-incorporation expenses incurred by the foreign company into equity shares of the Indian company was allowed in the proposals of M/s. BBI Power Krishnapatnam Company Pvt. Ltd., Hyderabad,[8] M/s. Peak Database Solutions Pvt. Ltd., Mumbai,[9] M/s. Peak Database Alliance Services Pvt. Ltd., Mumbai,[10] M/s. DLF Limitless Developers Pvt. Ltd., New Delhi,[11] M/s. Picanol India Pvt. Ltd., New Delhi[12] and M/s Etisalat Software Solutions Pvt. Ltd.[13]. The Board also allowed issue of shares against: (i) “music tagging services” in M/s. SK C&C Co. Ltd., Korea[14]; (ii) fees paid to foreign technocrats in M/s Kaal Flex Pvt. Ltd[15]; (iii) telephone, travel expenses and

[6] *Item No. 7 of 115th FIPB meeting held on March 28, 2008.*
[7] *Item No. 7 of 117th FIPB meeting held on April 25, 2008.*
[8] *Item No. 22 of 121st FIPB meeting held on June 24, 2008.*
[9] *Item No. 11 of 120th FIPB meeting held on June 4, 2008.*
[10] *Item No. 12 of 120th FIPB meeting held on June 4, 2008.*
[11] *Item No. 15 of 118th FIPB meeting held on May 9, 2008 and Item No. 14 of 120th FIPB Meeting held on June 4, 2008.*
[12] *Item No. 1 of 126th FIPB meeting held on September 12, 2008.*
[13] *Item No. 12 of 128th FIPB meeting held on October 24, 2008.*
[14] *Item No. 10 of 126th FIPB meeting held on September 12, 2008.*
[15] *Item No. 19 of 128th FIPB meeting held on October 24, 2008.*

postage in M/s. ISNI Electric Power Company Pvt. Ltd[16]; and (iv) advances received on services in M/s. Talisma Corporation Pvt. Ltd. Bangalore[17].

(c) In accordance with Press Note 4 of 2006, fresh issue or transfer of shares is permissible under the automatic route if the company's activities are covered under this route. In the proposal of M/s Mitsui & Co. India Pvt. Ltd.,[18] the Board approved issue of shares to the foreign collaborator to offset the security deposit, subject to the following conditions:

(i) consent of the parent company;

(ii) supporting audited statement; and

(iii) meeting tax liabilities.

The term "other than cash" needs to be clearly defined in the policy guidelines for being better understood by investors.

## C. Issues related to NBFC activities

**1. Definition of stock broking as a "non-fund based" activity:**

In Press Note 12 (1999), on NBFC activities, only six are regarded as non-fund based, each requiring a minimum capitalization of US$ 0.5 million. These are: (i) investment advisory services; (ii) financial consultancy; (iii) credit reference agencies; (iv) credit rating agencies; (v) foreign exchange broking; and (vi) money changing business. In the proposal received from M/s. Kim Eng Securities India Pvt. Ltd., Delhi,[19] the applicant stated that the business of stock broking does not require margin lending, or other fund-based activities, to meet the minimum capitalization norms for NBFCs under the FDI policy and, hence, requested that

[16] *Item No. 22 of 128th FIPB meeting held on October 24, 2008.*
[17] *Item No. 52 of 130th FIPB meeting held on December 12, 2008.*
[18] *Item No.. 29 of 121st FIPB meeting held on June 24, 2008.*
[19] *Item No.17 of 115th FIPB meeting held on March 28, 2008.*

stock broking be treated as a "non-fund based activity". The Board, however, did not approve the proposal as only six activities are allowed under the non-fund based category.

Clarification is required to define which activities fall in the non-fund based category.

**2. Definition of "Investment Company" as NBFC activity:**

The policy[20] allows 18 NBFC activities to bring in 100 percent FDI through the automatic route. Such companies need to seek the FIPB's approval only on the ground of other policy requirements, namely PN1 (2005). In other NBFC activities mentioned under Section 45 I A of the RBI Act, the Board was of the view that in accordance with the current policy, FDI up to 100 percent is allowed for 18 NBFC activities under the automatic route. This list is restricted as compared to the activities eligible under Section 45 I A of the RBI Act, and the activities must therefore be confined to those permitted under Press Note 4 (2006) and as modified by Press Note 1 (2008).

In the proposals of M/s. Future Venture India Ltd. (FVIL) Mumbai [21] and M/s. JM Financial Ventures Ltd., Mumbai,[22] the Board took the view that an "Investment Company" does not fall within the 18 permitted NBFC activities. In the proposals of M/s. Goldman Sachs (Mauritius) NBFC L.L.C., Mauritius[23] and M/s. Tata Investment Corporation Ltd.,[24] the Board took the same view.

The two proposals of M/s. NSK Holding Pvt. Ltd., Mumbai[25] and M/s. Kpin Capital Advisors Pvt. Ltd.[26] were referred to the RBI which gave the opinion that "Acquisition of shares etc. is defined in Section 45(1)(C) of the RBI Act, 1934 as one of the NBFI activities for which Certificate of Registration(COR) is required and as such "investment companies" are a

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[20] *Press Note 4(2006), modified by Press Note 1 (2008).*

[21] *Item No. 10 of 116th FIPB meeting held on April 9, 2008.*

[22] *Item No. 8 of 117th FIPB meeting held on April 25, 2008.*

[23] *Item No. 11 of 116th FIPB meeting held on April 9, 2008.*

[24] *Item No. 41 of 130th FIPB meeting held on December 12, 2008.*

[25] *Item No. 9 of 123rdh FIPB meeting held on July 29, 2008 and Item No. 19 of 124th FIPB meeting held on July 29, 2008.*

[26] *Item No. 12 of 123rdh FIPB meeting held on July 29, 2008 and Item No. 20 of 124th FIPB meeting held on July 29, 2008.*

category of NBFC to whom COR are issued. Though the 18 NBFC activities wherein FDI up to 100 percent is allowed under automatic route subject to minimum capital norms do not include "investment" or "holding companies engaged in investment", there may not be any concern in allowing 100 percent FDI subject to minimum capital norms as specified in Press Note No. 7(2008) as the activity of holding companies or investment companies is defined as NBFI activity and would require registration with the RBI." The two proposals were finally rejected[27] as the Board took the view that any addition to the permitted list of 18 activities lies in the domain of the Cabinet.

Clarity in the policy will help clear this ambiguity.

## D. Issues related to RBI, SEBI and FEMA

### 1. Issue of warrants:

Issue of warrants is not covered in the FDI policy but the Board has approved proposals on a case-to-case basis, as in the proposal of M/s. UTV Software Communications Ltd.[28] During the period under review, 15 proposals (2.47 percent of the total) involved the issue of warrants.

The RBI's A.P. (DIR Series) Circular No. 20 dated December 14, 2007 lays down the time limit of 180 days for issue of shares after the application money is received. The FIPB has given its approval to M/s. RPM International Inc., USA[29] for issue of warrants subject to the Securities and Exchange Board of India (Disclosure and Investor Protection) [SEBI (DIP)] Guidelines and Substantial Acquisition of Shares and Takeovers Regulations (SAST) Guidelines. The Board, while approving the proposal of the company, has recommended that a suitable dispensation in this circular be provided for issue of warrants.

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[27] *Item No. 19 and Item No 20 of 124th FIPB meeting held on August 8, 2008.*
[28] *Item No. 23 of 115th FIPB meeting held on March 28, 2008.*
[29] *Item No. 16 of 118th meeting held May 9, 2008.*

The issue of warrants for a listed company is guided by SEBI (DIP) guidelines which do not apply to unlisted companies. The Board has accorded permission to M/s. Laqshya Media Pvt. Ltd., Mumbai,[30] an unlisted company, to issue warrants, if the company agrees to abide by the SEBI (DIP) guidelines. Thereafter, the Board cleared the issue of warrants to other unlisted companies, based on the same analogy.

**2. Issue of partly paid up shares:**

The FDI policy is silent on the issue of partly paid shares. However, this is permitted under the Companies Act, 1956. The Board has approved the proposal of M/s. Dish TV India Ltd.[31] subject to SEBI (DIP) Guidelines and Regulation 6 of FEMA 20/2000. A similar proposal of M/s. CR Seals India Pvt. Ltd., now known as M/s. SKF Technologies (India) Pvt. Ltd. [32] was also approved. However, after the recent financial meltdown, the Board has had the opportunity of revisiting the issue in the proposal of M/s. Wire and Wireless (I) Ltd.[33] and decided that, in the current economic situation, there is a need to discourage half-hearted FDI proposals and hence rejected this proposal.

There is a need for a clear-cut policy on the issue.

## E. Issues related to Broadcasting

**1. Cable Television Networks (Regulation) Act, 1995:**

The proposal of M/s. Hathway Cable & Datacom Pvt. Ltd.,[34] pertained to the cable TV network sector where FDI is capped at 49 percent and the Ministry of Information & Broadcasting (MIB) does not calculate indirect equity, unlike all its other sub-sectors. The Cable Television Networks (Regulation) Act 1995 defines a cable operator, if it is a company, as one in which the majority (51 percent) shareholders are Indian citizens. Thus, in this case the question of indirect equity does not arise because Indian citizens

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*[30] Item No. 9 of 119th FIPB meeting on May 23, 2008.*
*[31] Item No. 8 of 120th FIPB meeting held on June 4, 2008.*
*[32] Item No. 17 of 123rdh FIPB meeting held on July 29, 2008.*
*[33] Item No. 35 of 130th meeting held on December 12, 2008.*
*[34] Item No. 24 of 115th meeting held on March 28, 2008.*

cannot provide an FDI component. However, in actual practice, resident investors, as in this case, can also be corporate bodies or individuals, and could provide an FDI component. Since it is difficult to ascertain if there was any FDI in the resident corporate shareholders, for the purpose of determining the indirect FDI component in the cable operator, the matter was not probed further and the aspect of compliance with the Act was left to the MIB.

This calls for policy intervention as the Cable TV Networks Regulation Act, 1995 does not allow indirect FDI beyond 49 percent.

## F. <u>Issues not mentioned in the FDI Policy</u>

### 1. GIS application and GPS:

M/s. NAVTEQ Corporation, USA[35] is engaged in activities such as developing, marketing, licensing and distributing digital maps and related location-based data, software and services for use in mobile navigation systems, and other navigation and GIS applications and devices in India, locally and nationally, that provide easy-to-use navigational tools to Indian customers.

The FDI policy is silent on this score.

### 2. Security services:

In the proposal of M/s. G4S Corporate Services (India) Pvt. Ltd.,[36] the holding company is engaged in the business of management consultancy. It has applied for conversion of its "holding company" status to "holding-cum-operating company" to make downstream investment in their three group companies, namely G4S Security Service (I) Pvt. Ltd., Monitron Security Pvt. Ltd. and G4S Cash Services (I) Pvt. Ltd. These three group companies

*[35] Item No. 23 of 118th FIPB meeting held on May 9, 2008.*

*[36] This was considered in the 122nd FIPB Meeting on July 8, 2008 (Item No. 2), in 126th FIPB Meeting on September 12, 2008(Item No. 16), and in 128th FIPB Meeting on October 24. 2008 (Item No. 42).*

are in the security business. Section 6(2) of the Private Security Agencies (Regulation) Act, 2005 states that "a company or firm or an association of persons shall not be considered for issue of licence under this Act if it is not registered in India or has a proprietor or majority shareholder, partner or director who is not a citizen of India." The company has foreign directors and contends that the provisions of this Act are not applicable to the holding company as: (i) it is engaged in management consultancy and not security activities; (ii) the three group companies are in the security business and have no foreign directors; and (iii) legal requirements are fulfilled on this basis. It needs to be clarified whether: (i) the company's downstream subsidiaries actually engaged in the security business have to comply with the provisions of this Act; or (ii) the holding company investing in such companies or subsidiaries, but not engaged in the security business, also needs to comply with the provisions of this Act. The Ministry of Home Affairs, Government of India has yet to complete its security verification and firm up its comments. The Board will take a view subsequently.

The Board earlier faced the issue of FDI in activities attracting the provisions of the Private Security (Regulation) Act, 2005 in the proposal of M/s. Tops Security Ltd., Mumbai[37]which had applied for downstream investment. Its activities included security and emergency response services. The Board cleared the proposal as the proposed foreign equity was only 7.10 percent.

It is expected that more proposals attracting the Private Security (Regulation) Act, 2005 will come to the Board in future. A clear policy for such cases needs to be worked out.

**3. Ex-post facto approval:**

Until November 2007, the FIPB directed that violations be first compounded by the RBI after which a company could approach the Board for approval. However, after receiving advice from the RBI, the Board has approved such proposals subject to compounding.

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[37] *Item No. 4 of 120th FIPB meeting held on June 4, 2008 and Item No. 31 of 123rd FIPB Meeting held on July 29, 2008.*

There is a need for separate guidelines on compounding and a monitoring mechanism to ensure compliance.

**4. Investment by sovereign entities:**

With regard to the proposal of M/s. Continental Air Express Pvt. Ltd., New Delhi,[38] the Department of Posts conveyed its strong objection as the foreign investor, Geo Post, would be the controlling partner in the JV. Geo Post is in the parcel and express segment of La Poste, France which is a member of the Universal Postal Union (UPU) and is, therefore, required to fulfill Universal Service Obligations (USO). India Post is in a similar position. The UPU stipulates that a member country cannot "poach" on the "creamy" territory of another without a matching USO. The fact that Geo Post is a subsidiary of La Poste and that it performs the functions relating to the parcel segment further establishes the fact that La Poste would make a back-door entry to Indian markets, thereby violating the Extraterritorial Office of Exchange (ETOE) regulations of UPU. After deliberation, the Board recommended that the proposal be rejected.

The company has represented against the decision and a clarification in policy is required.

**5. Investment from the Foreign Offshore Fund into the Trust and to issuing units in the Trust to the Offshore Fund**

Investment from the Foreign Offshore Fund into the Trust and issue of units in the Trust to the Offshore Fund is not defined in the FDI policy. The Board considers proposals on a case-by-case basis and approval, where granted, goes with the rider that profits be repatriated as required by tax laws. One such approval was given to M/s. Axis Private Equity Ltd., Mumbai.[39]

There is a need for clarification in the policy concerning such cases.

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[38] *Item No. 9 of 112th and Item No. 15 of 114th FIPB meetings held on January 18, 2008 and March 7, 2008 respectively.*

[39] *Item No. 18 of 115th held on March 28, 2008 and Item No. 12 of 118th FIPB meeting held on May 9, 2008.*

## 6. Divestment Condition:

In the proposal of M/s Berkley Petrochemicals Pvt. Ltd.,[40] the approval granted was subject to the conditions that FDI be brought down to 74 percent in five years, that is by April 23, 2008. The company submitted its inability to meet this condition as it was not listed in any stock exchange in the world as it was a closely held company and had also incurred substantial losses since inception. The Board accepted the request of the company, after observing that imposition of the clause of compulsory divestment in a time-bound manner for all FDI applications for marketing petroleum products was a quasi-legal necessity in 2003 but that now there is no such necessity.

M/s. Pepsico India Holdings Pvt. Ltd.[41] sought deletion of the condition that equity should be diluted to 51 percent over a period of five years, citing liberalization and the current policy of permitting 100 percent on the automatic route in the food processing industry. The proposal was deferred as the company wanted time to consult its parent organization. However, the Board finally recommended to the Cabinet Committee on Economic Affairs (CCEA) to delete this condition in its 128th meeting,[42] in view of the liberalization of the foreign direct regime in the food processing industry.

In some proposals, the Board has deleted the condition with the compounding requirement and in others without this requirement.[43]

Notwithstanding the case-by-case decisions of the Board, the issue of a policy intervention on deletion of the divestment conditions requires immediate attention.

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*[40] Item No. 13 of 124th FIPB meeting held on August 8, 2008.*
*[41] Item No. 22 of 118th FIPB meeting held on May 9, 2008.*
*[42] Item No. 47.*
*[43] FIPB allowed the deletion of the divestment condition subject to compounding of the default by RBI in the proposal of M/s. Colorcon Ltd. (Item No. 17 of 112th FIPB meeting held on January 18, 2008).*

## 7. International Brands:

Press Note 3 of 2006 stipulates that products should be sold under the same brand internationally. There is, however, an ambiguity concerning the number of countries in which a product should be available to qualify as an international brand.

The DIPP needs to clarify this.

## 8. Test Marketing:

Test marketing is allowed subject to the condition that it would be done for two years and that investment in manufacturing facilities should commence simultaneously.[44] However, violation of this condition may take many forms, all of which are not covered by the policy.

One such case relates to partial fulfillment of the condition. The DIPP in its Office Memorandum (OM) No. 9(1)/2002-FC I dated December 30, 2002 has clarified as follows:

(a) Non-fulfillment of the test marketing obligation does not make a company ineligible to be considered for other trading activities. Violation of the test marketing obligation has to be examined on a case-by-case basis. In the absence of sufficient justification for non-fulfillment of the condition, action may be taken against the company under existing FEMA provisions.

(b) When a company obtains approval for test marketing, but does not avail itself of the facility, there should be no objection to its surrendering the approval and obtaining separate approvals for other permitted modes of trading.

However, this OM is silent about situations in which a company only partially fulfills the test marketing obligation.

In the proposal of M/s. Elken International India Pvt. Ltd.,[45] the company received approval for test marketing 14 items and products but partially fulfilled the test marketing obligation

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[44] *Para 9 (h) of Press Note 2 of 2000.*

namely, for five items produced through contract manufacturing. The company said it could not manufacture all the products listed for test marketing in India due to: (i) difficulty in sourcing raw materials; (ii) achieving stability of raw materials; (iii) non-availability of contract manufacturing facility capabilities; (iv) high cost of production; and (v) extremely competitive market conditions in India. They wanted to surrender the existing FC approval and obtain a fresh approval for undertaking permitted modes of trading such as wholesale cash- and-carry, which is on the automatic route. The Board rejected the proposal on the ground that it was not covered in the FDI Policy on test marketing.

In the proposal of M/s Kerakoll SPA, Italy[46] the Board did not agree to give further extension to the company since it had failed to identify land and place orders for machinery during the two-year period.

The Board reiterated its position on not allowing any relaxation in the conditions of test marketing in the proposal of M/s BenQ India Pvt. Ltd.[47]

In view of the policy on cash-and-carry and non-standard approvals, it will be worthwhile for the DIPP to re-examine the issues and provide comprehensive clarifications.

## 9. Proposed change of policy on cigars and cigarette manufacture:

In accordance with para 7 of Press Note 7 of 2008, 100 percent FDI is permissible through the FIPB for cigars and cigarettes manufacture, subject to an industrial license under the Industries (Development & Regulation) Act, 1951. During consideration of the proposal of M/s JT International (India) Ltd.[48], DIPP announced they were in the process of changing the policy.

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*[45] Item No. 20 of 119th FIPB meeting held on May 19, 2008. Proposal rejected in 125th FIPB Meeting held on August 26, 2008 (Item No. 26).*

*[46] Item No. 18 of 123rd FIPB meeting held on July 29, 2008.*

*[47] Item No. 42 of 130th FIPB meeting held on December 12, 2008.*

*[48] Item No. 52 of 128th FIPB Meeting held on October 24, 2008*

There is a need to expedite the policy change so that a decision on the proposal can be taken at the earliest.

## G. Inter-Departmental Issues

### 1. Synergy with Department of Revenue:

The Department of Revenue (DOR) examines FIPB proposals from the taxation angle and looks at both the source of funds and antecedents of investors. The DOR’s view is that it should fully investigate the matter before the FIPB approves or rejects a proposal. This delays decision-making and interrupts the FIPB’s time table. The view of the FIPB is that the DOR’s participation in its deliberations cannot be a substitute for independent investigation by the DOR. It only affords advance intimation and allows FIPB to benefit from DOR’s views. It is also possible from the deliberations of individual’s proposals coming before the FIPB (who may demonstrate their propensity to exploit the tax regime in their favour) that DOR may suitably formulate or amend tax policies, based on exigencies of the national interest.

The DOR also examines the question of both”Treaty Shopping” and”Round Tripping”. In the case of “Treaty Shopping”, a resident of a third country invests by taking advantage of a fiscal treaty between India and another contracting state. The Supreme Court of India in the case of Azadi Bachao Andolan has not found the mechanism unlawful. Conversely, in the case of ”Round Tripping”, money is routed back to the country by local investors through tax havens like Mauritius. This is regarded as aiding tax evasion in India and severely impacts revenues from capital gains tax. While the FIPB discourages “Round Tripping”, it has no objection to ”Treaty Shopping” *per se* if it results from a valid treaty and the DOR does not have any specific and verifiable objection to the proposal.

The two departments of the Ministry of Finance have differing views on the issue and there is a need for an integrated and holistic approach to it.

## 2. Duplication of diligence in case of Print Media proposals:

Proposals pertaining to the print and visual media were not being put up before the FIPB till the time comments from the MIB were avialable. On this being taken up with the MIB, the attention of the FIPB was drawn to the Cabinet decision of June 25, 2002, which stated that, "each proposal pertaining to applications of newspapers and magazines, dealing with news and current affairs, would be decided on a case-by-case basis by the MIB, after considering the views of the MHA and other concerned Ministries [para -9(iii) of the Cabinet Note pertaining to applications of newspapers and magazines dealing with news and current affairs]. The same proposals were then considered afresh in the FIPB, where the MIB and MHA are present to give their views.

The Secretary (EA) in his D.O. letter No. 1(1)/2006-FC.I of December 11, 2008 to the Secretary (DIPP) has emphasized that, notwithstanding the need to carry out diligence on all proposals for foreign investment that require the government's approval, the foregoing process causes avoidable duplication of work between the MIB and the FIPB. This also delays the disposal of such applications.

The Secretary (EA) has therefore requested the DIPP to examine the matter so that the work of various departments and committees is harmonized without sacrificing due diligence and public interest. A response is awaited.

## 3. Raising the threshold for the CCEA:

During the period under review**,** 13 proposals involving an FDI inflow of Rs 41161.93 crores were approved by the Cabinet Committee on Economic Affairs (CCEA). The details of these proposals are as follows:

| Serial | Name of Applicant | FDI amount (Rupees crores) |
|---|---|---|
| 1. | M/s. Hindustan Coca Cola Holdings Pvt. Ltd. | 205.00 |
| 2. | M/s. Daimler A.G. | 1650.00 |
| 3. | M/s. Skil Infrastructure Ltd. | 195.00 |
| 4. | M/s. Agam SPV Six Ltd. | 1170.00 |
| 5. | M/s. Essar Power Ltd. | 8000.00 |
| 6. | M/s. Rakindo Developers Pvt. Ltd. | 750.00 |
| 7. | M/s. Aktiebolaget Volvo | 1127.50 |
| 8. | M/s Aditya Birla Telecom Ltd. | 2704.21 |
| 9. | M/s. Daiichi Sankyo Company Ltd. | 21,560.61 |
| 10. | M/s Pepsico India Holdings Pvt. Ltd. | 250.00 |
| 11. | M/s. Suzlon Energy Ltd. | 1800.00 |
| 12. | M/s. TPG India Investment I, Inc. | 805.61 |
| 13. | M/s. Krishnapatnam Port Company Ltd. | 944.00 |

The guidelines which stipulate the requirement of the CCEA's approval in some FDI proposals are contained in Press Note 7 of 1999. The threshold limit for such proposals to be considered by the CCEA was Rs.300 crores in 1992 (when the committee was titled "Cabinet Committee on Foreign Investment" (CCFI)]. This threshold limit was revised to Rs 600 crores in 1997. There has been no revision since then, even after considerable depreciation in the value of money.

The matter was taken up by the JS (FT) with the JS (Cabinet Secretariat) by D.O. letter of May 8, 2008 in which the following two issues were flagged: (i) the threshold limit on foreign investment should be suitably increased or the requirement to go to the CCEA dropped; and (ii) the sectors which were subsequently put on the automatic route need not come to the CCEA (or even the FIPB) for any modification in the terms of the initial approval ( when it required consideration by CCFI/ CCEA )

It is understood that this was referred by the Cabinet Secretariat to the DIPP. The Secretary (DEA) has therefore taken up the matter with the Secretary (DIPP) by D.O. letter of November18, 2008. A response from DIPP is awaited.

# <u>Compendium of Important FIPB Decisions</u>

In many proposals that came up during the period of review, the Board addressed some new issues and also handed down some precedent setting decisions. An illustrative list of such decisions is listed below**:**

| | Name of proposal | Meeting No. & Item No. | FIPB Decision |
|---|---|---|---|
| 1 | M/s. ZF Lenksysteme GmbH, Germany | Item No. 2 of 112th FIPB Meeting held on January 18, 2008 | Board held that **quantum of FDI is not a consideration** and the reason for setting up a new JV is the prerogative and commercial judgment of the parties concerned. |
| 2 | M/s. GS Strategic Investments Limited | Item No. 12 of 112th FIPB meeting held on January18, 2008 | Board laid down that the **computation of 26% FDI in an Insurance company is to be done in accordance with Section 11 of the Insurance Act.** |
| 3 | M/s. Sampad Vikas Ltd. Kolkata | Item No. 34 of 112th FIPB meeting held on January 18, 2008 | Board held that **investment by way of convertible debentures of a tenor of 8 years is permissible** in the FDI scheme, as laid down in FEMA and that the debenture would have to be in compliance with the policy of being compulsory convertible as laid down in RBI guidelines. |
| 4 | M/s. Sequoia Capital India Growth Investments I, Mauritius | Item No. 14 of 113th FIPB meeting held on February 8, 2008 | Board held that the activity of **Commodity Broking can be permitted on case to case basis** subject to adherence to capitalization norms, guidelines issued by the FMC and compliance with the FDI policy *as and when* announced. |
| 5 | M/s. Aramex India Private Limited | Item No. 21 of 113th FIPB meeting held on February 8,2008 | Board held that **issuance of shares on conversion of the existing unsecured loan arising in the Company's books on account of nonpayment of charges to their parent company is permitted** subject to compliance with the tax angle/allowable expenditure etc. It laid down that repayment of the loan could always be done and re-inducted as FDI in the company albeit at a |

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| | | | transaction cost. |
| 6 | M/s. Universal Success Enterprises Ltd. British Virgin Islands | Item No. 24, 25 & 26 of 113th FIPB meeting held on February 8, 2008 | The Department of Revenue insisted that the approval letter should state that for taxation purposes, the applicant shall follow the applicable domestic laws read with the DTAA, the Board observed that the **law does not prohibit creating a tax efficient structure by a corporate.** Further the condition suggested by Department of Revenue is already incorporated in the standard approval letters, as the FIPB approval is subject to application of all Indian laws and thus a specific mention is not necessary. |
| 7 | M/s. Macquarie Equities Limited, Australia | Item No. 30 of 113th FIPB meeting held on February 8, 2008 | Board considered that **Wealth Management Service is not amongst the specified NBFC activities eligible for FDI upto 100% but it could be approved** by FIPB. The activity should however, be fund based and the minimum capitalization norms of USD 50 million would apply for setting up a WOS. |
| 8 | M/s Anagram Securities Ltd., Mumbai | Item No. 16 of 114th FIPB meeting held on March 7, 2008 | The Board held that **where the FDI is inducted by way of fresh issue of shares, the FDI including the premium will be included in the minimum capitalization.** If, however, the shares are acquired from the Indian promoter, only the face value will be reckoned for capitalization. The downstream companies will need to be independently capitalized. |
| 9 | M/s. Societe Beaujon, Paris | Item No. 27 of 114th FIPB meeting held on March 7,2008 | Board gave **in principle approval where IRDA was yet to clear the insurance application.** |
| 10 | M/s. VRL Logistics Ltd. Bangalore | Item No. 12 of 116th FIPB meeting held on April 9, 2008 | The Board insisted that the Governmental **postal administration of any country does not hold any stake in the company engaged in courier service.** |
| 11 | M/s. Springer India Pvt. Ltd | Item No. 15 of 116th FIPB | The Board observed that the **royalty payment on books is not included in** |

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| | | meeting held on April 9, 2008 | **the list of current account transactions** where RBI/Government approval is required. |
| 12 | M/s. NYSE Euronext, USA | Item No. 9 of 117th FIPB meeting held on April 25,l 2008 | Board gave a **time frame of 3 months for the existing investments by FIIs in MCX to become policy compliant.** DIPP issued PN 8 of 2008 on **19 August 2008** allowed the Commodity Exchanges time till 30 June 2009 to comply. |
| 13 | M/s. Rio Tinto Singapore Holding Pte Limited. | Item No. 11 of 124th FIPB meeting held on August 8, 2008 | Board took the view that since the **alumina and activated alumina are the refined metal product of Bauxite and there is no specific code for the same, they can be identified as 349 of NIC Codes 1987** and may be treated as in the "Same Field"; |
| 14 | M/s. BBCW Channels Private Ltd., Mumbai | Item No. 13 of 125th FIPB meeting held on August 26,2008 | DOR has conveyed its no objection to the proposal subject to the condition that (i) The applicant company must either own the channel it wants downlinked for public viewing, or must enjoy, for the territory of India exclusive marketing/distribution rights to the advertising and subscription revenues for the channel and must submit adequate proof at the time of application. (ii) In case the applicant company has exclusive marketing/distribution rights, conclude contracts on behalf of the channel for advertisements subscription and programme content. The Board noted **that MIB is the administrative ministry to ensure compliance with all required regulations and there was no need to impose additional requirements.** |

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|---|---|---|---|
| 15 | M/s. SG Securities Singapore | Item No. 21 of 125th FIPB meeting held on August 26,2008 | The Board took the view that trading fraud and trading irregularity indicate operational failure and not a systemic failure and payment **of the fine imposed by a regulator may be seen as part of regulatory compliance.** The Board noted that, despite the penalty, the Bank has very good credentials and accordingly the proposal was approved for the activity of custodial services. |
| 16 | M/s. Keppel Puravankara Development Pvt. Ltd. Bangalore | Item No. 23 of 128th FIPB meeting held on October 24,2008 | The Board **did not permit sale of undeveloped plots** as the FDI in real estate is prohibited and purchase /sale of land may be categorized as real estate activity |
| 17 | M/s Scicom Technologies Pvt. Ltd. | Item No. 27 of 128th FIPB meeting held on October 24, 2008 | **Where operations of Branch Office have discontinued, Board agreed to delete the condition of closure of Branch Office** |
| 18 | M/s Yamaha Motor India Pvt. Limited | Item No. 30 of 128th FIPB meeting held on October 24,2008 | Board **allowed transfer of business operations and FC approval without transfer of equity.** |
| 19 & 20 | M/s. Rish Pte Ltd., Cook Islands | Item No. 40&41 of 128th FIPB meeting held on October 24,2008 | Where OCBs investment in the Indian companies was made in contravention of the relevant FEMA Regulations. The proposal for **sale of share from erstwhile OCB to NRs (other than NRI) was disallowed** and the company was advised to stop retail trading activities with immediate effect. |
| 21 | M/s Nagarjuna Construction Company Limited (NCC) | Item No. 32 of 129th FIPB meeting held on November 18,2008 | **The Board did not agree with the contention of the Company that ' foreign owned Indian holding company' as used in PN 9 of 1999 would refer to an Indian company in which the foreign investment is 50%+1 share and above and that only non-FII foreign participation,** ought to be considered for the purposes of determining whether NCC is a foreign owned holding company |
| 22 | M/s. Inuit U.S. Holdings U.S.A., | Item No. 33 of 129th FIPB meeting held on | **The Board decided that acquisition of additional stake through the secondary market would be clearly** |

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|---|---|---|---|
| | | November 18, 2008 | **a portfolio transaction trying to come in through the FDI route.** |
| 23 | M/s. FLSmidth Private Ltd., Chennai M/s. | Item No. 13 of 130th FIPB meeting held on December 12, 2008 | Where the downstream investment was made without FIPB approval but the **violation was due to merger, the Board approved the proposal without compounding** |
| 24 | Calcom Cement India Ltd., Kolkata | Item No. 15 of 130th FIPB meeting held on December 12, 2008 | **The Board allowed downstream investment through internal accruals** |
| 25 | M/s. HBS Realtors Pvt. Ltd., Mumbai | Item No. 26 of 130th FIPB meeting held on December 12, 2008 | The Board permitted **FDI in real estate with the condition that foreign money will not be deployed in FDI non-compliant projects** and a separate bank account of FDI will be maintained and further that the Company will intimate DIPP through the certified statement periodically. |

# Conclusion

The FIPB is acknowledged as being a government body that meets regularly, does not unreasonably delay approvals and has a strong record of pro-actively encouraging the flow of FDI. The Board serves as a valuable source for single-window clearance with different ministries acting in unison. It also plays a critical role in the administration and implementation of the government's FDI policy.

The mandate of the Board is to implement and enforce FDI policy regulations. In circumstances where there is no policy, or a conflict in policy or grey areas, the FIPB has stepped in to provide solutions.

The role of the FIPB, though important, has increasingly narrowed in scope when compared with the wide areas of approvals it previously provided. However, with the FDI policy being continually liberalized, new growth areas will always throw up complex situations. The previous review and the current review both document these challenges and present an opportunity for all stakeholders to formulate appropriate views.

<u>**Annexure - I**</u>

**No.1/3/2003-FIU**
**Government of India**
**Ministry of Finance and Company Affairs**
**Department of Economic Affairs**
**F.I Unit**

**New Delhi, the 18th February 2003**

<u>OFFICE MEMORANDUM</u>

**Subject: Foreign Investment Promotion Board**

In terms of Presidential order No. Doc.CD-36/2003 dated 30-1-2003 carrying out amendments to the Government of India, (Allocation of Business) Rules, 1961 and the functions related to the Foreign Investment Promotion Board (FIPB) are now within the administrative responsibilities of Ministry of Finance and Company Affairs, Department of Economic Affairs.

2. With a view to operationaiising the above order, in partial modification of the OM No.5(10)/96-FC(I) dated 11-7-1996, issued by the Department of Industrial Policy and Promotion (DIPP), Ministry of Industry, the following administrative arrangements are hereby introduced:-

(A) The FIPB will comprise the following Core Group of Secretaries to the Government:

(i) Secretary to Government, Department of Economic Affairs, Ministry of Finance and Company Affairs – Chairperson.

(ii) Secretary to Government, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry.

(iii) Secretary to Government, Department of Commerce, Ministry of Commerce Industry.

(iv) Secretary to Government, Economic Relations, Ministry of External Affairs.

The Board would be able to co-opt other Secretaries to the Government of India and top officials of financial institutions, banks and professional experts of industry and commerce, as and when necessary.

Secretary, Economic Affairs will be Chairperson of the Group.

(B). The recommendations of FIPB in respect of the project-proposals each involving the total investment of Rs.600 crore or less would be considered and approved by the Finance and Company Affairs Minister. The recommendations in respect of projects each with the total investment of above Rs.600 crore would be submitted to the Cabinet Committee on Economic Affairs (CCEA)

(C). To service FIPB a separate Secretariat will be created and located in DEA. For this, such staff as are at present dedicated to FIPB work in DIPP will be transferred to DEA, Ministry of Finance.

(D). The Secretariat would receive and process the applications/proposals for foreign investment and place them before FIPB for consideration. Thereafter, it would submit the recommendations of the Board to the Minister of Finance and Company Affairs or CCEA, as the case may be, for decision. The Secretariat will ensure that all the applications received by it are put up before FIPB within 15 days of their receipt and that the Administrative Ministries must offer their comments either prior to and/or in the meeting of FIPB. The Secretariat would also be responsible for communicating to the applicants the decisions of the Government on their proposals and would carry on the activities relating to post-approval amendments, providing advice and guidance to the entrepreneurs and investors and investment promotion and facilitation.

(E) The objective, functions and procedures of FIPB will continue to be regulated by OM No. 5(10/96-FC(I) dated 11-7-1996, issued by the Department of lndustrial Policy and Promotion (DIPP), Ministry of Industry, subject to the amendments included in the present OM.

Sd/-
(Dr. Adarsh Kishore)
Additional Secretary to the Government of India

To

All Ministries/Departments of the Government of India and all others concerned.

**Annexure - II**

# (Extract from Allocation of Business Rules, 1961)[49]

## MINISTRY OF FINANCE
## (VITTA MANTRALAYA)

## A. DEPARTMENT OF ECONOMIC AFFAIRS (ARTHIK KARYA VIBHAG)

### I. FOREIGN EXCHANGE MANAGEMENT

1. Administration of the Foreign Exchange Management Act, 1999 (42 of 1999), other than enforcement work mentioned under the Department of Revenue, and all matters relating to combating financing of terrorist acts.
2. Policy relating to exchange rates of Rupee.
3. Management of the foreign exchange resources including scrutiny of proposals for imports from the foreign exchange point of view.
4. Foreign and Non-Resident Indian Investment excluding functions entrusted to the Ministry of Overseas Indian Affairs and Direct Foreign and Non-Resident Indian Investment in Industrial and Service projects.
5. Indian Direct Overseas Investment.
6. Matters concerning commercial borrowing from abroad, including terms and conditions thereof.
7. Matters concerning gold and silver.
8. Approval for foreign travel of Ministers of State Governments/Union Territories, Members of State Legislature/Union Territories and State Government Officials.
9. Management of external debt.

### II. II. FOREIGN AID FOR ECONOMIC DEVELOPMENT

10. All matters relating to-
    (a) India Development Forum;
    (b) loans, credits and grants from foreign countries, special agencies, non-governmental foundations agencies and voluntary bodies;
    (c) loans and credits and grants from multilateral agencies;
    (d) withdrawals and borrowings from International Monetary Fund;
    (e) policy for private sector financing from International Finance Corporation.
11. Technical and Economic assistance received by India as under-
    (a) Technical Cooperation Scheme of the Colombo Plan;
    (b) The United Nations Technical Assistance Administration Programmes;
    (c) Ad-hoc offers of technical Assistance from various foreign countries, special agencies, non-Government entities;
    (d) United Nations Office of Project Services.
12. Technical assistance given by India to the member countries of the Colombo Plan under Technical Cooperation Scheme of the Colombo Plan.
13. All matters relating to the meetings of the Colombo Plan Council and the Consultative Committee of the Plan.
14. All matters relating to credits extended by Government of India to other countries except Nepal, Bhutan and Bangladesh.
15. Technical assistance received by India from or given to foreign governments, international institutions and organisations, except such as are relatable to subjects allocated to any other Department.
16. All matters concerning United Nations Development Programme (UNDP) including Programmes or Projects funded out of UNDP Budget.
17. Foreign Investment Promotion Board (FIPB).
18. Policy issues relating to the United Nations Fund for Population Activities (UNFPA) and contributions to the specialised agencies of the United Nations and other U.N. Bodies.

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[49] *Source: The website of Cabinet Secretariat [http://cabsec.nic.in/abr/abr_scnd.htm](http://cabsec.nic.in/abr/abr_scnd.htm)*

19. All matters relating to the Foreign Volunteers Programmes in India including the incoming United Nations Volunteers (UNV) but excluding programmes in India for overseas Indian Volunteers and outgoing volunteers under UNV.
20. All funding by United Nations agencies.
21. Commonwealth Fund for Technical Cooperation (CFTC).

**III. DOMESTIC FINANCE**

22. All matters relating to –
    (a) currency and coinage including its designing;
    (b) the Security and Currency Printing Presses, the Security Paper Mills and the Mints including the Assay Department and Silver Refinery, Gold Refinery, and Gold collection-cum-delivery centres;
    (c) production and supply of Currency Note Paper, Currency and Bank Notes and Coins including Commemorative coins, postal stationary, stamps and various security forms/items.
23 (a) Policy measures for the regulation and development of the securities market and investor protection.
    (b) New Investments and Securities for mobilising resources from the Capital Markets. Investment Policy including investment policy of Life Insurance Corporation of India, and General Insurance Corporation of India.
24. Investment pattern for Employees' Provident Fund and other like Provident Funds.
25. Financial Policy in regard to the process of disinvestments including Disinvestments Proceeds Fund and Asset Management Company.
26. All matters relating to Tax Free Bonds.

**IV. BUDGET**

27. Ways and means.
28. Preparation of Central Budget other than Railway Budget including supplementary excess grants and when a proclamation by the President as to failure of Constitutional machinery is in operation in relation to a State or a Union Territory, preparation of the Budget of such State or Union Territory.
29. Market Borrowing Programme of Central and State Governments and Government Guaranteed Institutions.
30. Floatation of Market Loans by Central Government and issue and discharge of Treasury bills.
31. Administration of the Public Debt Act, 1944 (18 of 1944).
32. Fixation of interest rates for Central Government's borrowings and lending.
33. Policy regarding Accounting and Audit procedures including classification of transactions.
34. Financial matters relating to Partition, Federal Financial integration and Reorganisation of States.
35. Contingency Fund of India and administration of the Contingency Fund of India Act, 1950 (49 of 1950).
36. Monitoring of budgetary position of the Central Government.
37. Sterling Pensions-Transfer of responsibility of U.K. Government and actual calculations of liability involved.
38. Public Provident Fund Scheme.
39. Finance Commission.
40. Resources of Five Year and Annual Plans.
41. National Deposit Scheme, Special Deposit Schemes, Compulsory Deposit Scheme, Other Deposit Schemes of the Central Government.
42. Small Savings, including the administration of the National Savings Institute.
43. Duties and Powers of the Comptroller and Auditor General.
44. Laying of Audit Reports before the Parliament under article 151 of the Constitution.
45. Financial emergency.
46. Government guarantees.
47. Functions of the Treasurer of Charitable Endowments for India.

**V. ******

48 -51. ******

**VI ******

52 -78 ******

## VII. MANAGEMENT OF THE INDIAN ECONOMIC SERVICE

79. Management of Indian Economic Service – its cadre and all matters pertaining thereto.

## VIII. ECONOMIC ADVICE

80. Advice on matters which have a bearing on internal and external aspects of economic management including prices.
81. Credit, fiscal and monetary policies.

## IX. MISCELLANEOUS ACTS

82. The Government Savings Bank Act, 1873 ( 5 of 1873).
83. Section 20 of the Indian Trustes Act, 1882 ( 2 of 1882) dealing with investments.
84. The Metal Tokens Act, 1889 (1 of 1889).
85. The Charitable Endowments Act, 1890 ( 6 of 1890).
86. The Indian Coinage Act, 1906 (3 of 1906).
87. The Indian Security Act, 1920 ( 10 of 1920).
88. The Currency Ordinance, 1940 (4 of 1940).
89. The International Monetary Fund and Bank Act, 1945 (00 of 1945).
90. The Finance Commission (Miscellaneous Provisions) Act, 1951 (33 of 1951).
91. The Government Savings Certificates Act, 1959 (46 of 1959).
92. The Compulsory Deposit Scheme Act, 1963 (21 of 1963).
93. The Unit Trust of India Act, 1963 (52 of 1963).
94. The Legal Tender (Inscribed Notes) Act, 1964 (28 of 1964).
95. The Asian Development Bank Act, 1966 (18 of 1966).
96. The Public Provident Fund Act, 1968 (23 of 1968).
97. The Small Coins (Offences) Act, 1971 (52 of 1971).
98. The Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act' 1971 (56 of 1971).
99. The Additional Emoluments (Complusory Deposit) Act, 1974 (37 of 1974).
100. The African Development Fund Act, 1982 (1 of 1982).
101. The African Development Bank Act, 1983 (13 of 1983).
102. The Securities and Exchange Board of India Act, 1992 (15 of 1992).
103. The Administration of Securities Contracts (Regulation) Act, 1956 (42 of 1956).
104. The Depositories Act, 1996 (22 of 1996).
105. The International Finance Corporations (Status, Immunities and Privileges) Act 1958 (42 of 1958).

******** Deleted by amendment Series No. 290 dated 28th June, 2007.**

**Annexure - III**

## Instructions for processing of proposals by FIPB (Part –II)
## No. Instr./1/07-08/ FIPB

**Dated 8th November 2007**

In continuation of the instructions for expeditious and streamlined processing the proposals issued on 1st December 2006, following additional instructions are being issued for compliance hence forth:

1) The **proposals received for seeking amendment** to the original approval shall be processed as per the following timelines:
   a. The proposals for amendment in existing activity shall also be received in 15 copies like the fresh proposals.
   b. Immediately after the receipt, the proposal would be circulated to all permanent members of FIPB, all AMs (as per the list when the original proposal was considered) and any additional AMs, if required, because of the nature of proposed new activity/ transaction, within 4 (four) working days of the receipt.
   c. Not more than five (working) working days will be taken by the FC-II section for getting the decision on (i) whether there is any shortcoming in terms of documents/ papers and communicating it to the applicant and/ or (ii) whether the proposal needs to be taken to the FIPB board meeting or the amendment can be noted on file only.
   d. Any communication to the applicant/ consultant would be sent by e-mail (if address is available) and fax both. If the answer is not received within five days, a reminder would be sent. If the response is still not received, then the concerned Dealing Hand/SO/US (FIPB) would also telephonically contact the company/applicant about the requirement and note their response on file, because it has been found that sometimes the communication from the FIPB unit does not reach the intended addressee.
   e. If the proposal requires consideration in the Board meeting, same timelines would be followed, as decided for fresh proposals.

2) In both fresh as well as amendment proposals, the **additional information/ papers** received from the applicant would immediately be **circulated** to all the permanent members as well as AMs concerned. It should be clarified in the communication to the applicant/ consultant (seeking clarification/additional information/ additional documents) that the information/documents have also to be submitted in 15 copies.

3) If any proposal (fresh/ amendment) is **withdrawn** by the applicant, the information of withdrawal should also be sent to all the permanent members as well as AMs concerned.

4) The copy of **Press Release** sent after approval of Minutes by FM, should also be sent by e-mail to all permanent members as well as to the AMs invited for that particular meeting.

5) The **approvals letters** for fresh/ amendment proposals are to be issued within 3 (three) working days after the receipt of approved minutes. To ensure compliance of this timeline, advance action would be taken for issue of approval letters by entering the basic information in the computer latest by the date of the meeting.

6) To ensure uniformity and streamlining the process of **determining AMs, following templates** shall be observed, apart from the instruction given, time to time:

| Sl. No. | Nature of the Proposal | Necessary AM (Apart from others depending on the nature of activity) |
|---|---|---|
| 1 | All proposals attracting PN 1/ 2005 | DIPP |
| 2 | All proposals of Telecommunication sector (UASL, Infrastructure provider, email, voice mail etc.) | MHA & MEA |
| 3 | All defence sector proposals | Deptt. Of Defence Production, MHA, MEA |
| 4 | Financial Infrastructure Companies (Stock Exchange/ Clearing Corporations/ Depositories) | DEA(CM) Division |
| 5 | Proposals involving investment by foreign companies owned by Resident Indians/ entities | Department of Revenue (International Taxation Division) |

7) All proposals sent to Department of Revenue would be sent in two copies, marking them separately as

    i. Department of Revenue (CBDT)
    ii. Department of Revenue (CBEC)

    so that they are examined by the Department from all the angles.

8) In all proposals received from the DIPP for single brand retail, basic information related to the Brand/ Foreign investor should be collected from the website and should be attached with the briefs for internal circulation.

9) To ensure minimum of correspondence with the applicants for getting required essential information/ documents, the enclosed notice should immediately be displayed on the FIPB website ( hyperlinked with a new icon "CHECKLIST FOR INFORMATION/DOCUMENTS FOR FIPB PROPOSALS" on the home page of FIPB ) as well as pasted at the facilitation counter. SO(FC-I) shall ensure communication of this information to NIC for uploading.

These instructions shall be complied with immediate effect

**Encl.: i) Notice for applicants to published on website and Facilitation Counter**

(D.K. Singh)
Dir.(Inv.&FIPB)
08/11/2007

## NOTICE

**In order to help us serve you better and expeditiously, all applicants filing fresh proposals for consideration by FIPB are requested to ensure that following information/ documents are available in their application form**

**Check List of Documents to be attached with and information to be provided in each set of the Application Form for consideration of fresh proposal by FIPB**

(copy to be attached with each set of the application)

| **Sl. No** | **Name of the Document/ item of information** | **Page No.** |
|---|---|---|
| 1 | Filled up application form in 15 copies. A format is available at the following web address on the FIPB website- http://finmin.nic.in/the_ministry/dept_eco_affairs/fipb/fccheck.doc (Pl. Note that this format is in the process of revision. However, till the time the revised format is notified on the website, this format may be used) | |
| 2 | Details of the foreign investor(s)/ collaborator(s) indicating their promoters, parentage, group companies/ affiliates (Please also provide the name, contact address and passport number of the directors/promoters of the company) | |
| 3 | Copies of certificates of incorporation(s) and Memorandum of Association of the foreign investor(s)/ collaborator(s) | |
| 4 | Details of the Indian joint venture partner(s) / technical collaborator(s) indicating their promoters, parentage, group companies/ affiliates | |
| 5 | Copies of certificates of incorporation(s) and Memorandum of Association of the Indian joint venture partner(s) / technical collaborator(s) | |
| 6 | For companies having/ proposing to have multi sectoral activities, details of all the existing/ proposed activities along with four digit NIC code, which can be accessed at the web address http://siadipp.nic.in/policy/nic/nic.htm | |
| 7 | In case the proposed investment is in holding company, the details/ information about the activities of the downstream investments. | |
| 8 | Copies of relevant past FIPB/SIA/RBI approvals, connected with the current proposal | |
| 9 | Copies of certificates of incorporation(s) and Memorandum of Association of the investee company, if already formed | |
| 10 | In case of transfer of existing equity - the board resolution of the investee company and the consent of transferor shareholder(s). | |

| | | |
|---|---|---|
| 11 | In case of fresh issue of shares - the board resolution of the investee/issuing company to that effect | |
| 12 | Pre and post investment, category wise detail shareholding structure of the investee company, mentioning name of each shareholder. In case of listed companies, this information shall be as on the last working day of the month, previous to the month, when the application is being filed. | |
| 13 | In case of indirect foreign investment in the investee company through Indian companies, the details of such indirect investment, mentioning the name of foreign companies and their shareholding | |
| 14 | Where the payment for technology/trademark/brand name/any other IPR falls outside cap for automatic approval and requires approval of FIPB, justification for higher payment. For eligibility of automatic route please refer to Press Note No. 19 of 1998, PN 9 of 2000 and PN 1 of 2002 available at the web address http://siadipp.nic.in/policy/changes.htm (as applicable in your case) | |
| 15 | Declaration in attached proforma from each of the foreign investor/ collaborator, on their official letter heads, with full name and contact address of the signatory of the declaration. | |
| 16 | Details of 'existing' ventures. Please refer to the Press Note 1 and 3 of 2005 at the web address http://siadipp.nic.in/policy/changes.htm for policy provisions regarding this information. | |
| 17 | A copy of the JV agreement/ Shareholders' agreement/ technology transfer/ trademark/brand assignment agreement (as applicable), in case there are existing ventures | |
| 18 | The comments of the Indian partners/ technical/ trademark collaborators about the new venture, on their official letter heads, with full name and contact address of the signatory of the comments. | |