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# Notification of rules for amalgamations involving foreign companies

April 17, 2017

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## In brief

The Ministry of Corporate Affairs (MCA) has recently notified the much awaited provisions of section 234 of the Companies Act, 2013 (the Act) dealing with the merger or amalgamation between a company and a foreign company. The corresponding rules have also been notified in consultation with the Reserve Bank of India (RBI) for implementation of the said section *vide* notifications dated 13 April, 2017.

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## In detail

MCA has notified that section 234 of the Act should be effective from 13 April, 2017. On the same date MCA has issued the Companies (Compromise, Arrangements and Amalgamation) Amendment Rules, 2017 inserting Rule 25A and Annexure B in prescribing rules in the Companies (Compromise, Arrangements and Amalgamation) Rules, 2016 in relation to operation of section 234.

Section 234 of the Act provides for amalgamation of a foreign company incorporated in notified jurisdiction with a company incorporated under the provisions of the Act or under the provisions of the earlier Companies Act, including Companies Act, 1956(56 Act) and vice versa. It also provides that both inbound merger and outbound merger should be subject to prior approval of RBI and

application of the other provisions of Chapter XV of the Act. Section 394 of the 56 Act allowed inbound mergers only, there was no provision for outbound merger under the 56 Act.

Section 234 provides that a Scheme prepared for inbound merger/ outbound merger may *inter alia* provide for payment of cash or issue of depository receipts or both as consideration to the shareholders of the merging company.

For the purpose of section 234, "Foreign Company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

Rule 25A prescribes as follows:

a) A foreign company, incorporated in any jurisdiction outside India, may merge with a company incorporated in India ("inbound merger").

b) A company incorporated in India may merge with a foreign company incorporated in jurisdictions specified in Annexure "B" ("outbound merger").

c) Both inbound merger and outbound merger require prior approval of RBI.

d) Both inbound merger and outbound merger should comply with the provisions of section 230 to 232 of the Act.

e) Concerned companies should file application with National Company Law Tribunal (NCLT) under provisions of section 230-232 of the Act and Rule 25A for obtaining approval of the NCLT.

f) In relation to outbound merger, the transferee company should ensure that the valuation conducted by valuers (being members of a recognised

professional body in the jurisdiction of the transferee company) is in accordance with internationally acceptable principles of accounting and valuations and a declaration to that effect is filed with the RBI.

Annexure “B” specifies following jurisdictions in relation to outbound merger:

- i a jurisdiction whose securities market regulator is a signatory to the International Organisation of Securities Commission’s Multilateral Memorandum of Understanding (Appendix A) or a signatory to a bilateral MoU with Securities and Exchange Board of India; (or)
  - ii a jurisdiction whose Central Bank is a member of the Bank of International Settlements (BIS)
- And
- iii a jurisdiction, not identified in the public statement of the Financial Action Task Force

(FATF) 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 FATF to address the deficiencies.

List of jurisdictions covered under Annexure “B” indicate that outbound mergers seem to be possible with foreign companies incorporated in jurisdictions such as Mauritius, Netherlands, Singapore, Cayman Islands, Abu Dhabi, DIFC (Dubai), UAE, United Kingdom, United States etc.

### ***The takeaways***

- This paves the way for a broader Mergers & Acquisition landscape as the option of

outbound mergers are now open to companies incorporated in India.

- It may facilitate listing of Indian securities on overseas stock exchanges, and enable provision of exit mechanism to non-resident investors.
- Section 234 and Rule 25A provides for applicability of provisions of sections 230-232 of the Act to inbound merger/ outbound merger. Further clarification may be necessary in relation to applicability of those provisions to Foreign Company.
- It is pertinent to note that the Section provides only for Schemes of Amalgamation or merger with foreign companies. Thus, cross-border demerger may not be possible.

### ***Let’s talk***

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

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