Regulatory Hotline

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RBI UNIFORMS THE LATE SUBMISSION FEE – AN ALTERNATE TO FEMA COMPOUNDING

The Reserve Bank of India ("**RBI**") vide A.P. (DIR Series) Circular No. 16 dated September 30, 2022[1] ("**RBI Circular**") has revised the late submission fee ("**LSF**") computation matrix for reporting delays under the Foreign Exchange Management Act, 1999 ("**FEMA**"), in order to bring uniformity in imposition of LSF across functions.

BACKGROUND

Practically, the reporting documentation of Foreign Investment ("**FI**"), External Commercial Borrowing ("**ECB**") and Overseas Investment ("**OI**") transactions involves a great deal of coordination amongst the multiple parties and the Authorised Dealer Bank ("**AD Bank**"), which may sometimes result in reporting of such transactions beyond the stipulated timeframes. While such reporting delays are mere procedural lapses, prior to introduction of LSF, the party in default had no other option but to undergo a cumbersome process of compounding to regularise such delays. This was a time consuming exercise and could take up to 6 months' time to pay the penalty and obtain the order. Requiring a person to go for compounding to regularise the procedural lapses was an enormous administrative burden on the regulators. To address this, the RBI introduced LSF as an alternate mechanism. It was first introduced on November 07, 2017[2] for the reporting delays of FI and subsequently, for ECB and OI transactions w.e.f. January 16, 2019[3] and August 22, 2022 through the Foreign Exchange Management (Overseas Investment) Directions, 2022[4] ("**OI Directions**"), respectively.

LSF has been a great initiative to deal with procedural lapses in a much faster and efficient way. By easing the process for regularization, this has de-clogged the RBI compounding cell from such trivial matters and allowed the compounding authorities to focus on serious contraventions.

HOW DOES LSF WORKS?

LSF mechanism has laid down a simple process of paying a prescribed late fee to regularise reporting delays of FI, ECB and OI transactions. As a process, once the reporting of transaction (through Single Master Form (SMF) on RBI's FIRMS portal[5] for FI transactions and in physical form for ECB and OI transactions) is completed, in the event of delay in reporting, such cases shall be forwarded by AD Bank to the RBI. The RBI shall then condone the delay and issue a conditional acknowledgment subject to payment of LSF within a stipulated timeframe. LSF is levied as per the computation matrix. Final acknowledgment of reporting shall be issued only upon payment of LSF by the reporting party. The amount once paid as LSF is not refundable in any manner.

LSF payment is an additional facility for regularizing reporting delays without undergoing the compounding procedure. Hence, an option to undergo the compounding process is always available when the reporting party decides not to avail LSF facility. Importantly, the LSF applies only for the reporting delays, and contravention of any other provisions under the FEMA would still be subject to adjudication or compounding with the RBI.

NEW UNIFORMED LSF MATRIX

Prior to the RBI Circular, although LSF was applied for all the transactions, the manner of computation of LSF was not consistent across functions (i.e. FI, ECB and OI). While LSF was applied as a percentage of the amount involved for FI reporting delays, in case of ECB reporting delays, it was applied as a fixed amount which is linked to the period of delay occurred. Further, LSF which was recently applied for OI reporting delays under the OI Directions prescribed a different method of computation depending upon the nature of reporting involved.

In order to streamline and bring uniformity, the RBI Circular introduced a new uniformed LSF matrix *(as below)* ("**New LSF**") which shall apply to all the reporting delays on or after September 30, 2022, across functions.

Sr. No	Type of Reporting delays	LSF Amount (INR)
1	Form ODI Part-II/ APR, FCGPR (B), FLA Returns, Form OPI, evidence of investment or any other return which does not capture flows or any other periodical reporting	7500
2	FC-GPR, FCTRS, Form ESOP, Form LLP(I), Form LLP(II), Form CN, Form DI, Form InVi, Form ODI-Part I, Form ODI-Part III, Form FC, Form ECB, Form ECB-2, Revised Form ECB or any other return which captures flows or returns which	[7500 + (0.025% x A x n)]

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capture reporting of non-fund transactions or any other transactional reporting

Notes:

a. "n" is the number of years of delay in submission rounded-upwards to the nearest month and expressed up to 2 decimal points.

b. "A" is the amount involved in the delayed reporting.

ANALYSIS & KEY TAKEAWAYS

A) Rationalised and simplified

New LSF is more rationalized and simplified. In substance, it follows the same approach as that of LSF recently applied for OI transactions. Unlike LSF previously applied for FI and ECB reporting delays, New LSF clearly distinguishes between periodical-based and event-based filings. Broadly, the filings which do not represent any fund flows (i.e. inward or outward remittances) or periodical in nature are treated as periodical-based and those which involves fund remittances or reporting of any non-fund (particularly, in OI matters) or any specific transactions are treated as event-based filings. While periodical-based filing delays are made subject to one fixed amount, event-based filing delays shall attract a fixed cum variable amount based on '*amount involved in reporting and the period of delay'* test. Hence, longer the delay and higher the amount involved, higher the LSF in case of event-based filing delays.

B) Enhanced coverage

The coverage of New LSF has been enhanced. It is now more broad-based and futuristic to cover different types of filings which currently exists and the filings that may be introduced in future, across functions. Previous LSF structures had covered only filings required to be made under the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019[6] for FI matters and had covered form ECB & ECB 2 required to be filed under ECB Master Directions[7] for ECB matters. However, apart from inclusion of filings expressly provided, New LSF is now prepared to cover in its ambit any other additional filings currently applicable or as may be prescribed in future. Such additional filings would trigger either a fixed or fixed cum variable amount under New LSF depending upon the nature of filing i.e. periodical-based or event-based, as explained above.

C) New vs old LSF amounts

New LSF amount (i.e. INR 7,500 + [0.025% x A x n] for event-based and INR 7,500 for periodical-based filings) brings mixed implications as compared to the earlier prescribed LSF amounts.

i. The minimum LSF payable for each delayed case irrespective of the nature of reporting, amount and time delayed has been now increased to INR 7,500, which was earlier only INR 100 and INR 5,000 for FI and ECB reported delays, respectively.

ii. Talking about maximum LSF, in case of FI reporting delays, it was prescribed earlier up to 3 times the investment amount subject to capping of INR 10 million (where the amount involved is more than INR 10 million) and INR 1 million (where the amount involved is up to INR 10 million). For ECB related matters, it was capped at INR 100,000 per year. However, maximum LSF payable is now capped at 100% of the amount involved. In terms of percentage of fee on the amount involved, New LSF prescribes 0.025% as against 0.05% to 0.15% applicable earlier for FI reporting delays.

For event-based filing delays, amount payable under New LSF may either result in lower or higher as compared to earlier LSF amounts in different scenarios. For instance, if the amount involved is INR 10 million with 1 year of reporting delay, LSF earlier applicable was INR 5,000 which will now be INR 10,000. However, if the amount involved is INR 100 million with the same 1 year of delay, New LSF will be only INR 32,500, as against INR 150,000 applicable earlier. While in most cases, New LSF seems to result in a much lower penalty amount, it may be noted that after crossing certain investment / borrowing limits, it could result in higher penalty as compared to the previous LSF amounts for FI and ECB matters, as they were earlier capped at INR 10 million and INR 100,000 per year, respectively.

D) Extension of LSF facility to previous OI filings

The OI Directions have extended the LSF facility also to the reporting delays of OI transactions prior to the notification of OI Directions for a period of 3 years from the date of notification. The RBI Circular also provides for the same now. This has come as a great opportunity for the Indian entities to regularise any previous outstanding OI filings by merely paying LSF, without having to undergo the compounding process.

However, the same facility has not been extended to FI and ECB transactions. Resultantly, regularisation of any FI or ECB reporting delays occurred prior to November 07, 2017 or January 16, 2019 respectively, would still involve a cumbersome process of compounding with the RBI. Since New LSF has been applied uniformly across functions, the RBI Circular could have extended LSF facility also for FI and ECB reporting delays occurred prior to November 07, 2017 and January 16, 2019 respectively, for certain period. This could have resulted in further de-clogging of the RBI compounding cell from procedural lapses and helped the reporting parties in cleaning up all such previous outstanding lapses and become compliant with a less cumbersome process.

E) Timeframe for opting LSF facility

Historically, there was no timeframe prescribed to opt for LSF facility in case of FI and ECB transactions. The RBI for the first time prescribed '*3 years from the due date of reporting or submission'* as a maximum timeframe to opt for LSF payment facility for OI transactions pursuant to the OI Directions. Subsequently, to bring uniformity, the RBI Circular applied this condition also to FI and ECB transactions. As a result, in case of reporting delay of any nature (i.e. FI, OI or ECB), the reporting party shall now have maximum 3 years' time to opt for LSF payment facility from the due date of such reporting, beyond which, this would be subject to compounding with the RBI.

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CONCLUSION

The RBI's initiative of bringing uniformity in LSF amounts across functions is certainly a welcome move. New LSF is more rationalised now and aims to provide a good financial breather in most cases. Extension of LSF facility also to the previous outstanding OI filings is a great opportunity for the Indian entities to regularise any such long-standing lapses with a less cumbersome process. However, one should also take note of possible increase in LSF for FI and ECB after crossing certain levels. Minimum LSF has also been increased which may effectively ensure timely filing of periodical-based returns henceforth. Further, the timeframe prescribed now to opt for LSF facility expects timely actions from the reporting parties. Nevertheless, this initiative of streamlining regularisation mechanism across functions under the FEMA would definitely reduce the overall administrative burden both on the regulators and the reporting parties and thus, effectively reduces one obstacle of doing business in India.

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You can direct your queries or comments to the authors

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[1] https://m.rbi.org.in/scripts/FS_Notification.aspx?Id=12393&fn=5&Mode=0

[2] https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11161&Mode=0

[3] https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11456&Mode=0

[4] https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT110B29188F1C4624C75808B53ADE5175A88.PDF

[5] https://firms.rbi.org.in/firms/faces/pages/login.xhtml

[6] https://rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=11723

[7] https://rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=11510
