
RBI CLARIFIES THE PROCESS FOR FILING THE MANDATORY SINGLE MASTER FORM IN RELATION TO FOREIGN INVESTMENT

1. INTRODUCTION

The Reserve Bank of India (the “**RBI**”), on September 1, 2018, released a user manual (the “**SMF Manual**”) to clearly set out the procedure for filing a single master form (the “**SMF**”), which it introduced on June 7, 2018, to integrate the existing reporting norms for foreign investment in India.¹

It should be noted in this context that ‘*foreign investment*’ is defined in the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations 2017 (the “**TISPRO Regulations**”),² as any investment made by a person resident outside India, on a repatriable basis, in the capital instruments of an Indian company or to the capital of a limited liability partnership (an “**LLP**”).

2. PROCEDURE FOR FILING

2.1. Online application portal for the entity master form

To implement the revised reporting structure, the RBI introduced an online portal called the *Foreign Investment Reporting and Management System* (“**FIRMS**”), under which every Indian entity³, with existing *direct or indirect* foreign investment, was required to provide

¹ *Foreign Investment in India - Reporting in Single Master Form* A.P (DIR Series) Circular No.30, available at https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=11297.

² This definition was incorporated in Regulation 2(xviii) of the TISPRO Regulations, which were introduced on November 7, 2017. The TISPRO Regulations are available at <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11161&Mode=0>.

³ An ‘*Indian entity*’ has been defined in Regulation 2(xxv) of the TISPRO Regulations as an Indian company (including a start-up) or an Indian LLP.

certain information⁴ to the RBI in the entity master form (the “EMF”), through the website of FIRMS.⁵

The window to enter this information in the EMF was initially from June 28, 2018 to July 20, 2018 (the “**Previous Window**”). The RBI has stated in the SMF Manual that this window will be reopened from September 1, 2018, for those Indian entities, which were unable to upload their details under the EMF within the Previous Window.

However, those entities will be required to state reasons for not registering under the EMF within the Previous Window, along with an *authority letter*, the format for which is in the SMF Manual.⁶ The SMF Manual does not provide for an end date for the new window, and it appears that the RBI will not be proposing one anytime soon.

One crucial aspect to note here is that Indian entities should enter their *entire shareholding* in the EMF, on a *fully diluted basis*,⁷ regardless of whether any foreign investments have previously been reported or not. This is because, under the SMF regime, all calculations of the paid-up capital of an Indian entity will be made on a *fully diluted basis*.⁸

2.2. Forms replaced by the SMF

The SMF Manual states that all Indian entities will be mandatorily required to file the SMF from September 1, 2018.

Under the SMF, the reporting of foreign direct investment (“**FDI**”), which was previously a two-step procedure, comprising the Advance Remittance Form (“**ARF**”) and Form FC-GPR, has now been merged into a single Form FC-GPR. Therefore, the previous requirement of an ARF has now been done away with.

⁴ For the EMF user manual, please refer to <https://m.rbi.org.in/Scripts/femaview.aspx?femaid=64>.

⁵ <https://firms.rbi.org.in/>.

⁶ For the format of the authority letter, please refer to page 7 of the SMF Manual.

⁷ Regulation 2(xvii) of the TISPRO Regulations defines the term ‘fully diluted basis’ as “the total number of shares that would be outstanding if all possible sources of conversion are exercised”.

⁸ For more information on how to input shareholding details in the SMF, please refer to pages 29 (FC-GPR); 35 (FC-TRS); 50 (LLP-I); 59 (LLP-II); and 70 (CN).

Presently, the SMF replaces the following forms:

- (a) **Form FC-GPR:** Issue of capital instruments by an Indian company to a person resident outside India;⁹
- (b) **Form FC-TRS:** Transfer of capital instruments between a person resident outside India and a person resident in India;¹⁰
- (c) **Form LLP-I:** Foreign direct investment in an LLP through capital contribution and profit shares;¹¹
- (d) **Form LLP-II:** Disinvestment or transfer of capital contribution and profit shares in an LLP;¹² and
- (e) **Form CN:** Issue or transfer of convertible notes.¹³

According to the SMF Manual, all new filings for these forms will have to be made only through the SMF, and not through any other form or platform. Therefore, with respect to the five forms set out above, FIRMS has replaced the earlier eBiz filing platform. The final formats for the remaining forms, which were to be replaced by the SMF, will be made available by the RBI at a later date. These forms are mentioned below:

- (a) **Form ESOP:** Issue of employee stock options, sweat equity shares or shares against the exercise of employee stock options by an Indian company to an employee resident outside India;
- (b) **Form DRR:** Issue or transfer of depository receipts;
- (c) **Form DI:** Reporting of downstream investment or indirect foreign investment in a company or an LLP; and

⁹ For the procedure to file Form FC-GPR, please refer to pages 11 – 30 of the SMF Manual.

¹⁰ For the procedure to file Form FC-TRS, please refer to pages 31 – 44 of the SMF Manual.

¹¹ For the procedure to file Form LLP-I, please refer to pages 44 – 51 of the SMF Manual.

¹² For the procedure to file Form LLP-II, please refer to pages 51 – 60 of the SMF Manual.

¹³ For the procedure to file Form CN, please refer to pages 61 – 70 of the SMF Manual.

- (d) **Form InVi:** Reporting of investment by a person resident outside India in an investment vehicle.¹⁴

2.3. Brief procedure for filing the SMF

Under the previous procedure for filing any form under FEMA, there were two levels of verification and scrutiny. The first was at the level of authorized dealer banks (“**AD Banks**”) and the second was at the level of the RBI.

The most crucial change brought about by the SMF is that the RBI will no longer scrutinize every FEMA filing. All SMF filings will need to be completed by Indian entities, and verified, scrutinized and acknowledged or rejected by their respective AD Banks. The RBI’s role in the entire SMF process has now been minimized.

We highlight, in brief, the procedure to file an SMF, below.

- (a) The SMF has to be filed by an applicant, who is termed a *business user* (a “**BU**”) in the SMF Manual. The BU must report the relevant transaction in the SMF through FIRMS, by using login credentials for the entity which has authorized him or her to report the relevant transaction. If a person wants to act as the BU for another entity, he or she must register himself or herself separately.
- (b) The SMF Manual also sets out the procedure for the BU to register himself or herself on FIRMS.¹⁵ At the time of registration, the BU will be required to select the Indian Financial System Code, or the IFSC code, of the bank which will be approving the eKYC.
- (c) After the BU submits the registration form, he or she must also submit an *authority letter*,¹⁶ authorizing the relevant AD Bank to conduct the eKYC. The concerned AD Bank will then verify this form, along with the authority letter.

¹⁴ An ‘*investment vehicle*’ has been defined in Regulation 2(xxix) of the TISPRO Regulations as an entity registered and regulated under the relevant regulations framed by Securities and Exchange Board of India or any other authority designated for the purpose, and includes (i) Real Estate Investment Trusts (REITs) governed by the Securities and Exchange Board of India (REITs) Regulations, 2014; (ii) Infrastructure Investment Trusts (InvIts) governed by the Securities and Exchange Board of India (InvIts) Regulations, 2014; and (iii) Alternative Investment Funds (AIFs) governed by the Securities and Exchange Board of India (AIFs) Regulations, 2012.

¹⁵ Please refer to page 4 of the SMF Manual.

¹⁶ For the format of the authority letter, please refer to page 7 of the SMF Manual.

The SMF Manual defines ‘eKYC’ as a type of verification, which every BU must complete before filing the SMF. eKYC is the sole responsibility of AD Banks. It appears that the eKYC verification is limited to verifying the registration form and authority letter to be submitted by the BU. AD Banks will have 3 working days to verify the eKYC of a BU, once the eKYC documents have been uploaded to FIRMS by the BU.

- (d) After the eKYC is completed, the SMF will be filed, through the procedure set out for each of the five forms which the SMF has replaced. As soon as the BU starts filing the SMF, a unique reference number will be generated for the filed SMF. Given that the ARF has been rendered redundant with the introduction of the SMF, no unique identification number (a “UIN”) will be generated for any FEMA filing in the SMF. Therefore, it appears that this unique reference number is intended to replace the requirement of obtaining a UIN.

It is important to note that, in all cases, the BU must enter the *common details* of the relevant Indian entity, which include the name of the entity, its corporate identification number, and details of all foreign investment, including the entry route and sectoral cap applicable to it. In addition to these common details, the BU must also enter the following information in the formats specified on FIRMS¹⁷: the shareholding pattern of the entity; declaration by the entity’s authorized representative and a certificate from the entity’s company secretary in relation to compliance with laws; and a certificate indicating the manner of arriving at the price, from a merchant banker or chartered accountant, and a chartered accountant or cost accountant or approved valuer.

- (e) AD Banks will then be required to verify the SMF filed by the relevant entity. A checklist will be provided to the concerned AD Bank, which will set out the details to be verified for acknowledging the filed SMF. If the details are in order, AD Banks will approve the form. If not, they will reject it. The SMF Manual gives AD Banks a time period of 5 working days from the entity filing the SMF, to approve or reject the form.

¹⁷ For indicative formats, please refer to pages 24, 25 and 26 of the circular titled, ‘Foreign Investment in India - Reporting in Single Master Form’, available at https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=11297. For a brief description of these documents, please refer to Paragraph 2.3 of our update titled ‘RBI Introduces a Single Master Form to Report all Foreign Investment received by Indian Entities’, available at <https://bit.ly/2wEGEXr>.

One key aspect under the SMF Manual is that it states that there is no provision for an AD Bank to resend or attach any clarification once an SMF is filed. However, the SMF Manual provides a leeway to AD Banks in very special cases where, for certain reasons, they are referring the filed SMF to the RBI. One such special case may be a delayed filing of the SMF, for which a late submission fee will be applicable. For example, if an Indian entity submits an SMF for an FC-GPR after the statutory period of 30 days from the issuance, or an SMF for an FC-TRS after 60 days from the transfer, the AD Bank, when tasked with acknowledging such an SMF, will have to refer the SMF to the RBI, stating reasons for the delayed submission.

In such cases, AD Banks need to select the regional office of the RBI on FIRMS, enter the reasons for referral, and send the request to the RBI. The RBI will then provide advice to AD Banks on whether the form needs to be approved or rejected. However, the final acknowledgement or rejection would then be made by AD Banks themselves.

This means that the workflow in relation to filing the SMF will now terminate at the AD Bank level, instead of the RBI, which was the case earlier. Therefore, once the AD Bank sends its acknowledgement to the concerned Indian entity, the SMF filing procedure is complete.

However, under the *Master Direction on Compounding of Contraventions under FEMA, 1999*,¹⁸ the power to compound delays in filing the SMF, or for any other non-compliance under the Foreign Exchange Management Act, 1999 (“FEMA”), vests with the RBI, and it appears that this power to compound delays and violations will continue to vest with the RBI.

- (f) Upon successful acknowledgement of the filed forms at the AD Bank level, the details under the EMF will be updated automatically, and will include the revised shareholding pattern of the Indian entity after it has received the foreign investment.

It may be relevant to clarify here that, only once an Indian entity has registered itself through the EMF, can it go ahead with the SMF filing. Further, it appears that once the

¹⁸ *Master Direction- Compounding of Contraventions under FEMA, 1999*, FED Master Direction No.4/2015-16, available at <https://www.rbi.org.in/SCRIPTS/NotificationUser.aspx?Id=10190&Mode=0>.

entity has registered itself through the EMF, for every subsequent reporting in the SMF, it will not be required to update its details, since the EMF will be updated automatically.

This is similar to the approach taken by the Ministry of Corporate Affairs (the “MCA”), which involves all MCA records being automatically updated when a company files an MCA form. For example, when a company changes its authorized or paid-up share capital by filing Form SH-7 or Form PAS-3 with the concerned registrar of companies, the company’s records with MCA with respect to the company’s authorized capital and paid up capital, respective, are automatically updated.

2.4. Implication of non-compliance

An entity will be considered non-compliant under FEMA, if it does not comply with the SMF filing procedure set out under the SMF Manual, or does not enter the relevant details in the EMF, or enters the details in the EMF without stating a plausible reason for the delay. In any one of these cases, the Indian entity will not be able to receive foreign investment, *including indirect foreign investment*.¹⁹

3. **INDUSLAW VIEW**²⁰

By introducing the SMF Manual in the form of a step-by-step procedure, the RBI has attempted to ensure that Indian companies receiving foreign investment are no longer in the dark about the process to be followed to file the relevant forms.

Further, since it is now clarified that an ARF will no longer be required under the SMF filing process, companies will have one less compliance to bear in mind. However, since companies have not yet filed the SMF, it is unclear whether the unique reference number allotted to a company at the beginning of the SMF filing will replace the UIN and the FC reference numbers, which were issued under the previous regime, in their entirety.

¹⁹ Section 13(1) of FEMA prescribes the penalty for the contravention of FEMA or any regulations made thereunder. If any person contravenes any provision of FEMA, or any rule, regulation, notification, direction or order issued in exercise of the powers under FEMA, or contravenes any condition subject to which an authorization is issued by the RBI, he shall, upon adjudication, be liable to a *penalty up to thrice the sum involved in such contravention where the amount is quantifiable or up to INR 200,000 (approximately USD 2,780), where the amount is not directly quantifiable, and where the contravention is a continuing one, further penalty which may extend to INR 5,000 (approximately USD 70) for every day after the first day during which the contravention continues.*

²⁰ For our detailed analysis of the EMF and SMF, please refer to Paragraph 3 of our update titled ‘RBI Introduces a Single Master Form to Report all Foreign Investment received by Indian Entities’, available at <https://bit.ly/2wEGEXr>.

It is interesting to note that once a company files the EMF and, subsequently, the SMF, the relevant details in the EMF will get updated. However, this also brings with it a greater need for companies to be extremely cautious of the details they insert into the SMF and the EMF, since it will, in all likelihood, be difficult for companies to now reach out to the RBI for clarifications or corrections.

Further, the RBI seems to have accounted for the inconvenience caused to companies in entering details in the EMF during the Previous Window, which was relatively short, and saw multiple instances of the FIRMS website crashing. Therefore, the window for the EMF has been reopened, with the RBI not prescribing any end date for now. This will undoubtedly be a respite for certain companies which had missed uploading details through the EMF within the Previous Window.

A key feature of the SMF filing procedure is the increased role that all AD Banks must play in the entire SMF process. Essentially, whatever the RBI was previously responsible for, is now the AD Banks' obligation. The RBI has gone a step further to ensure timely FEMA filings, by giving AD Banks 3 working days to complete the eKYC process, and 5 working days to acknowledge or reject an SMF.

While the intention of the RBI is clear and will be a welcome change for Indian companies, which previously had to wait for months for an acknowledgement, this strict timeline may prove to be cumbersome and harsh for some AD Banks.

Further, the RBI has not provided clarity on what will happen if an AD Bank is unable to comply with these timelines, or if it mistakenly acknowledges an incorrect form, or if the company is unable to file a fresh SMF within the statutory period after its earlier SMF has been rejected by the AD Bank.

It is also unclear whether the RBI will only entertain applications, clarification letters and referrals from AD Banks, or if it will do so from companies, as well. If companies are allowed to write to the RBI in relation to any SMF and EMF filing, the RBI should release a procedure for this, in the same way that it has for AD Banks. If companies are not allowed to do so, it will be imperative for the RBI to clarify that all communication from companies will now need to flow through AD Banks. If this is the case, companies will not be able to clarify their position to the RBI directly and the added responsibility may prove to be a burden on AD Banks.

Further, it is surprising that the RBI has not updated the *Master Direction on Reporting under Foreign Exchange Management Act, 1999* (the "**Reporting Directions**"), to reflect the revised position. Given that the EMF and SMF were introduced over two months ago, an

update of these reporting directions under FEMA is required. The TISPRO Regulations currently prescribe the requirement for a *fully diluted basis* calculation of shareholding or FDI, only for *listed* Indian companies.²¹

However, no such requirement is mentioned for *unlisted or private* entities. Given that unlisted or private Indian companies usually follow industry practice to calculate their shareholding pattern and have more flexibility in relation to issuing hybrid or convertible instruments, it may be prudent for *all* companies to now ensure that they comply with applicable sectoral caps, regardless of whether the shareholding calculation is on a *fully diluted basis* or on an *as-if converted basis*.

Since this is an entirely new procedure to file forms under FEMA, it may take a few days for companies and AD Banks to familiarize themselves with the process. Therefore, further clarifications may be required in terms of any technical issues faced by such companies and AD Banks, arising out of the SMF filing.

If FIRMS proves to be a seamless platform and is not plagued by issues such as the crashing of the website, and if AD Banks prove to be capable of adhering to RBI's strict timelines, the SMF filing has the potential to change how foreign investment is viewed by investors, companies and AD Banks. Until then, it is advisable for companies to consult with their lawyers or AD Banks for any queries in relation to the SMF, and to read the SMF manual carefully before making any filing.

For further information on the introduction of the EMF and the SMF, please refer to our update titled '*RBI Introduces a Single Master Form to Report all Foreign Investment received by Indian Entities*'.²²

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²¹ In this regard, please refer to the definition of the term 'FDI' under Regulation 2(xvii) of the TISPRO Regulations, which states that "*Foreign Direct Investment (FDI) means investment through capital instruments by a person resident outside India in an unlisted Indian company; or in 10 percent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company.*"

²² '*RBI Introduces a Single Master Form to Report all Foreign Investment received by Indian Entities*', dated June 18, 2018, available at <https://bit.ly/2wEGEXr>

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