



Government makes rules relating to merger or amalgamation of a foreign company with an Indian company and vice versa

Background

In a significant development, the Government has notified¹ the commencement of Section 234 of Companies Act, 2013 (the Act) as 13 April 2017. Section 234 provides for Scheme of Mergers and Amalgamations between a company registered under the Act and a foreign company and vice versa. The government, in consultation with the Reserve Bank of India (RBI) has also inserted Rule 25A² to amend the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

Key provisions of Rule 25A

- A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of RBI
- The merger/amalgamation should be compliant with the provisions of Section 230 to 232 of the Act. Section 230 to 232 provides for compromises, arrangements and amalgamations under the Companies Act, 2013, subject to obtaining the approval from National Company Law Tribunal (NCLT)

¹ Notification dated 13 April 2017 (To be published in the Gazette of India)

² Notification dated 13 April 2017 (To be published in the Gazette of India)

- A company may merge with a foreign company incorporated in any of the specified jurisdictions³
- Onus of obtaining valuation report lies on the transferee company which shall ensure the following:
 - Valuation has been conducted by the valuers who are the members of the recognized professional body in its jurisdiction and
 - Valuation is in accordance with internationally accepted principles on accounting and valuation.
- The concerned company shall attach the declaration to the above effect along with an application to RBI for obtaining its prior approval.
- The concerned company shall file an application with NCLT in accordance with the provisions of Section 230 to 232 of the Act.

³ Specified jurisdictions means jurisdictions –

- (i) whose securities market regulator is a signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding or a signatory to bilateral Memorandum of Understanding with SEBI, or
- (ii) whose central bank is a member of Bank for International Settlements (BIS), and
- (iii) a jurisdiction, which is not identified in the public statement of Financial Action Task Force (FATE) as:
 - (a) a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or
 - (b) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

The expression 'foreign company' means a company or body corporate incorporated outside India whether having a place of business in India or not.

Our comments

Under the Companies Act, 1956, cross border mergers were restricted to Indian transferee companies. With the introduction of Section 234 in the Act, the government eases the operations of a foreign company by allowing cross-border mergers both ways. This is indeed a welcome step.

Another key feature of Section 234 is that the terms and conditions of the Scheme of Merger or Amalgamation may provide for the payment of consideration to the shareholders of the merging company in cash or partly in cash or partly in depository receipts. These new provisions, therefore, provide alternative structuring mechanism to Indian companies with a global presence.



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