

Rule change on M&As with foreign holding co

[PT]
feedback@govint.com
NEW DELHI

The government has amended certain rules governing mergers under the companies law and amalgamations involving a foreign holding company and its wholly owned Indian subsidiary will now require prior RBI approval.

Amendments have been made to the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 by the corporate affairs ministry.

The changes are with respect to "transfer of foreign company incorporated outside India being a holding company and the transferee Indian company being a wholly-owned subsidiary company incorporated in India" entering into a merger.

In such cases, the ministry on Monday said both the companies shall obtain the prior approval of the Reserve Bank of India (RBI) and the transferee Indian company should also comply with the provisions of Section 233 under the Companies Act.

Broadly, Section 233 pertains to mergers and amalgamations of certain companies.

Sandeep Jhunjhunwala, Partner at Nangia Andersen LLP, said the trend of reverse flipping has been the norm for many new-age startups in recent times and the resilience and growth of the country's IPO market provide investors with a viable exit strategy for realizing returns.

Against this backdrop, he said the ministry has introduced the new sub-rule.

MCA gives fillip to reverse flipping, clears air on compliance framework

KR Srivats

New Delhi

The Corporate Affairs Ministry (MCA) has formally opened the doors for the “reverse flipping” of companies into India by clarifying the compliance requirements that would apply for such structures going forward.

It has now amended its Companies (Compromises, Arrangements and Amalgamations) Amendment Rules to stipulate that where a transferor foreign company incorporated outside India being a holding company enters into a merger or amalgamation with its wholly owned subsidiary company incorporated into India, certain conditions have to be met.

Both companies would have to obtain prior approval from Reserve Bank of India; the transferee company will have to comply with provisions of Section 233 of the Companies Act and an ap-

plication has to be made to the Central government under the same section.

REVERSE FLIPPING

Reverse flipping of companies refers to the process in which a company, particularly a start-up, that had earlier shifted its domicile overseas (often to countries like the US or Singapore) returns to its home country, usually to take advantage of local regulatory, tax, or investment benefits.

While still not as prominent as direct outbound flipping, reverse flipping is gaining momentum as India becomes a more attractive location for start-ups and established businesses alike.

Moin Ladha, Partner at Khaitan & Co said that the latest MCA amendment intends to clarify the compliance requirements that would apply to reverse flip structures.

“That being said a separate approval would be necessary only if the conditions for

Reverse flipping is gaining momentum as India becomes a more attractive location for start-ups and established businesses alike

deemed approval under the prescribed rules are not fulfilled. The existing FEMA cross-border regulations lay down these conditions clearly,” he added.

PRIOR APPROVAL

Regulation 9 of the FEM (cross-border regulations) 2018 states that any transaction on account of a cross-border merger undertaken in accordance with the CBM Regulations shall be deemed to have prior approval of the RBI under Rule 25A of the Companies (Compromises,

Arrangement and Amalgamations) Rules 2016.

Therefore a prior approval under the new rule i.e. Rule 25A (5) will have to be read with Regulation 9 of the CBM Regulations, and an application for prior RBI approval will only be required if the transaction does not comply with the applicable requirements, according to Ladha.

Sonam Chandwani, Partner, KS Legal said this RBI approval for cross-border mergers, particularly for companies involved in “reverse flipping,” makes a significant difference by establishing a formal mechanism to monitor and manage the inflow of foreign capital and the repatriation of businesses back to India.

“This oversight ensures that returning companies comply with India’s foreign exchange regulations, avoid potential tax evasion strategies, and align with national economic interests,” she said.

It also provides a clearer regulatory framework to prevent scenarios where capital could be drained from the country or where companies could exploit regulatory loopholes during their transition back to India, Chandwani added.

This change is a response to evolving market dynamics, ensuring that India’s interests are protected as the trend of companies returning to Indian soil accelerates, she said.

Sandeep Jhunjhunwala, Partner at Nangia Andersen LLP, said the trend of reverse flipping has been the norm for many new-age start-ups in recent times, driven by more favourable valuations in the Indian capital markets, robust Government support, simplified regulatory frameworks, and easier access to capital.

The resilience and growth of India’s IPO market provide investors with a viable exit strategy for realising returns, he added.