

Regulatory Hotline

November 29, 2022

ESOP REPORTING UNDER NEW OVERSEAS INVESTMENT REGIME - GRAPPLING WITH ISSUES!!

BACKGROUND

The Ministry of Finance (Department of Economic Affairs) and the Reserve Bank of India ("RBI") respectively released the Foreign Exchange Management (Overseas Investment) Rules, 2022¹ ("OI Rules") and the Foreign Exchange Management (Overseas Investment) Regulations, 2022² ("OI Regulations"). In addition to the introduction of the OI Rules and OI Regulations, the RBI has also issued the Foreign Exchange Management (Overseas Investment) Directions, 2022³ ("OI Directions") which are to be read in conjunction with OI rules and the OI Regulations. (collectively the OI Rules, OI Regulations and the OI Directions read as the "OI Framework"). For our detailed analysis of key changes under OI Framework, please visit this [Link](#).

Pursuant to the release of OI Framework, the RBI updated the Master Directions on Liberalized Remittance Scheme⁴ ("LRS") to align it with OI Framework. The LRS now categorizes (a) Overseas Direct Investments ("ODI"), and (b) Overseas Portfolio Investment ("OPI"), by an individual resident Indian as permissible capital account transactions, which are required to be carried out in accordance with OI Framework.

ACQUISITION OF SHARES UNDER EMPLOYEE STOCK OWNERSHIP PLAN ("ESOP") OR EMPLOYEE BENEFITS SCHEME ("EBS")

Pursuant to OI Framework, if a resident individual has acquired shares by way of acquisition of shares under ESOP or EBS, in each such case where the individual holds less than 10% of the equity capital of such foreign company whether listed or unlisted without control would be considered to be OPI.

OI Rules permit a resident individual to acquire, without limit, shares or interest under ESOP or EBS offered by the overseas entity subject to – (a) resident individual being an employee or a director of (i) an office in India or a branch of an overseas entity or (ii) a subsidiary in India of an overseas entity or (iii) an Indian entity in which the overseas entity has direct or indirect equity holding; and (b) issue of ESOP or EBS by the issuing overseas entity is done globally on a uniform basis. The expression '*indirect equity holding*' has been defined to mean indirect foreign equity holding through a special purpose vehicle or step-down subsidiary. Accordingly, to fulfil the criteria in *point (a)(iii)* above, the overseas entity is required to have either (i) direct equity holding in the Indian entity; or (ii) an indirect equity holding through a special purpose vehicle or subsidiary which is controlled by such overseas entity.

OI Directions have clarified that while a resident individual is permitted to acquire foreign shares or interest under ESOP or EBS without limit, the value of such shares / interest will count towards such individual's LRS limit of USD 250,000. In other words, if an individual has to remit USD 500,000 on exercise of the ESOPs or as a part of EBS in a financial year, the individual would be permitted to remit the same however, individual's LRS limit of USD 250,000 would stand fully utilized towards this and no further remittance under LRS would be allowed during the relevant financial year.

Further, the overseas entity is allowed to repurchase the shares so issued to the resident individuals in India under any ESOP or EBS, provided – (a) the shares were issued in accordance with the rules/regulations framed under FEMA, 1999, (ii) the shares are being repurchased in terms of the initial offer document, and (iii) necessary reporting is done through the Authorized Dealer bank ("AD Bank"). Here, AD Bank is the banker in India involved in processing the remittances for acquisition of shares under ESOP or EBS.

As per the Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange)

Regulations, 2015⁵ ("Repatriation Regulations"), if a resident individual acquires securities that represent less than 10% of the company's share capital under ESOP or EBS (which being a OPI), the individual will be required to repatriate into India, any proceeds of such securities within 180 days of receipt, unless such proceeds are reinvested in compliance with OI Rules within the said time period. It is the individual's responsibility to comply with this norm.

NEW ESOP / EBS REPORTING NORMS

Under the erstwhile regime, Indian company (or office / branch office) were earlier required to file a simple and prescribed statement of shares allotted or repurchased by the issuing foreign entity under ESOP at the end of each financial year. This filing requirement, however, was not applicable for 'cashless' ESOP.

Now, Form OPI⁶ is one single form introduced under OI Framework and this consolidates and facilitates reporting of different nature of OPI investments permitted under OI Framework. Where the acquisition of shares under ESOP or EBS qualifies as OPI, Form OPI needs to be filed by the employer concerned. This reporting applies also for the repurchase of shares by the overseas entity. As clarified, Indian office or branch of an overseas entity or a subsidiary

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in India of overseas entity or the Indian entity in which the overseas entity has direct or indirect equity holding where the resident individual is an employee or director, is liable to undertake Form OPI reporting. Since OI Framework do not differentiate between cashless and cash-based ESOP or EBS, the reporting exemption previously available for cashless ESOP shall no longer be available.

Form OPI is a semi-annual reporting which needs to be reported within 60 days from the end of half-year periods ending March 31st and September 30th and therefore, to be filed by May-end and by November-end of every year, respectively. Where such investment qualifies as ODI, the resident individual concerned will need to report it in Form FC.

NEW REPORTING STRUCTURE

Particularly, Section B of Form OPI deals with reporting of OPI made by resident individuals under ESOP or EBS by the Indian company (or office / branch office). Apart from all that information which were furnished under erstwhile regime, Form OPI now requires to report some additional information (collectively, “Additional Information”), a snapshot of which is given hereunder. It is pertinent to note that none of these Additional Information were required to be furnished in the erstwhile regime.

SNAPSHOT OF FORM OPI

B. OPI by resident individuals by way of ESOP/ Employee Benefits Scheme (EBS) (Please refer to Para 1 (2) (iii)(h) and para 3 of Schedule III of OI Rules) (reporting to be made by the company/ branch/ office, as the case may be

	USD	INR
i	Net Amount of ESOP/ EBS Investment held abroad (Opening Balance) at cost basis	
ii	Investments made during the Half Year (including reinvestment)	
iii	Disinvestments made during the Half Year *	
iv	Net amount of Investments held abroad (Closing Balance) (I+II-III)	
	Remittance Amount	
	Repatriation Amount	

* The disinvestment amount should correspond to the actual investment amount made and not the sale/market value on which disinvestment took place.

PRACTICAL ISSUES PERTAINING TO ADDITIONAL INFORMATION

- i. Additional Information are subject to various interpretation by the stakeholders. The rationale behind seeking these details by the regulator is not clearly known. There is neither practical guidance nor any clarifications issued as yet by the RBI.
- ii. No guidance available on how the Indian companies (or office / branch office) can gather some of this sensitive information from employees. For instance, reinvestment, disinvestment (other than in nature of repurchase) and repatriation amount are essentially the personal investment details. Due to sensitivity and confidentiality around such information, there may be reluctance or avoidance in sharing details by the employees.
- iii. In case of resident individual employees who have acquired the shares of overseas entity under ESOP or EBS resign from the Indian company (or office / branch office), obtaining certain information (like reinvestment and disinvestment) for the relevant half year may not be possible. In such cases, whether the reporting entity has an option not to furnish details of resigned employees is not clear.
- iv. Practically, it could be a great operational burden on Indian reporting entity (particularly, the entities operating with a large number of employees in India) to put in place an in-house system for collection of data from the employees on a half-yearly basis.
- v. Indian reporting entity may not be in a position to verify accuracy of certain information (like, reinvestment, disinvestment & repatriation) provided by the employees. Practically, the employees may be required to either furnish self-declaration or documentary proofs to the reporting entity and this would involve a lot of administrative efforts between the entity and its employees.
- vi. For cashless ESOP/EBS which do not involve remittance of funds from India, while Form OPI reporting would still apply, disclosure of ‘remittance amount’ becomes irrelevant. Further, how to determine and disclose investment details in terms of USD and INR in this scenario requires adequate clarity.
- vii. In case of delay or furnishing incorrect information by the employees, the reporting entity may be held liable for filing an incorrect/inaccurate information or may be exposed to the late submission fee.

CONCLUSION :

Introduction of Form OPI to facilitate consolidated reporting of all forms of OPI investment is certainly a welcoming move. However, if the rationale behind seeking aforementioned additional disclosures in said form is not clear and necessary practical guidance for completing such reporting is not provided, this can lead the concerned entities staying in a state of reporting limbo for want of guidance. Regulatory objective behind said reporting also will not be

fulfilled in spirit and may have wider ramifications. Hence, the timely guidance on this matter is most critical.

While these issues are pending redressal at RBI's level, for the half-year ended September 30, 2022, Form OPI reporting is already due by November-end. In view of this, Indian reporting entities are advised to formally approach their respective AD Bank to seek necessary clarifications. In order to ensure timely reporting, in consultation with AD Bank, the entities can file Form OPI immediately based on the extent of information available and provide a disclaimer on the limitation of information being reported.

– Chandrashekar K, Ajay Singh Solanki & Kishore Joshi

You can direct your queries or comments to the authors

¹ <https://rbidocs.rbi.org.in/rdocs/content/pdfs/GazetteRules23082022.pdf>

² <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=12380&Mode=0>

³ <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT110B29188F1C4624C75808B53ADE5175A88.PDF>

⁴ <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/03MD945692290C104C5595AEDAC89AE78788.PDF>

⁵ <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10258&Mode=0>

⁶ <https://rbidocs.rbi.org.in/rdocs/content/pdfs/13MDR291215.pdf>

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