



## IMPACT OF THE NEW REPORTING REQUIREMENTS UNDER INDIA'S FOREIGN INVESTMENT REGULATIONS AND COMPANY LAW

### ***Consolidated reporting form for foreign investment transactions***

On June 7, 2018, the Reserve Bank of India (the “RBI”) released a circular (the “Circular”) changing the reporting formats in all transactions involving issuance, or transfer of shares of Indian companies to foreign investors or *vice versa*. Formerly, this was done by filing the Forms FC-GPR and FC-TRS after completion of the issuance or transfer transactions, respectively. The new form called the Single Master Form now requires the applicant to list out the amount that may have to be paid under an indemnity agreement (if invoked) and also append extracts of the agreement in case of transfer transactions. This also applies in case of an escrow or deferred consideration transaction. Clearly, this implies that the RBI is going to strictly enforce its [18/25 rule](#), and gone are the days when *carte blanche* indemnities were taken in share purchase agreements with the intention of obtaining RBI approval at the time of payout, if necessary.

Other than the foregoing, the Single Master Form requires detailed disclosures for many other matters, including, without limitation, ESOP transactions, convertible notes and downstream investments.

### ***Reporting of significant beneficial owners of a company***

Earlier this year, the Companies (Amendment) Act, 2017 (the “Amendment Act”) was passed by the Indian government to extensively amend the provisions of the Companies Act, 2013 (the “Act”).

Under the Amendment Act, a new concept of “significant beneficial owner” was introduced to report “beneficial interest” of an individual, company, partnership or a trust in the shares of a company. Any individual (acting alone or together or through one (1) or more persons or a trust, including a trust or persons resident outside India) who holds a beneficial interest in shares of not less than 25%, or has the right to exercise or actually exercises significant influence or control over the company shall be treated as “significant beneficial owner” of that company. For a company, partnership firm or a trust, the threshold has been reduced to 10%. The term “beneficial interest in shares” has been defined to mean the right to exercise any or all rights attached to shares, or right to receive or participate in any dividend or other distribution in respect of shares, whether by contract, arrangement or otherwise, directly or indirectly.

Now, the Companies (Significant Beneficial Owners) Rules, 2018 (the “Rules”) have been notified. Under the Rules, significant beneficial owners, excluding AIFs, REITs, InvITs and domestic mutual funds, will have to make a declaration under Form No. BEN-1 to the company of their beneficial interest within ninety (90) days, i.e., on or before September 12, 2018. Further, the company will have to maintain a register of significant beneficial owners and file returns with the Registrar of Companies in respect of significant beneficial owners. Furthermore, companies will now have the obligation to report significant beneficial owners to the National Company Law Tribunal if any significant beneficial owners fail to notify to the company their significant beneficial interest in the company, and the National Company Law Tribunal will have the power to restrict the rights attached to such shares.



While Indian company law has always had requirements for declaration of beneficial ownership, practically speaking, companies and shareholders were not complying with these requirements. Given that the Amendment Act prescribes stringent penalties for significant beneficial owners and companies failing to comply with the new requirements, companies and shareholders will have to ensure compliance. This may have an impact on trustee or nominee arrangements between foreign investors and Indian trustees/nominees in sectors where foreign investment is not permitted up to 100%, but investment banks or other advisors hold some of the shares *de facto* in trust for the foreign investor.

### ***Reporting of existing foreign investments***

The Circular also requires all Indian companies and limited liability partnerships (“LLPs”) with foreign direct investment or foreign portfolio investment to report details of foreign ownership to the RBI. The reporting has to be done online in the Entity Master Form prescribed under the Circular.

The reporting has to be completed between June 28, 2018 to July 12, 2018 failing which the Indian company or LLP will not be eligible to receive further foreign investment (including, indirect foreign investment) and will be considered to be in violation of India's Foreign Exchange Management Act, 1999 and its regulations.

In the Entity Master Form, basic information about the Indian entity such as the corporate identification number, permanent account number, contact details, main business activity and registration number allotted by the RBI, if any, has to be mentioned. Further, foreign portfolio investment and foreign direct investment details have to be mentioned on a fully diluted basis.

Currently, the Ministry of Corporate Affairs of the Government of India maintains an online master database of all Indian companies and LLPs (which is available to the public for free). This database gives basic information such as the share capital, registered office address, status (active or dormant), encumbrances on assets, and list of directors or designated partners along with key managerial personnel. However, the list of shareholders is not available on this database and can only be obtained from the forms filed by the Indian entity with the Registrar of Companies on paying of a fee.

The requirement of filing the Entity Master Form appears to be an attempt to create a database of Indian entities with foreign investments with a view to assess the quantum of foreign investment that India has attracted. Although most of this data is already with different arms of the Indian government, it seems that the RBI is trying to consolidate all the information with itself. It is not certain whether the database will be in the public domain. However, in our view, the time period of two (2) weeks within which the Entity Master Form is required to be filed is very short, more specifically because the default in filing results in disqualification from receiving further foreign investment. We hope that the RBI will extend this time period depending on the response to the filing, as a complete embargo on receiving foreign investment is not in the best interests of the Indian economy.