INDIA – CROSS-BORDER MERGER PROVISIONS NOTIFIED

Introduction

The erstwhile Companies Act, 1956 (the "**1956 Act**") contained provisions for the merger of a foreign company with an Indian company but not *vice versa*. The Companies Act, 2013 (the "**2013 Act**") made a significant change and introduced enabling provisions for merging an Indian company into a foreign company. The provisions relating to both inbound and outbound mergers along with the corresponding amendments to the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, have been notified on April 13, 2017.

Conditions

- An Indian company can merge with a foreign company only if the foreign company:

- is regulated by a securities market regulator who is a signatory to the International Organization of Securities Commission's Multilateral Memorandum of Understanding or has entered into a bilateral memorandum of understanding with the Securities and Exchange Board of India; or

- is in a jurisdiction where the central bank is a member of the Bank for International Settlements; and

- is in a jurisdiction which is not identified in the public statement of the Financial Action Task Force ("**FATF**") as a jurisdiction: (i) having strategic anti-money laundering or combating the financing of terrorism deficiencies to which counter measures apply; or (ii) that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies.

- The Reserve Bank of India's (the "**RBI**") approval has to be taken prior to merging an Indian company into a foreign company and *vice versa*.

- After receiving the RBI's approval, the Indian company has to obtain the approval of the jurisdictional National Company Law Tribunal ("**NCLT**").

- The payment consideration (for the merger) to the shareholders can be discharged by way of cash or issuance of depository receipts, or partly in cash and partly through depository receipts.

- The transferee company has to ensure that the valuation is conducted by a member of a recognized professional body (in the jurisdiction of the transferee company), and is in accordance with internationally accepted standards on accounting and valuation. A declaration to this effect has to be given to the RBI. Note that the 1956 Act did not mandate a disclosure of the valuation report to the shareholders, although in practice, valuation reports were generally included in the documents shared with the shareholders and also in court filings. This enabled the shareholders to understand the business rationale of the merger arrangement and make an informed decision. The 2013 Act now mandatorily requires the merger scheme to contain the valuation certificate, and the certificate or valuation report also needs to be annexed to the notice for meetings for approval of the merger

scheme. This requirement may be a challenge for internal reorganizations wherein only a nominal consideration is contemplated.

Our Comments

With businesses no longer limited by borders, permitting Indian companies to merge with foreign companies is a welcome move. However, the requirement of obtaining RBI approval for mergers of Indian companies (who can otherwise invest overseas under the RBI's automatic route) seems to be unnecessary and will add to the time required to close the deal. In addition, given that the NCLT is still new (it has been in existence since June 1, 2016) and has not been established in all Indian states as yet, its ability to deal with complex restructuring schemes in a timely manner will be tested.

Separately, Indian tax laws currently do not provide tax-neutral provisions to enable cross-border mergers and also provide no guidance on the applicability of general anti-avoidance rules, the impact of the OECD BEPS profit sharing and base erosion initiatives, transfer pricing and related issues. Additionally, the 2013 Act is silent on the issue of cross-border demergers.

Another important aspect is stamp duty because the stamp duty laws in some Indian states levy stamp duty on share issuances taking place under merger schemes approved by High Courts. The applicability of these provisions on cross-border mergers and the jurisdictional authority of the Indian state levying stamp duty is unclear, and can become a matter of debate and litigation. Notwithstanding the foregoing, while we understand that this is just a beginning, we laud the Indian government's efforts and hope to see proactive intervention by the government to clarify and address the implementation issues and challenges.