

Regulatory Hotline

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FAST TRACK MERGER: UNLOCKING NEW PATHWAY FOR INBOUND CROSS-BORDER MERGER

- Indian Ministry of Corporate Affairs amends cross-border merger rules to enable inbound reverse mergers to opt for fast track merger route.
- Inbound cross-border reverse merger process stands significantly simplified and expedited
- Amendment Rules recognize and promote the current trend of reverse flipping of structures.

Recently, the Central Government issued the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2024¹ (“**Amendment Rules**”) to amend Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016² (“**Merger Rules**”) in order to fast-track the inbound cross-border merger of foreign holding companies with their Indian wholly owned subsidiaries.

LEGAL FRAMEWORK PRIOR TO AMENDMENT RULES:

As a background, to simplify and speed up the merger of companies, Section 233 of the Companies Act, 2013 (“**CA 2013**”) was enacted along with Rule 25 of Merger Rules with effect from December 15, 2016, permitting fast track mergers of certain categories of companies.

Pursuant to this alternate mode, merger and amalgamation of holding company and its wholly owned subsidiary(ies); two or more small companies; two or more startup companies; and one startup and one small company is permitted subject to certain procedures and the approval of the Central Government, without the intervention and approval of National Company Law Tribunal (“**NCLT**”). Here, the powers to approve fast track merger applications has been delegated to the jurisdictional Regional Director (“**RD**”). Prior to introduction of fast-track merger, the mergers were permitted only with the approval of NCLT, and the process involved in this is relatively very cumbersome and time consuming.

Subsequently, on April 13, 2017, the Central Government took a significant step and in consultation with the Reserve Bank of India (“**RBI**”), introduced Section 234 of CA 2013 along with Rule 25A to Merger Rules, to enable cross-border mergers (i.e., merger of a foreign company with an Indian company and vice versa), subject to fulfilling all the requirements under Sections 230 to 232 of CA 2013 as well as Merger Rules and the transferor company obtaining prior approval of RBI³. In case of outbound cross-border merger, an Indian company can merge only with a foreign company incorporated in prescribed jurisdictions. Complementing this development under CA 2013, the RBI notified the Foreign Exchange Management (Cross Border Merger) Regulations, 2018⁴ on March 20, 2018 (“**Exchange Control Regulations**”) in order to facilitate and address all the exchange control related issues that may arise in cross-border mergers.

This Rule 25A was later amended on May 30, 2022, to add sub-rule (4), requiring filing of specific declaration along with the application, in case of cross-border merger/demerger/ compromise between an Indian company and a foreign company situated in a country which shares land border with India.

KEY CHANGES UNDER AMENDMENT RULES:

The Amendment Rules have further amended this Rule 25A to introduce sub-rule (5). Earlier, Rule 25A permitted inbound cross-border reverse mergers subject to NCLT’s approval under Sections 230 to 232 of CA 2013. Now, effective from September 17, 2024, this sub-rule (5) to Rule 25A has extended the scope of fast-track merger option to cover inbound cross-border merger between a holding company and its wholly owned subsidiary as well, subject to satisfying the following conditions:

- Foreign holding company (i.e., transferor company) and the Indian wholly owned subsidiary (i.e., transferee company) to obtain prior approval of RBI.
- Transferee company to meet the requirements of fast track merger prescribed under Section 233 of CA 2013.
- Transferee company to file an application seeking RD’s approval under Section 233 of CA 2013 and Rule 25 of Merger Rules; and
- Filing of specific declaration under Rule 25A (4) where the transferor company is situated in a country sharing land border with India.

OUR ANALYSIS:

The Amendment Rules culminates the best of both Section 233 and Section 234 of CA 2013, ensuring that the

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process of merging a foreign holding company with its Indian wholly owned subsidiary is streamlined while maintaining a robust compliance framework.

The amendment intends to recognize and promote the current trend of reverse flipping of structures. Reverse flipping is the process of internalising through an integration of ownership and value of an entity back into India. General motivation for this is the increased certainty of an exit at a higher valuation in India. Large companies like *PhonePe*, *Groww*, *Razorpay* and *Pepperfry* have recently internalised into India which reflects the increasing popularity of reverse flipping. Many recent *initiatives, compliance and regulatory related reforms and startups related schemes introduced by the Government, availability of greater access to capital, growing maturity of Indian markets, recent relaxation of round-tripping restrictions, coupled with these Amendment Rules are aimed to create conducive ecosystem to boost reverse flipping ideas.*

Another noteworthy point is with respect to obtaining the RBI's prior approval under Rule 25A, prior to this amendment, only the foreign company or Indian company being the transferor entity in inbound or outbound cross-border merger respectively was required to obtain it. Now this sub-rule (5) requires both transferee and transferor to obtain such approval in case of inbound cross-border reverse merger undertaken through fast track merger route. Currently, as per Regulation 9(1) of Exchange Control Regulations, where the cross-border merger is undertaken in accordance with the requirements under Exchange Control Regulations, such merger shall have deemed prior approval of RBI as required under Rule 25A of Merger Rules. There is no actual requirement of filing separate application with the RBI seeking such approval. The NCLTs have in fact sanctioned cross-merger mergers based on this deemed approval and compliance certificate issued to that effect by the managing director/whole-time director and company secretary (if available), of the concerned company(ies) as per Regulation 9(2) of Exchange Control Regulations. Now, whether this deemed approval is available for inbound cross-border reverse merger undertaken through fast-track merger route as per sub-rule (5) is the question that may arise since Exchange Control Regulations currently refers to NCLT based inbound merger only and not about fast track merger. Though one needs to wait and see if such applications will be sanctioned by the RD's based on deemed approval going forward or any corresponding amendments that may be introduced to Exchange Control Regulations by the RBI in the days to come, since the overall object of this amendment is to simplify and expedite reverse flip mergers, arguably, deemed approval provision should continue to be available for both transferee and transferor companies in a reverse flip merger under fast track merger route as well.

Authors

- [Palomita Sharma](#), [Ankit Porwal](#) and [Chandrashekar K](#)

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¹ Available at <https://www.mca.gov.in/bin/dms/getdocument?mds=qTyAFp6vBFvAlie1mgFTbg%253D%253D&type=open>

² Available at https://www.mca.gov.in/Ministry/pdf/compromisesrules2016_15122016.pdf

³ Available at <https://nishithdesai.com/generateHTML/5670/4>

⁴ Available at <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11235&Mode=0>

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