Annexure

Regulatory framework for Cross Border Merger:

Section 394 of the erstwhile Companies Act, 1956 permitted the merger of a foreign company with an Indian company (i.e. Inbound merger); however, there were no specific guidelines issued by the Reserve Bank of India ("**RBI**") in this regard. Further, outbound mergers (i.e. merger of Indian company with foreign company) were not permitted within purview of the statutory framework.

Recently, the Ministry of Corporate Affairs ("**MCA**") and the RBI have introduced a framework for enabling cross border mergers and amalgamations within the regulatory framework as under:

i) With effect from 13 April 2017 - Enactment of section 234 in the Companies Act, 2013 ("**Companies Act**") read with Rule 25A[1] to permit the inbound-outbound mergers;

ii) Pursuant to above, on 26 April 2017, the RBI issued draft Foreign Exchange Management (Cross border Merger) Regulations, 2017 to seek public comments. With effect from 20 March 2018, the RBI notified the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 ("**the Regulations**").

Inbound Merger provide for a deemed approval of the RBI provided the merger is in accordance with the conditions specified as under:

a. Issue or transfer of security by the resultant Indian company to a person resident outside India in accordance with pricing guidelines, entry routes, sectoral caps, reporting conditions etc. as laid down in FEMA 20 (R)[2] – Foreign Direct Investment ("**FDI**") Regulation

   - If this involves the merger of foreign Joint Venture ("**JV**") / Wholly-owned subsidiary ("**WOS**") having step-down subsidiaries ("**SDS**"), such acquisitions should be in compliance with the Outbound Regulations[3] (such as financial commitment of the Indian company to be within the overall threshold of 400% of the net- wort, SDS to be engaged in bonafide business activity, conditions, compliance with the reporting requirements under Form ODI – Part I, Part II and Part III etc.)

b. An office of the foreign company outside India, shall be deemed to be a branch / office outside India of the resultant company in accordance with the Foreign Currency Account Regulations[4].

c. Any guarantee / outstanding borrowing of the foreign company from overseas sources which become the borrowing of the Resultant Company shall conform to the External

[1] Companies (Compromises, Arrangements and Amalgamations) Rules, 2016
[2] Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 read with the Amendment Regulations, 2018
[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

Commercial Borrowing ("**ECB**") norms and other applicable norms[5] within a period of two years ("**transition period**").

- No repayment of liability shall be permissible from India within two years and no conditions with respect to end use would apply, primarily because the loan was borrowed overseas which is now being grandfathered in the hands of the Indian Company.

d. The resultant company may acquire, hold and transfer any asset outside India for which an Indian company is otherwise permitted under provisions of Foreign Exchange Management Act, 1999 ("**FEMA**").
   - Currently, the Foreign Exchange Management (Acquisition and Transfer of Immovable Property outside India) Regulations, 2015, do not expressly permit an Indian company to hold an immovable property outside India acquired on account of an inbound merger. Accordingly, in such a scenario, the resultant Indian company may have to approach the RBI to obtain a prior clarification / approval.

e. If the asset or security is not permitted to be acquired or held, the resultant company shall dispose such asset or security within two years from the date of sanction of the Scheme and repatriate sale proceeds to India through banking channels. Similarly, where any liability outside India is not permitted to be held by resultant company, the same is to be extinguished from the sale proceeds of such overseas assets within two years.
   - While the details are not gone into, however, the determination of which liabilities are permissible or not may itself be an issue.

f. The resultant company may open a bank account in foreign currency in the overseas jurisdiction for transactions incidental to the cross-border merger for a maximum period of two years from the date of sanction of the Scheme.

~~Considering the complexity of issues under the cross – border merger framework, this article primarily focusses to examine key issues arising on account of **_Inbound Merger i.e. a cross border merger where the resultant company is an Indian Company._** The issues arising on account of Outbound merger will follow as Part II in a separate article.~~

[5] Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 or Foreign Exchange Management (Borrowing or Lending in Rupees) Regulations, 2000 or Foreign Exchange Management (Guarantee) Regulations, 2000,