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PART II SECTION 3(ii)]

GOVERNMENT OF INDIA
MINISTRY OF CORPORATE AFFAIRS

New Delhi

Dated the 12th February, 2016

Order

Whereas the Central Government is satisfied that to leverage combined assets, capital and reserves, achieve economy of scale, efficient administration, gainful settlement of rights and liabilities of stakeholders and creditors and to consolidate businesses, ensure co-ordination in policy, it is essential, in the public interest, that the Financial Technologies (India) Limited, a company incorporated under the Companies Act, 1956 (1 of 1956) (hereinafter referred to as the said Act) having its Registered Office at Shakti Tower-1, 7th Floor, Premises E, 766, Anna Salai, Thousand Lights, Chennai - Tamil Nadu-600002 and the National Spot Exchange Limited, a company incorporated under the said Act, having its Registered Office at FT Tower, CTS No. 256 and 257, 4th Floor, Suren Road, Chakla, Andheri (East), Mumbai, Maharashtra - 400093, should be amalgamated into a single company;

And whereas, the Central Government, in compliance with the provisions of clause (a) of sub-section (4) of section 396 of the said Act, a copy of the proposed Order dated 21.10.2014 was sent in draft form to the Companies aforesaid namely, the National Spot Exchange Limited and the Financial Technologies (India) Limited calling for their objections and suggestions, if any. A copy of the said Order dated 21.10.2014 in draft form was also hosted on the website of the Ministry, www.mca.gov.in. A public notice was also given, calling for

objections and suggestions from the stakeholders, calling their attention to the Order of amalgamation in draft form available on the website of the Ministry of Corporate Affairs;

And whereas, the Financial Technologies (India) Limited had filed a Writ Petition No. 2743 of 2014 before the Hon'ble Bombay High Court (hereinafter referred to as the High Court) against the said draft Order of Amalgamation wherein the High Court had granted a *status quo vide* Order dated 27.11.2014. Later, the High Court *vide* Order dated 04.02.2015 was pleased to vacate the *status quo* with a direction to the Central Government to consider passing a final Order, *inter alia*, after hearing contentions of the petitioners and respondents within the time directed by the Court. It was also directed that if an adverse Order was passed, the same shall not be notified for a period of two weeks after the Order was communicated to the petitioners. However, considering large number of representations received which had to be examined and various other factors like obtaining and providing inspection of documents to the Financial Technologies (India) Limited and the National Spot Exchange Limited, the Ministry had to seek extension of time from the High Court on four occasions and the High Court has lastly granted extension of time till 15-02-2016 to the Central Government to take a final view on the Draft Order;

And whereas the competent authority in the Ministry of Corporate Affairs has passed an Order *vide* number S.O 924(E) dated the 1st April, 2015 assessing the compensation in compliance of the provisions of sub-section (3) of section 396 of the said Act read with rule 12A of the Companies (Central Government's) General Rules and Forms, 1956. No appeal against the said Order of the competent authority has been preferred by the petitioners;

And whereas, a hearing was given by the Central Government to both the Companies proposed to be amalgamated, namely, the Financial Technologies

(India) Limited and the National Spot Exchange Limited as directed by the High Court and also considered their written objections and suggestions received in terms of clause (b) of sub-section (4) of section 396 of the Act;

And whereas, the Central Government also considered submissions received in writing from various classes of stakeholders including the shareholders, creditors and all other interested parties. A detailed background of the case, submissions made by the National Spot Exchange Limited and the Financial Technologies (India) Limited and a brief prepared on the basis of comments received from stakeholders has been compiled and analysed and annexed herewith as Annexure;

Now, therefore, in exercise of the powers conferred by sub-sections (1) and (2) of section 396 of the Companies Act, 1956 (1 of 1956) the Central Government hereby makes the following Order to provide for the amalgamation of the said two companies into a single company, namely the Financial Technologies (India) Limited:-

1. **Short title.**— This Order may be called the National Spot Exchange Limited and the Financial Technologies (India) Limited (Amalgamation in Public Interest) Order, 2016.
2. **Definitions.**— In this Order, unless the context otherwise requires,—
 - (a) "Act" means the Companies Act, 1956 (1 of 1956);
 - (b) "appointed day" means the date on which this Order is notified in the Official Gazette;
 - (c) "dissolved company" means the National Spot Exchange Limited (CIN: U51100MH2005PLC153384); and
 - (d) "resulting company" means the Financial Technologies (India) Limited (CIN: L29142TN1988PLC015586).

- (e) “assessment order” means the Order passed by the competent authority in terms of sub-section (3) of section 396 of the said Act read with rule 12A of the Companies (Central Government’s) General Rules and Forms, 1956 *vide* notification number S.O. 924(E) dated 01.04.2015 published in the Gazette of India, Part II, Section 3, Sub-section (ii) dated 1st April, 2015.

3. **Shareholding pattern.**— (1) The shareholding pattern of the two companies, as per latest available information, before this Order of amalgamation, are as under:-

- (i) The Financial Technologies (India) Limited (Resulting company) is having paid up share capital of Rs. 921. 57 lakh consisting of 46078537 equity shares of Rs. 2/- each as on 31.03.2015. The details of each category of shareholders of the Financial Technologies (India) Limited are as set out in the Table-1 below:

Table - 1

Details of shareholders of the Financial Technologies (India) Limited (the Resulting company)		
Category of Shareholders	Number of shares held	Amount (in Rupees)
(1)	(2)	(3)
Promoter and Promoter Group:		
Indian individuals or Hindu undivided family	8695910	17391820
Indian bodies corporate	12329968	24659936
Sub Total (A)	21025878	42051756
Public Shareholding: Institutions		
Mutual Funds	322	644
Financial Institutions or Banks	113848	227696
Foreign Institutional Investors	7543612	15087224
Foreign Portfolio Investors	26081	52162

Sub-Total	7683863	15367726
Public Shareholding:		
Non-Institutional		
Bodies corporate	2984917	5969834
Individuals	13569126	27138252
Others	814753	1629506
Sub-Total	17368796	34737592
Total Public Shareholding (B)	25052659	50105318
Total Shareholding: (A)+(B)	46078537	92157074

- (ii) As on 31.3.2015 the National Spot Exchange Limited is having paid-up share capital of Rs. 6,000.00 lakh consisting of 6,00,00,000 Equity Shares of Rs.10/- each. The details of each category of shareholders of the National Spot Exchange Limited (dissolved company) are as set out in the Table-2 below:

Table - 2

Details of shareholders of the National Spot Exchange Limited (the Dissolved company)		
Category of Shareholders	Number of shares held	Amount (in Rupees)
(1)	(2)	(3)
Promoter and Promoter Group:		
Indian bodies corporate		
Financial Technologies (India) Limited	5,99,99,895	59,99,98,950
Indian individuals (nominees of the promoter company)		
Shri Jignesh Prakash Shah	1	10
Shri Arshad Modh Khan	1	10
Shri Manjay Prakash Shah	1	10
Shri V. Hariharan	1	10
Shri Joseph Daniel Massey	1	10
Sub Total (A)	5,99,99,900	59,99,99,000
Public Shareholding:		
Institutions		
None	0	0
Sub-Total	0	0
Public Shareholding:		

Non-Institutional		
Bodies corporate		
National Agricultural Cooperative marketing Federation of India Limited (NAFED)	100	1000
Individuals		
Others		
Sub-Total	100	1000
Total Public Shareholding (B)	100	1000
Total Shareholding: (A)+(B)	6,00,00,000	60,00,00,000

(2) All the 59999900 Equity Shares of Rs.10/- each fully paid up in the National Spot Exchange Limited, which are now held in the name of the Financial Technologies (India) Limited, including their nominees before this amalgamation, shall be cancelled.

(3) Since the entire share capital of the National Spot Exchange Limited is not held in the name of the Financial Technologies (India) Limited, the resulting Company shall compensate the minority shareholders, namely, the National Agricultural Cooperative Marketing Federation of India Limited (NAFED) will be allotted thirty-eight (38) shares of the resulting company.

4. **Amalgamation of the Companies.**— (i) On and from the appointed day, the entire business and undertaking of the National Spot Exchange Limited and the Financial Technologies (India) Limited on as is where is basis including all the properties, movable or immovable and other assets of whatsoever nature namely, machinery and all fixed assets, leases, tenancy rights, advances of monies of all kinds, book debts, outstanding monies, recoverable claims, agreements, industrial and other licenses and permits, imports and other licenses, letters of intent and all rights and powers of every description, all mortgages and charges and hypothecation, guarantees and all rights whatsoever affecting the said

properties of the National Spot Exchange Limited, shall without further act or deed be transferred to and vest in or deemed to be transferred to and vest in the resulting company, in accordance with any law for the time being in force.

(ii) For accounting purposes, amalgamation shall be effected with reference to the audited accounts and Balance-Sheets as on 31.03.2015 of the dissolved company, and, the transactions thereafter shall be pooled into a common account. The dissolved company shall not be required to prepare its final accounts as on any later date and the resulting company shall take over all-assets and liabilities according to the Balance-Sheet of the dissolved company as on 31.03.2015 and accept full responsibility for all transactions thereafter.

Explanation.—The undertaking of the dissolved company shall include (a) all rights, powers, authorities and privileges, (b) all property, movable or immovable including, cash balances, reserves, revenue balances, investments and all other interests and rights in or arising out of such property as may belong to or, be in the possession of the dissolved company immediately before the appointed day, and (c) all books, accounts and documents relating thereto and also all debts, liabilities, duties and obligation of whatever kind then existing of the dissolved company.

5. *Transfer of certain items of property.*— For the purpose of this Order, all the profits or losses or both, if any, of the dissolved company as on the appointed day, and the revenue reserves or deficits or both, if any, of the dissolved company when transferred to the resulting company shall respectively form part of the profits or losses and the revenue reserves or deficit, as the case may be, of the resulting company as if such profits or losses have accrued or incurred by the resulting company.

6. *Saving of Contracts, etc.*—Subject to other provisions contained in this Order, all contracts, deeds, bonds, agreements and other instruments of whatever nature to which the dissolved company is a party, subsisting or having effect immediately before the appointed day, shall have full force and effect against or in favour of the resulting company and may be enforced as fully and effectually as if, instead, of the dissolved company, the resulting company had been a party thereto.
7. *Saving of legal proceedings.*—
- (i) All suits, prosecutions, appeals and other legal proceedings instituted by or against the dissolved company and or its directors or employees, pending on the appointed day shall not abate or be discontinued, or be in any way prejudicially affected by reason of the transfer to the resulting company of the undertaking of the dissolved company or of anything contained in this Order.
 - (ii) Subject to provisions of law relating to limitation, any suit, prosecution, appeal or other legal proceedings which may be required to be filed against the dissolved company shall be filed against the resulting company.
8. *Provisions relating to Taxation.*— All taxes in respect of profits and gains (including accumulated losses and unabsorbed depreciation, statutory allowance, investment allowance or other such allowances, if any) and any other type of taxation which is the subject of the business carried on by the dissolved company before the appointed day shall be payable by the resulting company subject to such concessions and reliefs as may be allowed under the Income-tax Act, 1961 (43 of 1961) and other tax laws as a result of this amalgamation.

9. *Provisions relating to Existing Officers and other Employees of the Dissolved Company* — Every whole-time officer (including the whole-time Directors and the whole-time Company Secretary) or other employees, not being Directors who are not whole-time Directors of the dissolved company, employed immediately before the appointed day in the dissolved company, shall, as from the appointed day, become an Officer or other employee, as the case may be, of the resulting company. Such officer or other employee shall hold office or service therein and upon the same terms and conditions and with the same rights and privileges as he would have held under the dissolved company and shall continue to hold such positions until his employment in the resulting company is duly terminated by mutual consent or operation of law or on orders of the competent authority.
10. *Position of Directors.*—Every Director of the dissolved company holding office as such immediately before the appointed day shall cease to be a Director of the dissolved company on the appointed day.
11. *Membership of Provident Fund and other employee benefit schemes.*—All officers and employees of the dissolved company shall continue to be the members of such schemes relating to Provident Fund and other benefits for employees, if any, as they were in the dissolved company and the resulting company shall continue to make employers contributions in the same manner as were liable to be made by the dissolved company.
12. *Dissolution of the National Spot Exchange Limited.*—Subject to the other provisions of this Order, on the appointed day, the National Spot Exchange Limited shall stand dissolved and after such dissolution no person shall make, or pursue any claims, demands or proceedings

against the dissolved company or against a Director or an Officer thereof in his capacity as such Director or Officer, except in so far as may be necessary for enforcing the provisions of this Order and subject to the provisions of clause 7 of this Order.

13. *Registration of the Order by the Registrar of Companies.*— Upon receipt of a copy of the Notification of this Order in the Official Gazette, the Registrar of Companies, Tamil Nadu and the Registrar of Companies, Maharashtra shall register the Order under their hand forthwith, and the Registrar of Companies who held all documents registered, recorded or filed with him relating to the dissolved company on the file, in electronic records or otherwise, shall send over the same to the other Registrar, for the purpose of consolidation and maintenance of the records of the Financial Technologies (India) Limited with whom the dissolved Company stands amalgamated, in the electronic mode, or as the case may be, in the physical mode.

14. *Memorandum and Articles of Association of the Resulting Company.*—

- (i) The Memorandum and Articles of Association of the Financial Technologies (India) Limited as they stood immediately before the appointed day shall, as from the appointed day be the Memorandum and Articles of Association of the resulting company with such modifications to incorporate Clause III of the Memorandum and Articles of Association of the dissolved Company relating to objects of the dissolved company by way of addition to the Clause III of Memorandum of Association of the resulting company.
- (ii) The Memorandum and Articles of Association of the Financial Technologies (India) Limited as amended by the terms of this

Order from the appointed day, shall be the Memorandum and Articles of Association of the resulting company.



(Pritam Singh)

Additional Secretary to the Government of India.

Place: New Delhi

Date: 12.02.2016.

**GOVERNMENT OF INDIA
MINISTRY OF CORPORATE AFFAIRS**

Annexure to the National Spot Exchange Limited (Dissolved Company) and the Financial Technologies (India) Limited (Resulting Company) (Amalgamation in Public Interest) Order, 2016

Background, Reasons and dealing with the objections and suggestions of various parties

1. Background

1.1 National Spot Exchange Limited (hereinafter NSEL)

1.1.1 NSEL was incorporated as a public limited company on 18.05.2005 under the Companies Act, 1956. The Authorised Share Capital of the Company as per the last available Balance Sheet as on 31-03-2015 is Rs 60 crore, divided into 6,00,00,000 equity shares of Rs 10 each. The issued, subscribed and paid-up capital is Rs 60.00 crore, divided into 6,00,00,000 equity shares of Rs 10 each. Of these, 5,99,99,900 equity shares are held by Financial Technologies (India) Limited (hereinafter FTIL), along with its nominees, constituting 99.9998% of the paid-up capital of NSEL. Thus, NSEL is a subsidiary of FTIL.

1.1.2 The main objects of NSEL as per its Memorandum of Association, inter alia, include; to establish, operate, regulate, maintain and manage facilities enabling the Members of the Exchange, their authorized agents and constituents and other participants to transact, clear and settle trades done on the Exchange in different types of contracts in agriculture produce & various commodities, securities and other instruments in ready markets and to provide accessibility to the markets to various members of the Exchange and their agents.

1.1.3 NSEL is managed by its Board of Directors and presently, it consists of one Managing Director and eight Directors.

1.1.4 As per the last available Balance Sheet as on 31.03.15, the net worth of the company is as under:

(Fig. in Rs in crore)

Particulars	2014-15	2013-14
Share Capital (X)	60.00	45.00
Total Reserves & Surplus (Y)	(51.14)	59.63
Total (X)+(Y)=(A)	8.86	104.63
Less: Accumulated losses, deferred expenditure, etc. (B)	0	0
Net worth (A) - (B)	8.86	104.63

1.2 Financial Technologies (India) Limited (FTIL)

1.2.1 FTIL was incorporated on 24.01.1995 and was later amalgamated with "Exchange On The Net Limited" pursuant to a scheme of amalgamation approved by the Bombay High Court vide order dated 29.11.2000 and by Madras High Court vide Order dated 13.03.2001. After amalgamation, the resultant company changed its name to "Financial Technologies (India) Limited" with effect from 10.4.2001. Presently, the company's shares are listed in the National Stock Exchange of India Limited (NSE), BSE Limited (BSE), Madras Stock Exchange Limited (MSE) and Ahmedabad Stock Exchange Limited (ASE).

1.2.2 The main objects of the company, inter alia, include acting as service or facility builder, owner, transferor and provider, facility for present and future automated electronic markets in the areas of finance and technology, etc. Presently, it is said to be carrying on the business of provider of end-to-end straight through processing (STP) technology solutions for financial service industry as well as of software solutions for brokers and other market

intermediaries for use in their front offices, middle offices and back offices for the purpose of dealing in Securities/commodities/currencies through exchanges. The company is also said to be providing start-ups to various exchanges like Multi Commodity Exchange of India Limited (MCX), Indian Energy Exchange Limited (IEX), National Spot Exchange Limited (NSEL), Dubai Gold and commodity exchange (DGCX), etc. The products developed by the company are sold and applied directly to the core technologies underlying the establishment of the exchanges.

1.2.3 The company is managed by its Board of Directors and it presently, consists of one Managing Director and seven Directors.

1.2.4 As per the last available Balance Sheet as on 31.03.15, the net worth of the company is as under:

(Fig. in Rs in crore)

Particulars	2014-15	2013-14
Share Capital (X)	9.22	9.22
Total Reserves & Surpluses (Y)	2770.73	2400.29
Total (X)+(Y)=(A)	2779.94	2409.50
Less: Accumulated losses, deferred expenditure, etc. (B)	0	0
Net worth (A) - (B)	2779.94	2409.50

2. Reasons for scheme of merger

2.1 NSEL started functioning ostensibly as a 'Spot Exchange' in or about 2008. This became possible by virtue of notification No. S.O. 906(E) dated 5th June, 2007 issued by the Ministry of Consumer Affairs, Food & Public Distribution, Department of Consumer Affairs (DCA) in exercise of powers conferred on it under section 27 of the Forward Contracts (Regulation) Act, 1952 (FCA). The said Notification had exempted all forward contracts of one-day duration for

the sale and purchase of commodities traded on the NSEL, from operation of the provisions of the FCA subject to the following conditions, namely:

- (i) No short sale by members of the Exchange shall be allowed;
- (ii) All outstanding positions of the trade at the end of the day shall result in delivery;
- (iii) The National Spot Exchange Ltd. shall organize spot trading subject to regulation by the authorities regulating spot trade in the areas where such trading takes place;
- (iv) All information or returns relating to the trade as and when asked for shall be provided to the Central Government or its designated agency;
- (v) The Central Government reserves the right to impose additional conditions from time to time as it may deem necessary and
- (vi) In case of exigencies, the exemption will be withdrawn without assigning any reason in public interest.

2.2 NSEL was neither recognized nor registered under the provisions of the FCA and since it was granted exemption under Section 27 thereof by the DCA, it was never under the regulatory purview of FMC.

2.3 DCA had earlier issued a Notification No. 228(E) dated 06-02-2012 substituting the words 'its designated agency' in condition (iv) in the Notification of 05-06-2007, by the words 'Forward Markets Commission, Mumbai'. This enabled FMC only to call for information from NSEL as and when considered necessary.

2.4 After analyzing the trade data received from NSEL, in terms of Notification of 06-02-2012, FMC identified certain issues relating to contracts traded on NSEL and sought clarifications from the company in February, 2012. On receiving and consideration of the clarification submitted by NSEL, FMC reported to DCA on 10-04-2012 that NSEL was violating conditions of

exemption granted to them. DCA issued a Show Cause Notice to NSEL on 27th April 2012. NSEL submitted its reply to DCA in May, 2012.

2.5 DCA vide its letter dated 12th July, 2013 directed NSEL to submit an undertaking that:

- a) No further/fresh contracts shall be launched by NSEL until further instructions from concerned authority; and
- b) All the existing contracts will be settled on the due dates.

2.6 In response to the above letter, the NSEL filed its reply vide its letter dated 22nd July, 2013. This response was referred to the FMC for its comments; FMC reported to the DCA that the undertaking was not in conformity with the directives of the Government.

2.7 NSEL vide its circulars dated 16th July 2013 and 22nd July, 2013: announced the suspension of launching of any new commodity, product or new centre and reduced the settlement and delivery period of existing contracts to T+10 days ('T' means the 'Transaction Date') and made them 'trade to trade' (i.e. no netting is permitted).

2.8 On 31st July, 2013, NSEL announced that trading in all contracts (except e-series contracts) was suspended and that it had been decided to merge the delivery and settlement of all pending contracts and defer the same for a period of fifteen days. As a result of this action by NSEL, a payment crisis of approximately Rs 5600 crore arose in NSEL involving about 13,000 investors. Such dues include dues to Public Sector companies, like, Projects and Equipment Construction Limited (PEC) and Minerals and Metals Trading Corporation (MMTC).

2.9 Subsequent to the suspension of trading by NSEL on 31-07-2013, the Government vide Gazette Notification No. SO 2406(E) dated 06-08-2013 (in

partial modification of the Gazette Notification dated 05-06-2007) imposed additional conditions on NSEL which, inter alia, provided that the settlement of all outstanding one-day forward contracts at NSEL shall be done under the supervision of the FMC. In view of this fresh supervisory role, FMC has taken various steps, including the following directions to NSEL:

- (i) To submit the details of the members who owed the money and the member to whom the money was owed.
- (ii) To open an Escrow Account wherein all the pay-in received on or after 31-07-2013 from the members who owed money are being deposited and disbursement from this account to the members to whom money was owed is being done with the approval of FMC.
- (iii) To declare members who owed the money as 'defaulters' as per the rules & byelaws of the Exchange. Accordingly, NSEL vide its circulars dated 22-08-2013, 28-08-2013 and 22-10-2013 announced that 22 members who owed the money (out of 24 such members) are declared 'defaulters' as per the rules of the Exchange for not making any payment of their dues.
- (iv) To engage an independent agency to physically inspect the commodities in its warehouses. NSEL appointed SGS Limited for this purpose.
- (v) FMC has instructed NSEL to initiate recovery proceedings and take all other actions against the defaulting members as per their bye-laws.

2.10 In November 2013, FMC constituted a Monitoring cum Auction Committee (MAC) comprising of representatives of members and Investor bodies to assist and advice FMC in carrying out its supervisory work. The Committee was discontinued on 04-09-2014.

2.11 On December 17, 2013, FMC passed an Order declaring FTIL, Sh. Jignesh Shah, Sh. Joseph Massey and Sh. Shreekant Javalgekar as not 'fit and proper' to be shareholder/ Director in the management and the Board of any Exchange, recognized or registered by the Government of India/ FMC, under the Forward Contracts (Regulation) Act, 1952. The following points emerging from the Order of FMC, are worth mentioning;

- (i) The violation of conditions prescribed in the exemption notification; trading in paired contracts to generate assured financial returns under the garb of commodity trading; admission of members who were thinly capitalized having poor net worth and giving margin exemption to those who were repeatedly defaulting in settling their dues; poor warehousing facilities with no or inadequate stocks; no risk management practices followed, non-provision of funds in Settlement Guarantee Fund (SGF); consciously appointing Shri Mukesh P. Shah as statutory auditors for the year 2012-13 despite the said person being a relative of Sh. Jignesh Shah (even though not in the prohibited degree of relationship under the Companies Act); and the apparent complicity of NSEL with the defaulters in defrauding the investors, etc. FMC held that these factors lead to an inescapable conclusion that a huge fraud was perpetrated by the NSEL despite having the presence of two Board members of FTIL on the Board of NSEL, one of whom was the Vice-Chairman of NSEL;
- (ii) NSEL cannot be said to be independent from the control of the holding/ parent company i.e. FTIL which holds 99.9998 % of its share capital.
- (iii) Since FTIL is effectively the only shareholder of NSEL, the constitution of the Board of Directors of NSEL is entirely under its control.

- (iv) FTIL through the Board of Directors of NSEL constituted by it possesses effective and absolute control over its subsidiary company i.e. NSEL. Such control is further amplified and accomplished by the fact that Shri Jignesh Shah, the promoter and Chairman-cum-Managing Director of FTIL, has been on the Board of NSEL and functioning as Vice-Chairman of the company since its inception. Shri Joseph Massey was a Director on the Board of NSEL, while Shri Shreekanth Javalgekar continued to be a Director of NSEL till he resigned from the post in July 2013;
- (v) It is on record that all the minutes of Board meetings of NSEL were regularly tabled at the Board meetings of FTIL. Crucial and sensitive matters like the observations of Internal Auditor on higher risk of credit default, insufficient stock of commodities at warehouses, mis-utilisation of margin money by NSEL, favour shown to defaulting members, etc. were all matters which were in the knowledge of the Board of Directors of NSEL, and through it in the knowledge of FTIL as well. Thus, FTIL kept itself apprised about the affairs of NSEL as it also approved/ ratified the actions of NSEL in its Board meetings on a regular basis. In other words, the Board of FTIL had full knowledge of the unsatisfactory affairs of its subsidiary and it was the duty of the Board to ensure that the corrective or penal action was initiated to set right such irregularities;
- (vi) It is undisputed that NSEL was an Exchange in which FTIL had ownership interest to the extent of 99.9998% leaving a negligible 0.0002% stake to NAFED. The Articles of Association of NSEL confers authority on its shareholders to appoint Directors. As the single largest shareholder, it is FTIL which has nominated all the directors on the NSEL board. As a wholly-owned subsidiary, NSEL is completely under the

control of FTIL, including financial control over the affairs of NSEL. FTIL, which had the responsibility of managing the affairs of NSEL, cannot claim to be unaware of the wrong-doings and fraud committed by the management of NSEL;

- (vii) FTIL cannot shy away from its role and duty as a parent company to take reasonable care and exercise prudence in management and governance of the subsidiary company;
- (viii) FTIL has not furnished any explanation as to what steps have been taken by NSEL or by FTIL itself as a parent company to honour the commitment of assuring safety and risk-free trading to the members and clients who have traded on their platform on the basis of an explicit assurance that the Exchange shall step into the shoes of counter parties should there be any default by any participant;
- (ix) FTIL has the principal business of development of software which has become the technology platform for almost the entire industry engaged in brokering in shares and securities, commodities, foreign exchange etc. Allowing trading in forward contracts on the NSEL platform in a circuitous manner which was neither recognized nor registered under FCA indicates mala fide intention on the part of the promoter of FTIL to use the trading platform of its subsidiary company for illicit gains away from the eyes of Regulator.
- (x) The facts of the case and the manner in which the business affairs of NSEL were conducted leaves no doubt that FTIL, notwithstanding its contention that it was ignorant of the affairs and conduct of NSEL, exerted a dominant influence on the management. It directed, controlled and supervised the governance of NSEL.

(xi) In the face of a fraud of such a magnitude involving settlement crises of Rs 5600 crore owed to over 13,000 investors on the trading platforms of NSEL, FTIL, cannot seek to take refuge behind the corporate veil so as to unjustifiably isolate itself from the fraudulent actions that took place at NSEL resulting in such a huge payment crisis.

2.12 FMC, therefore, inter alia, ordered that in the public interest and in the interest of the Commodities Derivatives Market which is regulated under Forward Contracts Act, holding that FTIL is not a 'fit and proper person' to continue to be a shareholder of 2% or more of the paid-up equity capital of Multi Commodity Exchange of India (MCX).

2.13 Proposal of Forward Markets Commission (FMC)

2.13.1 FMC brought to the notice of the Government that:

- i) Even after one year's incessant efforts and in spite of FMC's active role in supervising the settlement of contracts, the settlement plan could not result in making any substantial payment to the investors as the process of recovery of dues by NSEL from the defaulting members is very slow.
- ii) It is the NSEL, which has the responsibility to take all possible coercive measures as per their rules/ bye-laws and other laws of the land to ensure that the outstanding dues of all investors are settled. However, as on date, NSEL has been able to make a payment of only Rs 362.43 crore to its members as against the payment dues of approximately Rs 5689.95 crore involving around 13,000 investors. Thus, the recovery constitutes only 6.7% of the total amount due indicating a very dismal progress of recovery of dues

by NSEL.

- iii) The employee attrition in NSEL in the recent months, has been extremely high and it is learnt that the staff strength of NSEL has come down considerably, adversely affecting the recovery process. As per the information received from NSEL, the total employee count on NSEL rolls was 193 as on 31.07.2013 (when NSEL had suspended trading in one day forward contracts) which has come down to 33 on 31.7.2014. NSEL is also confronted with a number of cases against it, which are pending in the High Courts and the Special Court under the Maharashtra Protection of Investors Deposits Act (MPID) relating to its failure to make payment to the investors. The company is hardly left with any financial resources to meet even legal expenses apart from defraying staff salaries and other expenses related to the recovery process.
- iv) FMC had received feedback from the representatives of investors/ member bodies on the erstwhile Monitoring & Auction Committee, constituted by it reporting that with the loss of credibility, weak Organizational structure, depletion of man-power strength and lack of financial resources, NSEL as an organization has become very weak. As NSEL is a wholly owned subsidiary of FTIL, it is the primary responsibility of the parent company, i.e. FTIL to own complete responsibility for the affairs of its subsidiary company.

2.13.2 Thus, it would be observed from above that NSEL is not having the resources, financial or human, or the organizational capability to successfully recover the dues to the investors pending for over a year. Further, NSEL is not left with any viable, sustainable business while FTIL has the necessary resources to facilitate speedy recovery of dues.

2.13.3 In the above background, a proposal had been received from FMC vide letter dated 18-08-2014, proposing the merger of NSEL with FTIL by the Central Government under the provisions of Section 396 of the Companies Act, 1956. The proposal has been supported by the Department of Economic Affairs (DEA), Ministry of Finance. FMC has proposed the merger/ amalgamation of NSEL with FTIL in essential public interest so that the human/ financial resources of FTIL are also directed towards facilitating speedy recovery of dues from the defaulters at NSEL and the FTIL takes responsibility to resolve the payment crisis at NSEL at the earliest.

2.13.4 Further, FMC vide its letter dated 17-10-2014 has forwarded representations from various members/ investor bodies requesting for merger of NSEL with FTIL and has reiterated its recommendation submitted vide letter dated 18-08-2014. The said communication has provided additional grounds in support of the earlier recommendations, viz.:

- (i) The equity investment carries inherent investment risk. The shareholders of FTIL have enjoyed benefits like higher dividend, capital appreciation by way of rise in share prices of FTIL at the time of higher profits of the company which were derived from NSEL operations. Therefore, as shareholders, they are bound to be fully aware of the fact that if they are enjoying the benefits from the performance of the subsidiary company, i.e., NSEL, they may have to also bear the risk associated with the acts of omission and commission by the holding company.
- (ii) FTIL is conscious of its role as a parent company as by giving a loan of Rs 179.26 crore to NSEL which was distributed to the small investors of NSEL, has already owned up some responsibility for the NSEL payment crisis. However, the company cannot be allowed to

confine its responsibility and concern only for the small investors alone, it has to shoulder full responsibility for the outstanding dues at NSEL;

- (iii) A charge sheet has been filed by the Economic Offence Wing, Mumbai Police in NSEL matter against Sh. Jignesh Shah, the founder and Managing Director of FTIL. This clearly shows that Mumbai Police has already found prima facie evidence against Sh. Jignesh Shah regarding his culpability in the NSEL matter.

2.14 Consideration of the Proposal by the Central Government

- 2.14.1 While considering the above proposal, the Central Government also took into account the findings/ observations during the course of inspection under Section 209A of the Companies Act, 1956 of the Books of Account of NSEL and FTIL. The said inspections brought out non-compliances of the various provisions of the Companies Act, 1956. Further, it was observed that the management of the affairs of NSEL was being controlled and directed by FTIL and its key managerial persons (KMPs).
- 2.14.2 The Central Government also carefully considered the proposal received from FMC and DEA and was of the considered opinion that to leverage combined assets, capital and reserves for efficient administration and satisfactory settlement of rights and liabilities of stakeholders and creditors of NSEL, it would be in essential public interest to amalgamate NSEL with FTIL.
- 2.14.3 Accordingly, the Central Government had taken a view that there was a prima facie case for invoking Section 396 of the Companies Act, 1956 and had initiated this process by issuing the draft Order in terms of Section 396(4) of the Companies Act, 1956, on 21-10-2014.

3. Issue of Draft Order of Amalgamation

3.1 As per the requirement of the provisions of clause (a) to sub-section (4) of Section 396 of the Act, a copy of the proposed order dated 21.10.2014 was sent in draft by the Central Government to the two Companies namely, National Spot Exchange Limited and Financial Technologies (India) Limited calling for their objections and suggestions, if any. A copy of the said proposed order dated 21.10.2014 in draft form was also hosted on the website of the Ministry, www.mca.gov.in. A public notice was also given, calling for objections and suggestions from the stakeholders, calling their attention to the order of amalgamation in draft form available on the website of the Ministry.

4. Proceedings before the Hon'ble High Court of Bombay

4.1 Financial Technologies (India) Limited had filed a Writ Petition No. 2743 of 2014 before the Hon'ble Bombay High Court against the said Draft Order of Amalgamation wherein the Hon'ble High Court had granted a status quo vide order dated 27.11.2014. Later, the Hon'ble Court vide orders dated 04.02.2015 was pleased to vacate the status quo with directions to the Central Government to consider passing a final order after hearing contentions of the petitioners and respondents and all other interested parties and the petitioners and all other interested parties were also directed that they may file their objections within 30 days and thereafter, within four weeks, the Central Government may pass appropriate order after giving brief hearing to all interested parties. It was also directed that if an adverse order is passed, the same shall not be notified for a period of two weeks after the order is communicated to the petitioners. However, However, considering large number of representations received which had to be examined and various other factors like providing inspection of documents to FTIL/ NSEL, etc. the Ministry had to seek extension of time from the Hon'ble High Court of Bombay on four occasions and the

Hon'ble Court has lastly granted extension of time till 15-02-2016 to the Central Government/ Ministry of Corporate Affairs to take a final view on the Draft Order.

5. Assessment of compensation u/s 396(3) of the Companies Act, 1956

5.1 The competent authority in the Ministry of Corporate Affairs has passed the order to assess the compensation in compliance of the provisions of sub-section (3) of Section 396 of the Act read with Rule 12A of the Companies (Central Government's) General Rules and Forms, 1956. Such Order of the competent authority was published in the Official Gazette vide number S.O. 924(E) dated 01.04.2015.

5.2 No appeal against the Order of the competent authority issued under sub-section (3) of Section 396 and published in the Official Gazette vide S.O. 924(E) dated 01.04.2015 was filed and pending before the Company Law Board in terms of sub-section (3A) of Section 396 Act.

6. Hearing to the parties in compliance of the orders of the Hon'ble High Court of Bombay

6.1 The Central Government constituted a Committee headed by Additional Secretary and assisted by Sh. H.P. Chaturvedi, Joint Secretary and Legal Adviser, Ministry of Law to give hearing to FTIL and NSEL.

6.2 Hearing was given by the above mentioned Committee to both the Companies proposed to be amalgamated, namely, Financial Technologies (India) Limited (on 13-10-2015) and National Spot Exchange Limited (on 14-10-2015) in compliance of and in accordance with the Orders of the Hon'ble High Court of Bombay in Writ Petition No. 2743 of 2014 and the Central Government also considered their written objections and suggestions received in terms of clause (b) to sub-section (4) of Section 396 of the Act.

6.3 The Central Government received in writing and through email various objectives/ suggestions from various classes of stakeholders including the shareholders, creditors, and all other interested parties claiming that monies are recoverable from the proceedings arising out of the business of the dissolved company.

7. **Dealing with objections, suggestions and submissions of FTIL, NSEL and other parties** - The parties herein have made various objections, suggestions and submissions on the proposed amalgamation u/s 396 of the Act on the order dated 21-10-2014 in Draft form issued by the Central Government. The said objections, suggestions and submissions were made during the course of hearing and written submissions (physically and electronically) received by the Central Government on various dates. The said objections, suggestions and submissions made by each of the parties are dealt in the manner herein under:

7.1 **Overall Analysis of the nature of objections and suggestions received by the Central Government post issue of Draft Order Dated 21.10.2014:**

7.1.1 Following are the observations based on the analysis of the nature of objections and suggestions received from various categories of stakeholders numbering 50,389:

- i) The said objections were collated and tabulated by entering the data by way of tailor made computer software to understand categories of senders and the nature of objections/suggestions so received.
- ii) A total of 50,389 representations (physical papers as well as emails) were received during March, 2015 to October, 2015 in response to the public notice issued by the Ministry of Corporate Affairs. The profile of the authors of these representations, together with their dispositions in

respect of the merger proceedings, is as below, with the numbers indicated against each category:

Name	Categories of Senders			
	For	Against	Suggestions	Total Records
Shareholders FTIL	2618	45803	1	48422
Shareholders NSEL	0	0	0	0
Employee FTIL	0	1203	0	1203
Employee NSEL	0	0	0	0
Investors NSEL	479	5	0	484
Creditors FTIL	0	81	0	81
Creditors NSEL	39	1	0	40
FTIL	0	2	0	2
NSEL	0	6	0	6
Industry Chamber	0	1	0	1
Investor Forum	9	0	0	9
Others	66	69	6	141
Total Records	3211	47170	8	50389

- iii) The said representations have further been analyzed on the basis of key issues raised in the representations. Twenty five (25) such key words were identified against which number of times such key issues has been used in favour or against such key issue were identified. For example, against the key issue "Merger is in public interest", 600 are in favour and 1861 are against. In case where in one representation more than one key issue is addressed/ raised, all have been captured.
- iv) The contentions raised in the representations have been catalogued and dealt with, as follows:

S.No	Name	Keywords			Total Records
		For	Against	Suggestions	
1	Merger is required even though it adversely affects the livelihood of FTIL employees	0	1185	0	1185
2	Merger is as per the principles of natural justice	7	13	0	20
3	No reason assigned	11	68	1	80
4	Merger is justified even though there is no money trail leading to FTIL/NSEL	2	1237	0	1239
5	Merger is required as NSEL is privity of contract with the trading clients	2	46	0	48
6	Merger is necessitated as an enforcement measure	3	6	0	9
7	Merger is required even if Draft Order is based on a prima facie view of MCA / FMC	4	1189	0	1193
8	Merger is justified even if emphasis is on recovery of money from defaulters	5	1245	0	1250
9	Merger is justified even if Brokers are liable to pay, not NSEL	0	8	0	8
10	Merger is justified as there is professional misconduct by auditors of NSEL	4	1	0	5
11	Merger is justified as NSEL has offer counter party guarantee	15	1	1	17
12	Merger is required as investors lack resources for persistent litigations unlike FTIL	2	0	0	2
13	Merger is justified as the companies abused legal provisions	267	4	1	272

7.1.2 The above tabulation is analyzed and observations are as under:

14	Merger is required to build confidence in the system	317	15	0	332
15	Merger will give justice to creditors	40	88	1	129
16	Merger is required as recovery of dues from defaulters is slow	80	4	1	85
17	Merger is in the interest of shareholders of FTIL	2222	45255	0	47477
18	Merger is as per the limited liability concept and as per separate legal entity concept	21	46676	0	46697
19	Merger is constitutional	3	44	0	47
20	Merger is in public interest	600	1861	4	2465
21	Merger will give justice to invertors	546	39	1	586
22	Merger is desired even though adversely affect the networth of FTIL	0	224	0	224
23	Merger is relevant even if matter regarding liability of NSEL is subjudice	21	45046	0	45067
24	Case Pending Adjudication	24	46748	0	46772
25	Merger is necessary to punish the Companies for fraud	466	11	1	478

- (i) At the outset, it is observed that over 96% of the objections are from the shareholders of FTIL. (48422 out of the total 50389 records). It is reiterated that the language and manner of emails and representations purportedly from the shareholders are almost ditto and from the same email id and seemingly created by FTIL (shareholder@ftindia.com). The emails were sent in bulk and thus the email box was dumped resulting into bouncing back of a few emails. Later, the physical copies were

received and considered. Prima- facie, these objections were orchestrated and concerted.

- (ii) Total 1203 (2.38%) objections were from the employees of FTIL. They too were repeating the same objections in similar language. *Prima facie*, these objections were orchestrated and concerted.
- (iii) There are 81 representations from the creditors of FTIL and all are opposing the scheme of amalgamation.
- (iv) 484 (479 in favor and 5 against) suggestions are from investors of NSEL, 40 (39 in favour and 1 against) are from the creditors of NSEL, 141 (66 in favour, 69 against and 6 suggestions) from others and one against from an industry chamber.
- (v) There are 9 (all in favour of amalgamation) representations from investor forums.
- (vi) Rest are from NSEL and FTIL.

7.1.3 The above analysis and the key issues have been considered while dealing with the objections and suggestions raised by each category of parties herein under:

7.2 Representations by Financial Technologies (India) Ltd. and National Spot Exchange Limited: FTIL has made its written submissions vide representations dated 04.03.2015 and additional representation dated 18.09.2015, its submissions through their counsel on 13.10.2015 and 14.10.2015 and additional written submissions dated 16-10-2015. Similarly, NSEL has made its written submissions vide representations dated 02-03-2015 and additional representation dated 18.03.2015, its submissions through their counsel on 14.10.2015 and further additional written submissions dated 16.10.2015 and an addendum dated 20-10-2015. Thereafter, NSEL has also submitted information regarding the money trail vide letter dated 23-12-2015.

The representations of FTIL and NSEL have been examined and it is observed that most of the contentions and arguments are similar to those offered/ submitted by FTIL. These contentions and position with regard thereto are summarized as under:

7.2.1 *FTIL has challenged the background and reasons for the amalgamation as the power under section 396 of the Act has been used only in cases of Government companies alone.* This argument does not derogate from the scope of the statutory provisions. The statutory provisions of section 396 of the Act are being invoked in essential public interest to safeguard the interest of all stakeholders in the captioned company. The present status and composition of the Boards of FTIL and NSEL have been noted. However, the fact that the Boards had not acted with an independent mind to collect information and to put the system under a robust technology is borne out of the simple fact that the Show Cause Notice dated 27-04-2012 issued by the Department of Consumer Affairs based on analysis of trade data by the-then Forward Market Commission had given an alarming picture of the state of affairs of NSEL. The public interest driving the merger are set out in the business realities of the case, it is noted from the facts of the case and the recommendations of FMC as well as its order dated 17-12-2013 which throw ample light to the grave shattering of the public confidence and the purpose of establishing commodity exchange has been defeated.

7.2.2 *The background and reasons for the merger as set out in the annexure to the draft Order dated 21-10-2014 are incorrect and based on misrepresentation of facts by FMC and in violation of principles of natural justice, and as the FMC actions have been challenged, no reliance can be placed on them.* This argument is reiteration of the pleadings of FTIL against the order dated 17-12-2013 by FMC declaring FTIL as not fit and proper person to continue to be a shareholder

of 2 percent or more of the paid up capital of MCX and two of its directors as not fit and proper persons to hold any position in the management and the Board of any exchange recognized or registered by the Government/ FMC under FCRA, 1952. The said order was challenged by such persons feeling aggrieved by the said order but no relief, till date, has been granted by any court. Even the SLP filed by such persons has been dismissed as withdrawn. Therefore, the said order is valid, till date. The said order speaks volume about the working of both the companies and their directors at the helm of affairs and cannot be seen as segregated from this order in the context under reference. Thus, these arguments in the instant matter cannot be considered as tenable.

7.2.3 *Since the Order dated 17-12-2013 of the-then Forward Markets Commission is valid only for three years, i.e., of temporary effect, the merger based on such an order of temporary validity, if finally ordered, would be final and irrevocable/ irreversible, i.e., of permanent effect, and such an action may not be valid or appropriate.* It is noted that FMC had passed an order dated 17-12-2013 declaring FTIL as not fit and proper person to continue to be a shareholder of 2 percent or more of the paid up capital of MCX and two of its directors as not fit and proper persons to hold any position in the management and the Board of any exchange recognized or registered by the Government/ FMC under FCRA, 1952. The said order was challenged before Hon'ble High Court, Bombay but no relief was granted. Even the SLP filed by such persons has been dismissed as withdrawn. Thus, the findings and conclusions drawn by FMC are in force. It shall be too far-fetched/ presumptive on the part of FTIL to say that they shall be in a position to embark upon the same business activities in future and place it as an argument to negate any need for the merger and thus, denying the underlying essential public interest.

7.2.4 *The forced amalgamation is proposed for the purpose of foisting the alleged*

and unproven liabilities of NSEL (arising out of the trades on the Exchange) on the FTIL, as made clear in the paragraph 7 of the draft Order dated 21.10.2014, and this purpose is illegal. The argument is not tenable. FTIL has contended that the High Court Committee has the mandate to recover the dues and settle the claims, and as such recovery of money is already expedited, and that the addition of human or financial resources of FTIL for NSEL's recovery effort is not likely to result in any added efficiency or expediency. The Central Government is only ordering merger of a wholly-owned subsidiary (NSEL) with its holding company (FTIL) and resultantly all the assets and liabilities of the dissolved company (NSEL) shall become the assets and liabilities of the resulting company (FTIL). The recoveries, if any, in full or in part, shall be that of the resulting company to meet its liabilities, if any. There are sufficient safeguards in the scheme of merger being ordered under section 396 of the Act to this effect.

7.2.5 *The FTIL has contended that the amalgamation under Section 396 of the Companies Act, 1956 has to be consensual, and in view of the opposition of an overwhelming majority of the shareholders of FTIL, the merger proceedings ought to be dropped.* The scheme of amalgamation is in essential public interest as contemplated under section 396 of the Act is a code in itself, quite distinct from the schemes of arrangements including amalgamations as provided under section 391 to 394 of the Act. In case of scheme of arrangement u/s 391-394 of the Act, wherein a company, its members or creditors willingly agree to the schemes of the arrangements by following the prescribed procedures under those sections, and thus, the mergers/ amalgamations under those sections are consensual. Whereas, the objective of amalgamation under section 396 of the Act is different, being in essential public interest and the section provides altogether different procedure for amalgamations

including the circulation of draft order, calling and consideration of suggestions and objections from the concerned companies, their creditors and shareholders. In the instant case, the prescribed procedure u/s 396 of the Act read with the additional requirements as directed by the Hon'ble High Court of Bombay has been duly followed. Thus, this argument does not hold good in the given circumstances.

7.2.6 *FTIL and NSEL have distinct and separate objects and nature of operations and completely disparate and unconnected objects, and hence there is no synergy, efficient administration, consolidation of business or coordination in policy to be gained by the forced amalgamation:* The argument runs contrary to the concept of merger which essentially means that two or more separate entities are getting merged to achieve the objectives of amalgamation. In the instant case, amalgamation is targeted to achieve its stated objects, essentially in public interest. By all intents and purposes, the way both the companies were being managed, owned and controlled, NSEL is the alter ego of FTIL and thus, the two companies have been practically one entity. All stakeholders were also looking at them as one entity. The amalgamation u/s 396 of the Act only formalizes this practical reality in essential public interest.

7.2.7 *There are no stakeholders and/or creditors, whose rights and liabilities are to be settled gainfully, as the claims of 13,000 claimants, or the so-called investors of NSEL, are sub-judice. Even the identity and number of the claimants is yet to be verified, and the matter is under the consideration of the High Court Committee. FTIL has also contended that the High Court Committee has the mandate to recover the dues and settle the claims, and as such recovery of money is already expedited, and that the addition of human or financial resources of FTIL for NSEL's recovery effort is not likely to result*

in any added efficiency or expediency: In reference to this argument, the reasoning given against para 7.1.5 above is reiterated and is not being repeated for the sake of brevity.

7.2.8 *The FTIL has questioned the jurisdiction of the Central Government to decide on the question of fraud and claimed that it has to be proved beyond reasonable doubt by adducing necessary particulars:* The Central Government is invoking section 396 of the Act in essential public interest for the merger of NSEL which is an almost wholly-owned subsidiary of FTIL. The merger is not an adjudication on the alleged fraud. The merger is targeted to achieve its stated objectives for long term sustainability in the best interest of the stakeholders.

7.2.9 *The holding company is not involved in the management and the parent company cannot be held liable for acts of the subsidiary. In any case, NSEL was a victim, and not the perpetrator, of the fraud. FTIL did not permit or authorise circuitous trading on NSEL, but that was done by the brokers. Order dated 22.08.2014 of the Hon'ble High Court granting bail to Shri Jignesh Shah dispels allegations against FTIL/NSEL:* It is reiterated that this order is not on the adjudication of alleged liabilities of any company or persons. The reasons given against paras 7.2.5 and 7.2.6 are reiterated and are not being repeated for the sake of brevity.

7.3 In addition to the common/ similar contentions, NSEL has made further submissions against the amalgamation. The position with respect to the same is as follows:

7.3.1 *NSEL was always regulated and all its contracts were legal (This is sought to be supported an affidavit of the Department of Consumer Affairs). The Show Cause Notice dated 27.04.2012 was followed only by the interim order*

dated 12.07.2013 which was in public interest but not finally adjudicated. In regard to this contention, it is observed that the portion of the affidavit relied upon only paraphrases the claims of NSEL in response to the Show Cause Notice dated 27.04.2012. The Show Cause Notice dated 27.04.2012 asked NSEL as to why the exemption given vide Notification dated 05.06.2007 should not be withdrawn. It is further observed that the final order withdrawing the exemption was issued vide Gazette Notification S.O. 2529(E) dated 19.09.2014.

7.3.2 FMC has projected a private recovery dispute as one of public interest. FMC was conferred all powers to enforce recovery by Notification dated 06.08.2013, but it did not exercise its powers to effect recoveries. The money has not been lost, but has been traced to defaulters, but the FMC, in fact, declined approval to settlement plans. The contention is not tenable as the aspects of public interest are much wider and beyond the requirement of recoveries. The FMC has done its statutory duties, and has given reasons while declining its approval to settlement plans. The refusal dated 11-04-2014 of FMC for the settlement plan has not been challenged.

7.3.3 There was a deep-rooted malice in FMC/ DEA to cause detriment to FTIL/ NSEL. FMC also changed its stand that the exemption was not to a specific section of the FCR Act, showing that its earlier stand misled the DCA. In this regard, it is noted that the DEA/FMC have done their official/statutory duties. No specific reason for personal malice of any officer has been given. As such, the contention of NSEL is not tenable.

7.3.4 The role of trading members, in manipulating the ledgers etc., and the genuineness of claimants/ claims need to be investigated. These processes have been explained in great detail by NSEL as a major consideration to claim that NSEL was a victim of fraud. In regard to this submissions made by NSEL, it is

observed that the software provided by FTIL permitted manual intervention, which allowed the manipulation. The allegations of manipulation of stock registers/ warehouse receipts are also based on the same premise. These are under the consideration of the Hon'ble High Court - appointed Committee. Further, these contentions regarding investigation into the fraud by trading members are beyond the context of the issue of amalgamation and therefore not tenable.

7.3.5 *NSEL contends that in the present scenario, as the recovery process is at an advanced stage, i.e., where NSEL has been able to secure undertakings, decrees, orders, etc. and having assisted EOW and ED to attach assets of defaulters, it may not be essential to merge.* The recovery efforts, organizational capability, human and financial resources of NSEL are admittedly dependent on *ex gratia* and without-prejudice loans, equity and payments from FTIL. The FMC's stand that NSEL, left to itself, does not have the wherewithal to deal with its responsibility has been confirmed both by FTIL and NSEL, and thus this argument does not add weight against the merger.

7.3.6 *The merger is not in the interest of NSEL as its corporate existence would come to an end. Besides, its status as an Exchange under a special statute will not be available to the merged entity and it may face difficulties in effecting recoveries.* The NSEL, in the business realities, was always seen as part of the FTIL by all stakeholders. Its status, rights and obligations under the statute (FCR Act), and its objects under the Companies Act will be bestowed on the FTIL in the final order. The apprehensions, as expressed by NSEL are therefore misplaced and not tenable.

7.4 Representations by Shareholders' Association of FTIL (SHAFT):

Representation dated 05.03.2015 was received from "Shareholders' Association of Financial Technologies (India) Ltd" (SHAFT), claiming to be a

body consisting of around 3000 members, spread all over India and including some NRIs from USA and the UAE. However, it has not been stated explicitly, as to whether each of them is a shareholder in FTIL, and if so, what is their exact shareholding. By a representation dated 12.10.2015, which again did not disclose the individual shareholding of its members but claiming to be an association of approximately 3000 members, spread all over India, but the reference to NRIs from USA and the UAE is conspicuously missing. An undated letter, purportedly written in March, 2015, requesting for a 'patient hearing', was also received enclosed to the representation dated 12.10.2015. It was requested to treat the objection as individual personal objections to the proposal of merger vide Draft Order dated 21.10.2014.

7.4.1 The objections/ suggestions are summarized as under:

- (i) *The proposed merger is fatal to the future of nearly 64,000 shareholders of FTIL, and the proposal has been characterized as 'draconian';*
- (ii) *Real public interest lies in safeguarding the interests of the shareholders of FTIL, who are genuine and bona fide investors in a visionary company, i.e., FTIL, and not with the 'traders' who were trading on the platform of NSEL's exchange, who have been called as 'bogus' traders/ investors by the Hon'ble Bombay High Court.*
- (iii) *Government cannot usurp the assets of once class of persons to benefit another class, even while the dispute(s) await(s) judicial determination; The interests of the investors of NSEL cannot be looked after by expropriating the property of the shareholders. MCA should take an objective view as to whether forcibly taking away the wealth of genuine investors (SHAFT) for compensating another set of investors whose claims are yet unproven;*
- (iv) *The NSEL having obtained several decrees, the Ministry of Corporate Affairs ought not to think of exercising its power for merger, rather the*

Government ought to "chase the defaulters through investigating agencies", thereby helping NSEL in its recovery efforts;

- (v) The judicial process should be allowed to take its course and the proposed merger proceedings ought to be dropped.*
- (vi) SHAFT has substantially reproduced the objections raised by FTIL and NSEL.*
- (vii) In addition, it is submitted by SHAFT that the interests of members (shareholders) of both companies has to be the same (as in the original company) in the resulting entity, and if not, the shareholders are entitled to be compensated, but the compensation Order dated 01.04.2015 is silent on this point;*

7.4.2 The objections and suggestions by SHAFT are dealt with as under:

- (i) At the outset, it is observed that the language and manner of emails and representations purportedly from the shareholders are almost similar and sent/ generated from the same email id (shareholder@ftindia.com) and seemingly created by FTIL. The emails were sent in bulk and thus the email box was dumped resulting into bouncing back of a few emails. Later, physical copies were also received and all these have been duly considered.*
- (ii) The objections that the amalgamation is not in essential public interest, whether liabilities of NSEL can be considered as liability of FTIL, on concept of separate legal entity, pending litigations with regard to the recovery of dues etc. have been dealt with herein above under the relevant paras while dealing with the objections and suggestions of NSEL and FTIL. The contents thereof are reiterated and are not being reproduced for the sake of brevity and is not tenable;*
- (iii) The argument that the merger shall result in deteriorating the wealth of the shareholders of FTIL to meet the liabilities of traders of NSEL or*

otherwise the liabilities of NSEL is also not tenable as firstly it is an admitted fact that the subject matter of liabilities, if any, devolving on NSEL is sub-judice and secondly NSEL is almost wholly owned subsidiary of FTIL (99.9998% shares in NSEL are held by FTIL). By no stretch of imagination, could it be argued that in absence of proposed merger the deterioration in the value of NSEL shall not affect the value of the share-holders of FTIL in the present situation wherein NSEL is badly marred, both in terms of financials and reputation. A merger shall result into making both the entities as one single entity, which practically is so the way both the Companies (FTIL and NSEL) are managed, owned and controlled.

- (iv) An order for assessment was issued by the competent authority in terms of section 396(3) of the Act which was duly notified in the Official Gazette on 01.04.2015. There is no provision in the Act to impart hearing to any parties while passing the assessment order. Any person feeling aggrieved by the said order could file an appeal before the Company Law Board as per section 396(3A) of the Act within thirty days from the publication of the said order. A copy of the order was also placed on the website of the Ministry www.mca.gov.in. As per the records maintained, no appeal has been filed before the Company Law Board. The shareholders, in their own wisdom, have chosen not to file appeal against the said order and thus, cannot agitate before the Central Government at this stage. As such, this contention is also not tenable.

7.5 Representations received from Creditors:

- 7.5.1 *A group of foreign banks (including foreign branches of PSU Banks in India) have represented to the Ministry (through their counsels M/s. Juris Corp LLP) that the merger may not be proceeded with as it might result in a requirement*

to re-assess credit worthiness of FTIL. The statutory function of the Central Government cannot adjust itself to commercial risk assessment programmes of commercial banks, even if they were public sector undertakings of the Government of India. In any case, the creditors' interest in FTIL would remain the same in the merged entity also as provided in the order, and thus, this point deserves no further consideration because the Order of Assessment of Compensation dated 01.04.2015 has already attained finality.

7.6 Investors' Groups - NSEL Investors Forum (NIF), NSEL Aggrieved and Recovery Association (NAARA) and NSEL Investors' Action Group (NIAG): These groups have also submitted several representations on various dates and the suggestions/ objections can be categorized under two heads - those with respect to trade in NSEL and the other with respect to the role of FTIL. These are summarized as under:

7.6.1 With respect to trade in NSEL:

- (i) NSEL did not carry out its operations as per the permissions/exemptions granted to it by the Government and its own bye-laws;*
- (ii) The NSEL issued a brochure inviting HNIs to invest in its Exchange, and offered/ promised returns, in the range of 14% to 16%, and the NSEL offered corporate guarantees to the investors, and that the laws were being complied with; the assurances attract the MPID Act;*
- (iii) NSEL claimed that the actual possession of the commodities will be kept in accredited warehouses under its control, the trade would be backed by commodities, and hence the money invested would be safe. However, in reality the trades were not supported by goods, and in some cases the accounts of the traders (suppliers) and the NSEL warehouses were not tallying, due to bogus entries at the NSEL exchanges, and in some cases there were false entries made in collusion with traders (suppliers); and*

- (iv) *There was no control over physical delivery or movements of commodities and the warehouse records maintained by NSEL.*

7.6.2 *With respect to role of FTIL:*

- (i) *The NSEL Board was appointed by FTIL, and the paired contracts were approved by FTIL Board, and exorbitant salaries were approved by FTIL Board for S/Shri Manjay Shah and Dewang Narella;*
- (ii) *Shri Jignesh Shah, CMD, FTIL was the nominee of FTIL on the Board of NSEL and also headed the Audit Committee, and the bogus entries have invited strictures against him, and Shri Jignesh Shah is the mastermind of the NSEL scam. The present Board, being puppets in the hands of Shri Jignesh Shah, is frustrating all genuine efforts for recovery, and in fact is persecuting Shri Ketan Shah, who is fighting for the investors' cause;*
- (iii) *From Emails from other key managerial personnel, such as S/Shri Manjay Shah, Paras Ajmera, Shreekant Javalgekar, Devendra Aggarwal and Anjani Sinha, it can be seen that Shri Jignesh Shah was kept informed of all developments in the NSEL;*
- (iv) *Some companies with which Shri Jignesh Shah had other business dealings as well as IBMA, a group company of FTIL were involved in bogus trading, and the NSEL's Settlement Guarantee Fund was exhausted in favour of such companies, a few days before the scam broke out;*
- (v) *The emails of employees of NSEL were vetted by the management, and the NSEL operated in the premises of FTIL;*
- (vi) *The FTIL extended a loan of around Rs. 120 Crores to NSEL through another group company, National Bulk Handling Corporation (NBHC) in the wake of the payment crisis, and the money received from NAFED was paid to the said NBHC, after NSEL stopped making payments;*
- (vii) *Even after stopping pay-outs, NSEL gave loans to IBMA, a FTIL-group company;*

- (viii) *The office of Shri Jignesh Shah was taking information from defaulters about the amounts due in June/ July, 2013;*
- (ix) *Many defaulters were mere shell companies and the Enforcement Directorate is pursuing them and has gone cold on FTIL/NSEL;*
- (x) *The NSEL has challenged the invocation of MPID only because the assets of Shri Jignesh Shah had also been attached;*
- (xi) *Although the Boards of NSEL and FTIL have changed, it is Shri Jignesh Shah who is still in control of affairs of NSEL;*
- (xii) *FTIL has allowed higher dividends after the draft Order dated 21.10.2014 was issued, in the wake of cases filed by the investors, and the various investments of FTIL are being sold at less than optimal value, and also through hawala and bogus shell companies. In this manner, funds of FTIL have been siphoned with the complicity of FTIL management; and;*
- (xiii) *The proceedings of the High Court Committee are clogged with several applications, to ensure that the recovery process is jeopardized;*
- (xiv) *Even after sale of assets attached by EOW Mumbai, the actual monetary realization would be severely short of the dues, and this gap has to be bridged by merging FTIL and NSEL;*
- (xv) *Several court cases are being fought by FTIL and malicious anti-investor advertisements are being issued by FTIL, and the said time and energy ought to be used for recovery of the dues;*
- (xvi) *FTIL is the alter ego of NSEL and hence NSEL should be merged with FTIL, and the FTIL Board should be superseded.*

7.6.3 While examining the objections/ submissions of the Investors' Groups it is noted that the NIAG has been allowed to intervene in the Writ Petition filed by FTIL against the draft merger order, and it has also moved an application in the proceedings for management take-over of FTIL before the CLB. It also bears mention that the NSEL has taken some criminal proceedings against Shri Ketan

Shah *inter alia* on charges of defamation. The NSEL has also written questioning the credibility of the said forums, claiming that they are not allowing NSEL to concentrate on recovery proceedings by resorting to campaigns in the social media against Shri Jignesh Shah. NSEL has asked the Ministry to intervene and restrain the said forums. It is also not out of place to mention that the FTIL has stated that the Central Government ought not to take into account any submission of any stakeholder not mentioned in the Section 396 of the Companies Act, 1956. In connection with the issue of *locus standi*, the business realities of the situation has to be seen and the matter cannot be confined to a narrow view. Also, taking into account the Order of the Hon'ble High Court of Bombay whereby the investors groups have been allowed to intervene in the Writ Petition No. 2743 of 2014 along with the objections of FTIL/ NSEL in this regard, it is considered just and proper to consider the submissions of the investors' groups, not being classified as creditors. It is however, made clear that, by considering/ scrutinizing the investors' groups, the Central Government has not conferred the status of creditors on them, a question which is sub-judice. The representations of the investors' groups, thus, stand disposed of by reiterating that the Central Government has invoked the provisions of section 396 of the Act in essential public interest.

7.7 Submissions by Industry Chambers:

7.7.1 One Industry Chamber (ASSOCHAM) has raised concerns on the lifting of corporate veil, the floodgate and the doomsday arguments. In view of the specific consideration to these arguments taken in the FTIL's response, no specific order needs to be passed on the representations of the Industry Chambers. However, the apprehensions of the chambers that such proposals may become a norm are baseless.

8. In addition, the Ministry has also considered inputs received from other

investigating agencies - who have been conducting investigation into various aspects of the alleged scam and the status of recoveries/ attachments, if any. The inputs received are as under:

8.1 Economic Offences Wing, Mumbai:

- Total amount due and recoverable from 24 defaulters is Rs 5689.95 crore;
- Injunctions against assets of defaulters worth Rs 4400.10 crore have been obtained;
- Decrees worth Rs 1233.02 crore have been obtained against 5 defaulters;
- Assets worth Rs 5444.31 crore belonging to the defaulters have been attached of which assets worth Rs 4654.62 crore have been published in Gazette under the MPID Act for liquidation under the supervision of MPID Court and balance assets worth Rs 789.69 crore have been attached/ secured for attachment by the EOW;
- Assets worth Rs 885.32 crore belonging to the directors and employees of NSEL have been attached out of which assets worth Rs 882.32 crore have already been published in Gazette under the MPID Act for liquidation under the supervision of the MPID Court and balance assets worth Rs 3 crore have been attached/ secured for attachment by the EOW;
- MPID Court has already issued notices u/s 4 & 5 of the MPID Act to the persons whose assets have been attached as above. Thus, the process of liquidation of the attached assets has started;
- Bombay High Court has appointed a 3 member committee headed by Mr. Justice (Retd.) V.C. Daga and 2 experts in finance and law to recover and monetize the assets of the defaulters.
- Rs 558.83 crore have been recovered so far, out of which Rs 379.83 crore have been received/ recovered from the defaulters and Rs 179 crore were disbursed by NSEL to small traders/ investors.

8.2 Enforcement Directorate:

- ED has traced proceeds of crime amounting to Rs 3973.83 crore to the 25 defaulters;
- ED has attached assets worth Rs 837.01 crore belonging to 12 defaulters;
- As per the recent amendment in the PMLA, the assets attached by ED can be used for restitution to the victims.

8.3 The above status indicate that the said enforcement agencies are working as per their mandate. The merger shall result into making NSEL and FTIL as one single entity wherein all the assets and liabilities of NSEL will become assets and liabilities of resulting company (FTIL). Adequate safeguards have been provided in the final order with regard to the litigations pending and devolving of liabilities and assets arising out of pending proceedings.

9. Accordingly, the Central Government issues the final order in terms of Section 396(1) of the Act.



(Pritam Singh)

Additional Secretary to Government of India
on behalf of the Central Government

Place: New Delhi
Date: 12-02-2016