

## Corpsec Hotline

March 16, 2011

### OUR RECOMMENDATIONS ON THE CONSOLIDATED FDI POLICY

Foreign Direct Investment ("FDI") into India is governed as per the policy framed by the Ministry of Commerce and Industry. The policy framework relating to FDI for the first time was introduced in the year 1993, since then the Department of Industrial Policy and Promotion ("DIPP") under the Ministry of Commerce and Industry has been formulating the policy relating to FDI by issuing press notes, which are notified by the Reserve Bank of India ("RBI") as amendment to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 ("TISPRO"). In order to bring clarity and certainty in the policy framework, the DIPP for the first time issued a consolidated policy relating to FDI in India, which came into effect on April 1, 2010 (the "**Consolidated FDI Policy**").

Further, the Consolidated FDI Policy specifically provided that the consolidation subsumes and supersedes all Press Notes/ Press Releases/ Clarifications/ Circulars issued by DIPP, which were in force as on April 1, 2010. Further, as a policy, it was decided that the Consolidated FDI Policy would be revised every six months and consequently superseded by the revised version of the Consolidated FDI Policy. Presently, the Consolidated FDI Policy brought into effect from October 1, 2010 is in force, which would be superseded by its revised version to be brought into effect from April 1, 2011.

While the preamble to the Consolidated FDI Policy stated that the "*Consolidated FDI Policy is a consolidation/compilation and comprehensive listing of most matters on FDI and is not intended to make changes in the extant regulations*", several restrictions were introduced in the Consolidated FDI Policy without separate notification by RBI by way of press note or as amendment to TISPRO. Further, these new introductions in the Consolidated FDI Policy have created various ambiguities leading to uncertainty both for existing and future investment into the country.

However, as a policy decision and to address the ambiguities arising out of the provisions of the Consolidated FDI Policy, it has been decided that prior to the issue of any revised version of Consolidated FDI Policy, DIPP would invite comments from public so that the same can be addressed in the subsequent versions. Accordingly, prior to the release of the Consolidated FDI Policy to be brought into effect from April 1, 2011, DIPP has invited comments from the public.

We, at Nishith Desai Associates, have also provided our key recommendations alongwith rationale to DIPP, which *inter alia* include:

- **Removal of sectoral restrictions for FVCI investments:** The investments made by Foreign Venture Capital Investor ("FVCI") investments should not be subject to sectoral restrictions as are applicable for FDI. Also, such amendment should entail benefit to existing FVCI investments as well.
- **Investments in a VCF under automatic or government route (as the case may be):** Investments in a Venture Capital Fund ("VCF") set up as trusts should not be mandated under the government route as both the FVCI and the investee VCF are regulated by the Securities and Exchange Board of India ("SEBI"). Further, instead of blanket restriction, investments in unregistered trust should be allowed under the government route.
- **Flexibility in pricing of convertible instruments:** We have proposed that as long as the issuer company's equity base value is met upfront, there should not be any restriction in pricing of convertible instruments, the subsequent conversion should be allowed to be a function of performance and actual balance sheet of the issuer company.
- **Clarity on lock-in provision for FDI in Real Estate sector:** We have requested for clarity on the issue pertaining to lock-in restrictions applicable to FDI in real estate sector, as to whether the lock-in provision would apply to a subsequent holder of the securities of the Indian company wherein the original holder has already complied with the three years of lock-in as provided in the present version of the Consolidated FDI Policy?

For our detailed comments and recommendations on the existing

Consolidated FDI Policy, please [click here](#).

This article can be best viewed in Adobe Acrobat version 7.

If our submissions are considered by DIPP, it would help in bringing clarity to existing framework relating to FDI and would be a progressive step towards encouraging promotion of FDI in India.

- Corporate & Securities Law Team

You can direct your queries or comments to the above email address.

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**Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business**

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