

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 (Company Rules) were issued. Section 234 provides for prior Reserve Bank of India (RBI) approval in case of cross border merger.

Reserve Bank of India ('RBI') has issued draft guidelines on Foreign Exchange Management (Cross Border Merger) Regulations, 2017 on April 26, 2017. After receipt of comments from the various stake holders, RBI vide notification dated March 20, 2018 has notified Foreign Exchange Management ("Cross Border Merger") Regulations, 2018 ("RBI Cross Border Merger Regulations").

***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.***

'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;

'Inbound merger' means a cross border merger where the resultant company is an Indian company;

'Outbound merger' means a cross border merger where the resultant company is a foreign company;

**A summary of the Cross Border Merger Regulations is given below in the context of inbound and outbound mergers.**

Particulars	Inbound Merger	Outbound Merger
<b>Mechanics</b>	A merger or amalgamation of foreign company with an Indian company.	A merger or amalgamation of Indian company with a foreign company.
<b>Issue / Acquisition of securities pursuant to cross-border merger</b>	<p>Issuance/ transfer of security/foreign security to person resident outside India should comply with the pricing guidelines, entry routes, sectoral caps, attendant conditions and reporting requirements as laid down in Foreign Exchange Management (Transfer and issue of Security by a person Resident outside India) Regulations, 2017.</p> <p>However, if the foreign company is joint venture ("JV")/ wholly owned subsidiary ("WOS") of Indian company then conditions prescribed under Foreign</p>	A person resident in India may acquire or hold securities of the foreign Company pursuant to the outbound merger. However, the fair market value of such Securities is within the limits prescribed under the Liberalized Remittance Scheme laid down in the Act or rules or regulations framed thereunder.

Particulars	Inbound Merger	Outbound Merger
	<p>Exchange Management (Transfer or issue of any foreign security) Regulations, 2004 shall need to be complied by Indian company.</p> <p>Further, in case the merger of the JV/ WOS results into acquisition of step down subsidiary of JV/ WOS of the Indian party, then Regulation 6 and 7 of Foreign Exchange Management (Transfer or issue of any foreign security) Regulations, 2004 shall need to be complied with.</p>	
<p><b>Office outside/ in India</b></p>	<p>An office outside India of the foreign company, pursuant to the sanction of the Scheme shall be deemed to be the branch/office outside India of the resultant Indian company in accordance with Foreign Exchange Management (Foreign Currency Account by a person resident in India), Regulations, 2015. Accordingly, the resultant Indian company may undertake any transaction as permitted to a branch/ office under the aforesaid Regulations.</p>	<p>An office in India of the Indian company, pursuant to sanction of the Scheme of cross border merger, may be deemed to be a branch office in India of the foreign company in accordance with the 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. Accordingly, the foreign company may undertake any transaction as permitted to a branch office under the aforesaid Regulations.</p>
<p><b>Conditionalities on Outstanding Borrowings/- Guarantees</b></p>	<p>Any borrowing or guarantees of the foreign Company from overseas source which becomes the borrowing of the Indian company pursuant to inbound merger shall conform with the External Commercial Borrowing norms or Trade Credit norms or other foreign borrowings norms within a period of two years.</p> <p>In the initial two years, the Indian company will not be able to make remittance for repayment of the foreign liability.</p> <p>Further, end use restrictions for such borrowings shall not apply.</p>	<p>Foreign Company shall be liable to repay outstanding borrowings or guarantees as per the Scheme sanctioned by National Company Law Tribunal (“NCLT”) in terms of the Companies (Compromise, Arrangement or Amalgamation) Rules, 2016 pursuant to the outbound merger.</p> <p>However, the resultant foreign company shall not acquire liability payable to lender in India if the same is not in conformity with Foreign Exchange Management Act, 1999 (“Act”), rules or regulations framed by</p>

Particulars	Inbound Merger	Outbound Merger
		<p>the RBI.</p> <p>Further, no-objection certificate to this effect shall need to be obtained from the lenders in India of the Indian company.</p>
<p><b>Acquisition / Holding of assets or securities</b></p>	<p>An Indian company may acquire and hold any assets/securities outside India pursuant to the inbound merger, which an Indian Company is permitted to acquire under the current provisions of the Act, rules or regulations framed by the RBI.</p>	<p>Foreign Company may acquire and hold any assets/securities in India pursuant to the outbound merger which Foreign Company is permitted to acquire under the provisions of the Act, rules or regulations framed by the RBI.</p>
<p><b>Transfer of assets / securities not permitted to be acquired / held</b></p>	<p>In a situation where an Indian company is not permitted to acquire or hold any assets/securities outside India which is forming part of the foreign Company under inbound merger, in such case company shall sell assets/security within a period of two years from the date of sanction of the Scheme by NCLT and sale proceeds shall be repatriated to India immediately through banking channels;</p> <p>Any liability outside India not permitted to be held by the Indian company, the same may be extinguished from the sale proceeds of such overseas assets within a period of two years.</p>	<p>In a situation where foreign company is not permitted to acquire or hold any asset/security in India which is forming part of an Indian Company under outbound merger, such asset/security can be transferred by the foreign company within a period of two years from the date of sanction of the Scheme and sale proceeds shall be repatriated outside India immediately through banking channels;</p> <p>Repayment of Indian liabilities from sale proceeds of such asset/securities within a period of two years shall be permissible.</p>
<p><b>Bank accounts</b></p>	<p>The resultant Indian company may open a bank account overseas, in foreign currency for a maximum period of two years from the date of sanction of Scheme.</p>	<p>The resultant foreign company may open Special Non-resident Rupee (“SNRR”) account in India in accordance with Foreign Exchange Management (Deposits) Regulations, 2016 for a maximum period of two years from the date of sanction of Scheme.</p>
<p><b>Valuation of Companies involved in cross border merger</b></p>	<p>The valuation of the Indian Company and the Foreign Company for the purpose of cross border merger shall have to be in accordance with Rule 25A of the Companies (Compromises, Arrangement or Amalgamation) Rules, 2016.</p>	

Particulars	Inbound Merger	Outbound Merger
	<p>Rule 25A of the Co. Rules governs the 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.</p>	
<p><b>Miscellaneous</b></p>	<p><i>All the non-compliance, contravention, violation of the Act or the Rules or the Regulations shall need to be completed <b>prior to cross border merger.</b></i></p>	
<p><b>Reporting</b></p>	<p>The Indian Company and the foreign Company involved in the cross-border merger shall be required to furnish reports as may be prescribed by RBI, in consultation with Government of India, from time to time.</p>	
<p><b>Deemed Approval</b></p>	<p>All cross-border mergers undertaken in accordance with these regulations shall be deemed to be approved by RBI as required under Rule 25A of the Companies (Compromises, Arrangement and Amalgamations) Rules, 2016. In the event, the above guidelines are complied with, no separate approval is required in the case of cross-border mergers/demergers/arrangements, from the RBI;</p> <p>However, a certificate from Managing/ Whole Time Director and Company Secretary, if available, stating compliance with the RBI Cross Border Merger Regulations shall need to be furnished along with the application made to NCLT under Rule 25A of the Companies (Compromises, Arrangement and Amalgamations) Rules, 2016.</p>	