

Update

VINOD KOTHARI & COMPANY

Mergers and Corporate Restructuring: MCA Circular streamlines Central Government's role

Team of Vinod Kothari & company
nidhiladha@vinodkothari.com

Check at: www.india-financing.com/staffpublications.htm for more write ups.

Copyright:

This write up is the property of Vinod Kothari & Company and no part of it can be copied, reproduced or distributed in any manner.

Disclaimer:

This write up is intended to initiate academic debate on a pertinent question. It is not intended to be a professional advice and should not be relied upon for real life facts.



Update

Vide General Circular 53/2011 dated 26th July, 2011, Ministry, in supersession of all earlier guidelines, has provided the under mentioned new guidelines for RDs and ROCs to streamline the procedure to be followed for cases u/s 391-394.

On receipt of notice from the court u/s 394A regarding the scheme, the RD should make an entry in a register or in electronic form. If the petition has already been filed with ROC in Form 61 in the system, the same can be monitored directly from the system.

Activity	Deadline provided
Mail to the concerned RoC by the RD for giving his report	Within 3 days of receipt of notice from the court
Furnishing of report by RoC	within 7 days from the receipt of Form 61 without waiting for RD's intimation
Letter to company / its Advocate to provide material of valuation report, Chairman's report regarding creditors / members meeting etc by RD	Within 5 days of receipt of notice from the court
Finalization and processing of matter	Within 7 days from receipt of information from the company/advocate
Letter to local branch of Law Ministry / Assistant Solicitor General appointed for the state by Law Ministry as the case may be (furnishing copy of the notices received u/s 394A) by the RD requesting for	Within 7 days of receipt of notice from the court



Update

nomination of an advocate.	
Finalized affidavit to be sent to the designated Standing Counsel for the particular case for signature and then to Law Ministry (local branch) for identification	Within 5 days of getting required information from the company/advocate and preparation of the affidavit by the RD

Annexure I to the Circular provides the following list of issues to be examined by the RoC:

- Filing position of the applicant companies
- Pending Investor grievances, if any
- Status of Inspection/investigation/technical scrutiny, if any
- Pending prosecutions
- Comments on the scheme of amalgamation

Annexure II to the Circular provides the following list of issues to be examined by the RD:

- Ensure whether all requisite statutory procedure for supporting the scheme have been complied with
- Whether companies forming part of scheme are sensitive sectors categories companies such as, Defence Equipment Manufacturing Companies / Telecommunication / Insurance / Business / Companies / Media News / Channels / Television Broadcasting Companies / Aviation Section / Power, Energy, Natural Gas / Petroleum etc? If so, whether notices served on the concerned Regulatory Authorities / Ministry?
- Whether there is any NRI holding / foreign interest in any of the Transferor or Transferee Company?

Update

- Whether Petitioner Company and / or its director have prima facie contravened any provisions of Companies Act, 1956?
- Whether Transferor and Transferee Company are regular in filing its statutory returns?
- Reports sent by concerned Registrar of Companies should be examined.
- Investors/or other companies regarding affairs of the company should be examined.
- In case of complicated legal/technical issues, opinion of Law Ministry/ Government Advocates should also be obtained.
- Whether Transferor or Transferee Company was inspected u/s.209A of the Companies Act, 1956 by this Directorate and position of latest follow up of penal actions arising out of inspection?
- Whether Valuation Report submitted, if so, whether share exchange ratio in the scheme is as per Valuation Report and as per general accepted accounting principles?
- Whether transfer of Employees and their interest is protected?
- Whether Accounting Treatment clause is as per Accounting Standard- 14 and in tune with the provisions of sec.211 3A / 3C of the Companies Act, 1956?
- Whether meeting is conducted by the company in respect of equity shareholders/secured creditors/unsecured creditors? If not, whether any exemption is granted by the Hon'ble High Court?
- Whether details of transactions entered with related parties of directors falling u/s.295, 297 and 299 of the Act is furnished?
- Whether consideration is made in cash other than of shares?
- Whether provisions of sec.77 in respect of buy back of shares is attracted?

Update

- Whether any reduction of share capital is involved in the scheme of demerger and provisions of sec.100-104 is complied with?
- Where no such reduction of capital is involved, it is made sure that necessary adjustment is made in the books of accounts duly incorporating in the scheme?
- Whether the authorized share capital of the Transferee Company is sufficient for allotment of new shares for the shareholders of the Transferor Company?
- Whether any foreign entity is involved and if so necessary permission is obtained from Regulatory Authorities?
- Whether compliance of FEMA/RBI Guidelines has been done wherever applicable?
- Whether any qualification has been made by the Statutory Auditor, if so, whether company has complied with sec. 217(3) of the Companies Act, 1956?
- How the qualification and reservations of the Auditors are complied with by the company?
- Whether the companies have come up with schemes to circumvent the Law in the garb of obtaining approval of the Hon'ble High Court under the accepted principle of "Single Window" approval and other grounds laid down by the Courts in its rulings? If so, the Regional Director should bring out his objection in his statement/report/affidavit irrespective of the fact whether Court accepts it or not.

Additional areas to be checked by the RD if the applicant company is a listed one

- Whether any of the Transferor/ Transferee Company is listed company at any Stock Exchanges? If so, NOC from Stock Exchange is submitted?

Update

- Whether a listed company is merging with an unlisted company ? In such a case he should ensure that share of unlisted company also gets listed.
- Whether consequent to merger, the promoters holding in the listed company is substantially increased?

To see the text of the circular, click http://mca.gov.in/Ministry/pdf/Circular_53-2011_26july2011.pdf