



REPORTING UNDER FEMA NOW AT THE DISCRETION OF THE AD BANKS



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Reporting regime for inbound investments in India went through an overhaul when the Reserve Bank of India (“RBI”) vide its circular no. RBI/2017-18/194 A.P. (DIR Series) Circular No. 30 dated June 7, 2018 introduced the system of Single Master Form (“SMF”). SMF was an integration of nine (out of twelve) different types of reporting requirements prescribed under Regulation 13 of the Foreign Exchange Management (Transfer or Issue of Security by Person Resident Outside India) Regulations, 2017 (“TISPRO Regulations”).

The intention of the RBI was to streamline the process of reporting by making it uniform, expedited and transparent. However, its implementation so far has not been on par with the expectations and has been the subject matter of many uncertainties. This article attempts to highlight the practical challenges being experienced by the users of Foreign Investment Reporting and Management System (“FIRMS”) while reporting through different Authorized Dealer Banks (“AD Banks”).

Role of AD Banks

AD Banks are commercial banks, state co-operative banks and urban co-operative banks that are authorized by the RBI under Foreign Exchange Management Act, 1999 (“FEMA”) to deal in foreign exchange transactions, be it current account or capital account. RBI has delegated all the administrative, compliance and reporting formalities to the AD Banks, with the result various reports and forms prescribed by the RBI are required to be submitted by/through the AD Banks.

Reporting under FEMA

Prior to February 8, 2016, form FC-GPR, ARF and FC-TRS were required to be filed in physical form through the AD Bank. Thereafter, the process was made online through the e-Biz portal of the Government of India, under which the AD Banks were required to download the completed forms, verify the contents from the available documents, if necessary by calling for additional information from the customer and then upload the same for RBI to process and allot the requisite registration number.

Subsequently, with effect from September 1, 2018, five forms viz. FC-GPR, FC-TRS, LLPI, LLP-II and CN were made available for filing in SMF. The other three forms viz., ESOP, DI, and DRR were made available for filing in SMF with effect from October 23, 2018, while Form InVi is yet to be made available.

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Single Master Form

SMF regime was implemented in two steps, first being reporting of total existing foreign investments by all Indian investee entities on the FIRMS portal by completing the entity master form within a specified timeline. This exercise allowed the RBI to put in place an updated database of all Indian entities (i.e. Companies and LLPs) with foreign investments for monitoring of future transactions. The second step of its implementation completely replaced the old model of reporting, where the investee entities or the resident transferors/transferees, were required to do the filing on e-Biz portal, with the FIRMS portal.

The new process of reporting under TISPRO Regulations were set out by the RBI in detail in the user manuals uploaded on the FIRMS portal. The user manual states that, any reporting made under TISPRO Regulations (which have been integrated in the SMF) with the AD Bank should be verified, reviewed and acknowledged by the AD Bank, within five working days in accordance with the check-list (listing down the details that need to be verified for acknowledging the return filed) that has been provided to all the AD Banks. In case the reporting is in accordance with aforesaid check-list, the AD Bank shall approve the return else reject the same.

In this regard, it is important to note that the above said checklist of the RBI is not available in public domain. Therefore, the applicant has no choice but to believe in good faith that whatever information has been sought on the FIRMS portal is the final set of information required for the purpose of processing the SMF. While, it is logical that there may be additional information required by the AD Bank to process the application and therefore they should be entitled to request for additional information or documents. However, the user manual clarifies that that there is no provision for resending or attaching any clarification once the SMF is submitted, and the AD Bank may take due caution while approving or rejecting the same.

This has led to practice where if the AD Bank is not satisfied with information uploaded along with the SMF on the FIRMS portal, they reject the SMF in question. There have been cases, where the applicants had to experience rejection with one AD Bank due to non-submission of documents/information such as charter documents, board resolutions or NIC details, in advance (which are otherwise not a pre-requisite for such reporting), whereas another AD Bank has approved a similar SMF with same set of documents. Only difference between the two SMFs were that they were being processed by two different AD Banks, one being more conservative than the other. Consequently, such restraint attitude of the AD Banks is proving detrimental for the applicants.

Under FIRMS, the SMF can only be either accepted or rejected. SMF once rejected, is by definition, treated as if it was not filed. Therefore, in cases where such rejections are made closer to the deadline of reporting under TISPRO Regulations, it results in delayed reporting and hence subjected to compounding and penalty that may be prescribed by the RBI. During M&A transactions, which are often time sensitive, such delays do not just cost the penalty money but can sometimes also lead to contractual damages. Further, rejection of FC-TRS would delay its certification by the AD Bank which, in turn, would delay the Indian company taking on record the transfer.



Conclusion

Short point here is that under the new regime of reporting under TISPRO Regulations, it is the applicant who is ultimately bearing the brunt of the situation due to the restricted approach being taken by some of the AD Banks. Even though the intention of the AD Banks may be bona-fide, the execution is leading to adverse results for the applicant. Such cases wherein SMFs are being rejected for lack of additional documents can be avoided, if the check-list provided by the RBI to the AD Banks is made publicly accessible for ready reference. Alternatively, all the AD Banks should release their own check-list to prevent cases of delayed reporting due to lack of availability of necessary information. One other option could be that instead of rejection, a period of 2 weeks from the date of reporting should be given, to enable AD Banks to seek clarifications / documents.

The comprehensive set of instructions made available by the RBI to the AD Banks is certainly not in resonance with the practice being followed. The entire integration of the reporting system under one head was introduced for the benefit of the users. It should, therefore, be seen and ensured by the RBI that such a system is, in fact, reaping the fruits that were intended. RBI should thus, reassess what is on paper and in practice and accordingly rectify the positions with respect to the same.

CREDIT RATING AGENCIES (RECENT DEVELOPMENTS)

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Overview of Credit Rating Agencies

A credit rating agency is a company that appraises a debtor's proclivity to reimburse debt by making timely principal and interest payments and the likelihood of non-payment. These agencies assess enterprises, special purpose entities, federal or local governmental bodies, non-profit organizations and sovereign countries. Ratings accorded by these agencies determine the nature and integrals of the credit (higher the credit rating, lower is the probability of defaults). It assists investors in identifying the risk involved in lending and gives an equitable assessment of the debtor's creditability.

These agencies may gauge the creditworthiness of issuers of debt

obligations, financial instruments, the servicers of the underlying debt- exclusive of individual consumers. It is pertinent to note that credit rating agencies differ from credit bureaus. The latter is for investors to determine the risk factor of an undertaking whereas the former is for creditors to determine the creditworthiness of individuals. There are six predominant credit rating agencies in India namely, Credit Rating Information Services of India Limited ("CRISIL"), Investment Information & Credit Rating Agency of India ("ICRA"), Credit Analysis & Research Limited ("CARE"), Onida Individual Credit Rating Agency ("ONICRA"), Brickwork Ratings ("BWR") and Small & Medium Enterprises Rating Agency ("SMERA").

Regulation of Credit Rating Agencies

In 1999, the Securities and Exchange Board of India brought the rating agencies under its regulatory framework. After the 2008 economic crisis, capital markets all over the