RBI issues Draft Regulations in relation to Cross Border Mergers

May 02, 2017

In brief

The Reserve Bank of India (RBI) has recently issued draft regulations relating to the cross border mergers between Indian companies and foreign companies and invited comments from the public. The last date for the receipt of comments by RBI is 09 May, 2017.

The regulations are proposed to be called Foreign Exchange Management (Cross Border Merger) Regulation, 2017. These regulations propose to deal with cross border merger transactions pursuant to section 234 of the Companies Act, 2013 (the Cos Act) and the corresponding rules i.e. Companies (Compromises, Arrangements and Amalgamation) Rules 2016, as amended by Companies (Compromises, Arrangements and Amalgamation) Amendment Rules of 2017 issued on 13 April, 2017 (Co. Rules).

In detail

Background

- Rule 25A of the Co. Rules governs the merger of foreign companies with Indian companies (inbound merger) and *vice-versa* (outbound merger) and requires prior approval of the RBI for such mergers. It allows inbound merger of foreign companies incorporated in any jurisdiction; however, it allows outbound merger with foreign companies incorporated in specified jurisdictions only.
- Pursuant to the above, the RBI has now released the draft of the Foreign Exchange Management (Cross Border Merger) Regulation, 2017 (the Regulations) under the Foreign Exchange Management Act, 1999 (FEMA) to address the issues arising therefrom and to stipulate conditions for such cross border mergers. The same is open for public comments till 09 May 2017.

The Regulations

- The Regulations provide for certain definitions that, *inter alia*, include the following:
  - Çross border merger means any merger, demerger, amalgamation or arrangement between Indian companies and foreign companies in accordance with the Co. Rules;
  - Foreign company means any company/ body corporate incorporated outside India, regardless of whether it has a place of business in India. It is further explained that the foreign company should be incorporated in a jurisdiction specified in Annexure B of the Co. Rules.
  - Resultant company means an Indian company or a foreign company that is established or formed or is proposed to be established or formed on sanction of the scheme of the cross border merger;
- The Regulations prohibit acquisition/ transfer of assets/ debt/ securities outside India by persons residing in India and acquisition/ transfer of assets/ debt/ securities in India by persons residing outside India except as provided in the Regulations or with the general or special permission of RBI.

Inbound Merger**:** The following applies to cross border mergers where the resultant company is an Indian company

- Issue/ transfer of security by the resultant company to a person residing outside India shall be in accordance with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.
- Any borrowing of the foreign company from overseas sources that becomes the borrowing of the resultant company needs to conform to Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 or Foreign Exchange Management (Guarantee) Regulations, 2000, as applicable.
- The resultant company may acquire/ hold/ transfer an asset outside India that an Indian company is permitted to acquire/ hold/ transfer in accordance with the provisions of FEMA.
- Where the asset or security is not permitted to be acquired/ held by the resultant company under the FEMA provisions, the resultant company should sell such asset/ security within a period of 180 days from the date of sanction of the Scheme of the cross border merger and repatriate the sale proceeds to India immediately.

Outbound Merger: The following applies to cross border mergers where the resultant company is a foreign company

- A person residing in India may acquire or hold securities of the resultant company in accordance with Foreign Exchange Management (Transfer or issue of Foreign Security) Regulations, 2000 or the provisions of the Liberalised Remittance Scheme, as applicable.
- The resultant company shall be liable to repay outstanding borrowings or impending borrowings as per the Scheme sanctioned by the National Company Law Tribunal in terms of the Co. Rules.
- The resultant company may acquire/ hold/ transfer any asset in India that a foreign company is permitted to acquire under the provisions of FEMA and Rules/ Regulations made thereunder.
- Where the asset/ or security is not permitted to be acquired/ held by the resultant company under FEMA and Rules/ Regulations made thereunder, the resultant company shall sell such asset or security within a period of 180 days from the date of sanction of the scheme of the cross border merger and repatriate the sale proceeds outside India immediately.

- ***Valuation***: For the purpose of the cross border merger, the valuation of the Indian company and the foreign company should be on the basis of internationally accepted valuation method and should be duly certified by a Chartered Accountant/ public accountant/ merchant banker authorised to do so in either jurisdiction.
- ***Reporting:***
  - Any transaction arising due to cross border merger to be reported to RBI in the same manner as the transaction would have been otherwise reported.
  - The Indian company and the foreign company involved in the cross border merger will be required to furnish reports to RBI as may be prescribed.
- Any transactions undertaken in accordance with these Regulations shall be deemed to be approved by RBI for the purpose of Rule 25A of the Co. Rules.

The takeaways

- The Regulations laying down the framework, under FEMA, in relation to cross border merger, is a welcome step and was most necessary for such mergers.
- It appears to be difficult to meet certain conditions such as compliance with External Commercial Borrowing norms in case of foreign borrowing getting transferred in inbound mergers. Some clarity may be required on such conditions.

Let's talk

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

Our Offices

Ahmedabad

1701, 17th Floor, Shapath V,
Opp. Karnavati Club,
S G Highway,
Ahmedabad – 380051
Gujarat
+91-79 3091 7000

Bengaluru

6th Floor
Millenia Tower 'D'
1 & 2, Murphy Road, Ulsoor,
Bengaluru – 560 008
Karnataka
+91-80 4079 7000

Chennai

8th Floor
Prestige Palladium Bayan
129-140 Greams Road
Chennai – 600 006
Tamil Nadu
+91 44 4228 5000

Hyderabad

Plot no. 77/A, 8-2-624/A/1, 4th Floor, Road No. 10, Banjara Hills,
Hyderabad – 500034
Telangana
+91-40 44246000

Kolkata

56 & 57, Block DN.
Ground Floor, A- Wing
Sector - V, Salt Lake
Kolkata – 700 091
West Bengal
+91-033 2357 9101/
4400 1111

Mumbai

PwC House
Plot No. 18A,
Guru Nanak Road(Station Road),
Bandra (West), Mumbai – 400 050
Maharashtra
+91-22 6689 1000

Gurgaon

Building No. 10, Tower - C
17th & 18th Floor,
DLF Cyber City,
Gurgaon – 122002
Haryana
+91-124 330 6000

Pune

7th Floor, Tower A - Wing 1,
Business Bay, Airport Road,
Yerwada, Pune – 411 006
Maharashtra
+91-20 4100 4444

For more information

Contact us at
pwctrs.knowledgemanagement@in.pwc.com

About PwC

At PwC, our purpose is to build trust in society and solve important problems. We're a network of firms in 157 countries with more than 223,000 people who are committed to delivering quality in assurance, advisory and tax services. Find out more and tell us what matters to you by visiting us at www.pwc.com.

In India, PwC has offices in these cities: Ahmedabad, Bengaluru, Chennai, Delhi NCR (Gurgaon), Hyderabad, Kolkata, Mumbai and Pune. For more information about PwC India's service offerings, visit www.pwc.com/in

PwC refers to the PwC International network and/or one or more of its member firms, each of which is a separate, independent and distinct legal entity. Please see www.pwc.com/structure for further details.

Follow us on: