Paul | Weiss

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Foreign Investment in the Indian Media Sector

In June 2005, the Government of India announced an end to its 50-year-old policy banning the publication of foreign newspapers in India, the latest development in a trend of liberalization of foreign investment in the Indian media sector. These changes unfold against the backdrop of a booming market for advertising in India, with spending on television advertisements expected to increase by 12% in 2005 to $1.1 billion (compared to a global average of 6.8%) and spending on print advertising expected to increase by 23% in 2005 to $2.1 billion (compared to a global average of 3.9%).

While these developments signal new opportunities, foreign investments in several Indian media sectors remain subject to significant restrictions, such as percentage caps on foreign equity ownership. In these sectors, foreign investors must follow specified procedures and apply for prior governmental authorization of a proposed investment.

This memorandum provides an introduction to the general legal and regulatory framework for foreign investment in India, and some of the more specific regulations applicable to foreign investment in Indian media sectors.

I. General Regulation of Foreign Investment in India

Foreign investment in India is governed primarily by:

- the Industrial Policy of the Indian government, as formulated by the Secretariat of Industrial Assistance (SIA);
- press notes issued by the Ministry of Commerce and Industry;
- the Foreign Exchange Management Act of 1999; and
- regulations and notifications issued by the Reserve Bank of India (RBI) and the Securities and Exchange Board of India (SEBI).

In general, responsibility for administering India's foreign investment policies falls largely to three agencies:

- RBI, which administers exchange controls;

- the Foreign Investment Promotion Board (FIPB), which reviews all foreign investment proposals that require prior governmental authorization; and

- SEBI, which regulates India's capital markets.

For most sectors of the Indian economy, foreign direct investment (FDI) is permitted without prior governmental authorization through what is commonly referred to as the "automatic route." After the investment is made under the automatic route, the target company must notify the relevant RBI regional office within 30 days of receipt of inward remittances and file the required documents with that office within 30 days of the issuance of shares to foreign investors.

Though prior governmental authorization is not necessary, investments under the automatic route are nonetheless subject to a number of regulations. In particular, such investments must:

- be within the prescribed sectoral equity caps;

- comply with a variety of minimum pricing requirements under guidelines issued by SEBI or the Controller of Capital Issues (depending on the circumstances); and

- not be in a sector in which the investor has a prior joint venture arrangement with an Indian partner (with exceptions for certain financial investors and investments in the IT sector).

If the foreign investment is in a sector where the automatic route is available through acquisition of existing shares from resident or non-resident Indians, then the foreign investor will need to comply with certain additional requirements. Further, the automatic route for foreign investment by way of acquisition of existing shares is not available for certain specified kinds of transactions or where the target company is engaged in the financial sector (*e.g.* banks, financial companies and insurance companies). In such cases, approval from FIPB and/or RBI would be required.

Likewise, foreign investment in sectors that do not qualify for the automatic route, including media sectors such as print media and broadcasting, must be approved in advance by FIPB. FIPB uses the following criteria, among others, when evaluating proposals:

- the amount of the investment;

- the effects of the investment on employment;

- the availability of new technology;

- the level of exports proposed to be generated as a result; and
- other benefits to India resulting from the investment.

Approval is granted on a case-by-case basis. In the absence of any special circumstances, the process is typically completed within four to six weeks. Once a proposal has been approved by FIPB, there is no need for separate approval from RBI (other than in certain limited circumstances), although investors must still comply with RBI notice requirements.

Other avenues for foreign investment in India beyond FDI include registration as a foreign institutional investor (FII) or foreign venture capital investor (FVCI). Each of these alternatives offers benefits tailored to the needs of particular investors. In addition, foreign investment is also possible through the purchase of American Depository Receipts and Global Depository Receipts.

FIIs include asset management companies, pension funds, mutual funds, investment trusts as nominee companies, incorporated/institutional portfolio managers, university funds, endowment foundations, charitable trusts and charitable societies. FIIs can buy and sell securities on Indian stock exchanges and can invest in unlisted securities where the price has been approved by RBI. So long as an FII buys and sells securities on a recognized stock exchange, permission from RBI is not required. Additionally, FIIs can invest in exchange-traded derivative contracts.

FIIs are required to register with SEBI and comply with certain exchange controls adopted by RBI. Each FII investment in an Indian company is capped at 10% of the total issued share capital of that company, and the aggregate investment of all FIIs in an Indian company cannot exceed 24% of that company's total issued share capital. However, it is possible for the Indian company to increase such limit to the applicable sectoral cap through a board resolution followed by a special resolution passed at a shareholders meeting. High net-worth individuals and foreign corporations can invest through FIIs, but each such investment is capped at 5% (within the aggregate limit for FIIs). Sectoral caps applicable to FDI also apply to FIIs.

Unlike FIIs, FVCIs are permitted to buy and sell the securities of certain qualifying companies at a negotiated price. By registering as FVCIs, investors can avoid the approval requirements of RBI for the purchase and sale of securities, as well as the pricing requirements applicable to FDI. Furthermore, FVCIs are treated as qualified institutional investors and are therefore permitted to subscribe for securities in an initial public offering under India's book-building offering process.

On the other hand, regulations significantly restrict the ability of FVCIs to invest in listed companies. FVCIs may invest in existing domestic venture capital funds in India, or invest directly in qualifying Indian companies. However, FVCIs choosing the latter route are required to invest at least 66.67% of their funds in unlisted equity shares or equity-linked shares. FVCIs are free to invest up to 33.33% of their funds in shares of a qualifying company obtained through an initial public offering, debt instruments of a qualifying company in which the FVCI has already made an equity investment, equity shares of a listed company obtained through a preferential allotment (provided that the shares are subject to a one-year holding period), or other approved arrangements and entities. Given the tight restrictions placed on FVCI investment in listed companies, the number of foreign investors registering as FVCIs has been limited.

II. Regulation of Foreign Investment in Media Sectors

India's media sectors, including the print media and certain segments of the broadcast media, have traditionally been closed to foreign investment, so foreign investment in these areas is a relatively recent phenomenon. While some media sectors, such as film and advertising, are open to FDI of up to 100% on the automatic route, foreign investment in other sectors, such as print media and broadcasting, remain subject to stricter limits. The following sections discuss the regulations applicable to foreign investment in India's print media and broadcast sectors, and the hurdles that foreign investors in these sectors might expect to encounter.

A. Print Media

A 1955 Cabinet resolution banned foreign investment in magazines and newspapers in India, and that policy remained in place until 2002, when the government allowed FDI of up to 26% in periodicals and newspapers dealing with news and current affairs and up to 74% in journals and specialty magazines. At the same time, however, syndicated content from abroad in any publication was restricted to 7.5% of total printed area. The cap on foreign investment in Indian entities publishing scientific, technical and similar magazines, periodicals and journals ("Scientific/Technical Journals") was eventually increased to 100%.

In June 2005, the Indian government introduced a number of reforms designed to liberalize the regime for foreign investment in print media. While the cap on total foreign investment in news and current affairs publications was left at 26%, the government permitted FIIs and others to invest in print media, thereby broadening investment beyond simply FDI, and the syndication limit for foreign content was increased to 20%. The government also allowed publication of facsimile editions of foreign newspapers and journals in India, although such publications remain barred from access to Indian content or advertisements. Additionally, facsimile editions of foreign publications must be approved in advance by the Ministry of Information and Broadcasting.

These developments in the regulatory environment have ushered in new opportunities for foreign investment in Indian print media. Since the 2002 decision to allow FDI of up to 26% in news media, Indian media ventures have raised approximately $300 million in foreign funds, with news reports predicting an additional $250 million in foreign investment soon to follow.

1. Scientific/Technical Journals

As noted above, foreign investment of up to 100% is permitted in Indian entities publishing Scientific/Technical Journals. Additionally, the government recently began allowing publication of Indian editions of foreign Scientific/Technical Journals.

Foreign investors in Scientific/Technical Journals must apply to the Ministry of Information and Broadcasting for approval. Applicants must provide details of the contents of the publication (on a form provided by the Ministry of Information and Broadcasting), and pay an application fee of Rs.5000. The Ministry of Information and Broadcasting reviews applications, after due inter-ministerial consultations, to decide whether the proposed publication is covered under the category of Scientific/Technical Journal. Representatives of the concerned ministries, specialist bodies and language experts are consulted by the Ministry of Information and Broadcasting as necessary.

Upon approval, the Ministry of Information and Broadcasting will issue a No Objection Certificate (NOC) for foreign investment, with copies sent to the Registrar of Newspapers for India, SIA, RBI and the applicant. After obtaining a NOC, the applicant may approach the FIPB or RBI for clearance.

2. News and Current Affairs

Foreign direct investment of up to 26% is permitted in Indian entities publishing newspapers and periodicals dealing in news and current affairs, subject to safeguards to:

- verify the "sound credentials and international standing" of the foreign investor;
- keep editorial and management control in the hands of resident Indians (*e.g.* at least three-fourths of the directors and all key executives and editorial staff must be resident Indians);
- ensure against dispersal of Indian equity; and
- require that the equity held by the largest Indian shareholder is at least 51% of total equity, excluding equity held by certain passive financial investors.

When calculating whether the 26% threshold has been reached, indirect foreign shareholdings (through Indian shareholding entities) will be included.

At least 50% of the foreign direct investment must be introduced through the issuance of new equity. The reminder may be introduced through transfers of outstanding equity.

Applicants for foreign investment in news and current affairs print media must submit nine copies of the prescribed application form to the Ministry of Information and Broadcasting for approval. The application must disclose the names and details of all proposed directors who are not resident Indians, as well as the names and details of any foreigners or non-resident Indians (NRIs) to be employed by the proposed venture for more than 60 days per year.

Applicants must also fully disclose any shareholders agreements, loan agreements or similar agreements entered into or proposed in connection with foreign investment in this sector. Any changes to this disclosure must be reported to the Ministry of Information and Broadcasting within 15 days of the change.

B. Broadcasting

For regulatory purposes, India's broadcasting sector encompasses television, including cable and Direct-to-Home services (DTH), and FM radio. Within the television sector, there are no restrictions on foreign investment in the production of TV software (*i.e.* programming), the marketing of TV rights or advertising. Otherwise, foreign investment across the sector is subject to caps on foreign ownership, with particular restrictions on foreign investment in television news and current affairs channels. Guidelines for foreign investment in cable TV networks, TV news and current affairs channels, DTH and FM radio are discussed below. A recent government proposal to regulate television content is briefly addressed below as well.

1. Cable TV Networks

Foreign investment (inclusive of FDI and FII) in cable TV networks of up to 49% is allowed. Additionally, cable TV networks are required to have at least 51% of their paid-up share capital held by Indian citizens in order to be eligible under the Cable Television Network Rules (1994) to provide cable TV services.

2. News and Current Affairs Channels

As with print media, foreign investment in TV news and current affairs channels is subject to tighter regulation than foreign investment in other channels. FDI in news and current affairs channels which uplink from India is capped at 26%, while FII in such channels is prohibited altogether. Any such investment is also subject to safeguards to:

- keep editorial and management control in the hands of resident Indians (*e.g.* at least three-fourths of the directors and all key executives and editorial staff must be resident Indians); and

- require that the equity held by the largest Indian shareholder is at least 51% of the total equity, excluding equity held by certain passive financial investors.

When calculating whether the 26% threshold has been reached, indirect foreign shareholdings (through Indian shareholding entities) will be included.

Prior permission from the Government of India is required before effecting any change to the foreign shareholding pattern and/or in the board of directors or certain key management personnel. In addition, similar to the requirements applicable to the foreign investment in news and current affairs print media discussed above, foreign investors are required to fully disclose any shareholders agreements, loan agreements and other similar agreements that are entered into or proposed in connection with their foreign investment in TV news and current affairs channels.

While there are no foreign ownership restrictions on channels uplinked from abroad, such channels cannot have news and current affairs content that is specially targeted towards the Indian audience.

3. Direct-to-Home TV

Foreign investment (FDI and FII) in DTH is capped at 49%, of which the FDI component may not exceed 20%. Indirect foreign shareholding (through Indian shareholding entities) will be included when calculating the amount of foreign investment. Management control must remain with Indians, with majority of the members of the board of directors as well as the Chief Executive of the company being resident Indians. There are also certain cross-media holding restrictions that apply.

Foreign-owned satellites may be used to beam down programs directly to DTH operators. In 2004, the Minister of Information and Broadcasting, S. Jaipal Reddy, said that a DTH licensee can use bandwidth capacity for DTH service on both Indian and foreign satellites. However, the Minister added that proposals which use Indian satellites will get preferential treatment.

4. TV Content

India's practice with respect to TV content has favored self-regulation, but recent proposals put forth by the Ministry of Information and Broadcasting suggest that changes may be coming. Currently, TV content is governed by the Prasar Bharti Act, the Cable TV Network Regulation Act and the Telecom Regulatory Authority of India (TRAI). None of these regulations, however, cover DTH.

Earlier this year, the Minister of Information and Broadcasting proposed an autonomous Broadcast Content Regulatory Authority, which is expected to be part of a Broadcast Authority Bill he plans to introduce in the upcoming Monsoon Session of Parliament. It is not clear at this point exactly what shape the new regulation will take.

5. FM Radio

In July 2005, the Government of India issued guidelines permitting foreign investment of up to 20% in private FM radio broadcasting, subject to the following safeguards:

- one Indian individual or company must own more than 50% of the equity of the Indian entity (excluding equity held by banks and other lending institutions);
- the majority shareholder must exercise management control of that Indian entity; and
- all the directors and key executive officers must be resident Indians.

Any change in the ownership of the Indian company through transfer of shares of the major shareholders to any new shareholders would require prior written permission of the Ministry of Information and Broadcasting. Such permission would not be granted during the first five years following the date of effectiveness of the FM radio license permission.

There are also certain restrictions on the branding of FM Radio channels, the outsourcing of content production and the payment of license fees. News and current affairs programmes are not permitted under the existing FM radio policy.

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This memorandum was prepared in conjunction with AZB & Partners, a leading Indian law firm with offices in New Delhi, Mumbai and Bangalore and with particular expertise in merger and acquisition transactions.

This memorandum provides only a summary and is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Any questions concerning this memorandum should be addressed to any of the following members of our Indian practice:

New York	
Raphael M. Russo	1 212 373 3309
Valerie Demont	1 212 373 3076
London	
David K. Lakhdhir	44 (0)20 7367 1602
Tarun M. Stewart	44 (0)20 7367 1604