

Foreign Exchange Management (Cross Border Merger) Regulations, 2018

March 26, 2018

In brief

Section 234 of the Companies Act, 2013 (notified with effect from 13 April, 2017) provided for the cross border merger of Indian and foreign companies. Further, Companies (Compromises, Arrangements and Amalgamation) Rules, 2016, as amended by the Companies (Compromises, Arrangements and Amalgamation) Amendment Rules, 2017 (Co. Rules) were issued. Section 234 provides for prior Reserve Bank of India (RBI) approval in case of cross border merger.

On 26 April, 2017, the RBI issued draft regulations relating to cross border mergers for comments from the public.

The Foreign Exchange Management (Cross Border Merger) Regulations, 2018 have now been notified *vide* notification no. FEMA 389/ 2018-RB dated 20 March, 2018 and are effective from the date of notification.

As per the Regulations, merger transactions in compliance with these regulations shall be deemed to have been approved by RBI, and hence, no separate approval should be required. In other cases, merger transactions should require prior RBI approval.

In detail

A summary of the Regulations is given below in the context of inbound and outbound mergers.

Particulars	Inbound merger	Outbound merger
Definition	Cross border merger in which the Resultant Company is an Indian company.	Cross border merger in which the Resultant Company is a foreign company. The foreign company should be incorporated in a jurisdiction specified in Annexure B to Co. Rules.
Conditions for issue of security by the Resultant Company	<ul style="list-style-type: none">Compliance with FEMA regulations concerning inbound investments,¹ including pricing	<ul style="list-style-type: none">Compliance with FEMA regulations concerning outbound investments².

¹ Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017

² Foreign Exchange Management (Transfer or issue of any Foreign Security) Regulations, 2004

Particulars	Inbound merger	Outbound merger
	<p>guidelines, entry routes, sectoral caps, attendant conditions and reporting requirements.</p> <ul style="list-style-type: none"> • Additionally, compliance required with FEMA regulations concerning outbound investments² in the following cases: <ul style="list-style-type: none"> – Where transferor foreign company is a joint venture (JV)/ wholly owned subsidiary (WOS) of the Indian company. – Where the merger results in acquisition of step-down subsidiary (SDS) of JV/ WOS outside India. 	<ul style="list-style-type: none"> • Compliance with FEMA regulations concerning outbound investments³. • In case shareholder of transferor Indian company is a resident individual, the fair market value of foreign securities should be within the limits prescribed under the Liberalised Remittance Scheme.
Treatment of office of transferor company	<ul style="list-style-type: none"> • Any office of the transferor foreign company outside India will be deemed to be the branch/ office outside India of the resultant Indian company. • Relevant FEMA regulations to be complied with⁴ post-merger. 	<ul style="list-style-type: none"> • Any office of the transferor Indian company in India will be deemed to be the branch/ office in India of the resultant foreign company. • Relevant FEMA regulations⁵ to be complied with post-merger.
Guarantees and outstanding borrowings of transferor company	<ul style="list-style-type: none"> • Guarantees and borrowings of the transferor foreign company from overseas sources, which become guarantees and borrowings of the resultant Indian company to comply with the relevant FEMA regulations. • Timeline of two years prescribed for above compliance. No remittance for repayment can be made within these two years. • Conditions with respect to end-use would not apply. 	<ul style="list-style-type: none"> • Resultant foreign company should not acquire any liability payable to local Indian lenders, which is not in conformity with FEMA or guidelines issued thereunder - NOC to be obtained from lenders in India. • Guarantees and borrowings of the transferor Indian company to be repaid as per terms of the scheme that may be sanctioned by the National Company Law Tribunal (NCLT).
Bank account in country of transferor entity	<ul style="list-style-type: none"> • Resultant Company permitted to open a bank account in foreign currency in the overseas jurisdiction for putting through transactions incidental to the merger. • This bank account can be maintained for a maximum period of two years from the date of sanction by the NCLT. 	<ul style="list-style-type: none"> • The Resultant Company is permitted to open a Special Non-Resident Rupee Account (SNRR Account) in accordance with relevant FEMA regulations⁶. • This bank account can be maintained for a maximum period of two years from the date of sanction by the NCLT.

³ Foreign Exchange Management (Transfer or issue of any Foreign Security) Regulations, 2004

⁴ Foreign Exchange Management (Foreign Currency Account by a person resident in India) Regulations, 2015

⁵ Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016

⁶ Foreign Exchange Management (Deposit) Regulations, 2016

Particulars	Inbound merger	Outbound merger
Acquisition/ holding of any other asset of transferor entity	<ul style="list-style-type: none"> Resultant Company permitted to acquire and hold asset outside India to the extent permitted under FEMA guidelines. Asset or security not permitted to be acquired or held under FEMA guidelines should be sold within two years from the date of sanction by the NCLT. Proceeds to be repatriated to India immediately on sale <ul style="list-style-type: none"> Proceeds could be utilised for payment of an overseas liability not permitted to be held under FEMA guidelines within the two-year period. 	<ul style="list-style-type: none"> Resultant Company permitted to acquire and hold any asset in India to the extent permitted under FEMA guidelines. Asset or security not permitted to be acquired or held under FEMA guidelines should be sold within two years from the date of sanction by the NCLT. Proceeds to be repatriated outside India immediately on sale <ul style="list-style-type: none"> Proceeds could be utilised for repayment of Indian liability within the two-year period.
Other conditions	<ul style="list-style-type: none"> Valuation Valuation of the Indian company and the foreign company to be in accordance with Rule 25A of the prescribed Co. Rules, i.e., internationally accepted principles on accounting and valuation. Compensation Payment of compensation by the Resultant Company, to a holder of a security of the Indian company or the foreign company to be in accordance with the Scheme sanctioned by the NCLT. Regularisation of non-compliances Companies to ensure completing requisite regulatory actions prior to merger with respect to any non-compliance, contravention, violation under FEMA. Reporting compliances Certificate confirming compliance with above guidelines to be furnished by the managing director/ whole-time director and company secretary (if available) to be submitted to the NCLT. Other reporting guidelines to be prescribed by the RBI in consultation with the Government of India. 	
Transition cases	<ul style="list-style-type: none"> Merger cases pending before the competent authority as on 20 March, 2018 to be governed by the above guidelines. 	

Key definitions under these regulations

- “Cross border merger” means any merger, amalgamation or arrangement between an Indian company and foreign company, in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies

Act, 2013 (Under the draft regulations, the word “demerger” was part of the definition of “Cross border merger.” However, the same has been deleted in the notified regulations).

- “Foreign company” means any company or body corporate incorporated outside India whether having a place of business in India or not.

- “Indian company” means a company incorporated under the Companies Act, 2013 or under any previous company law.
- “Resultant Company” means an Indian company or a foreign company, which takes over the assets and liabilities of the companies involved in the cross border merger.

The takeaways

The notification of FEMA regulations laying down the framework in relation to cross border mergers is an extremely positive development, which should facilitate international

merger and acquisition transactions. Given that the guidelines deal with a new set of transactions, they are likely to evolve based on practical experience, as may be encountered in the due

course of time.

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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