FCRA STORM

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Standards & Norms

Resource support on NGO Governance, Accounting and Regulations

A NON TECHNICAL ANALYSIS OF FOREIGN CONTRIBUTION (REGULATION) AMENDMENT BILL, 2020



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Credibility Alliance
Improving Governance Building Trust

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INTRODUCTION

1.01 The Foreign Contribution (Regulation) Amendment Bill, 2020 was introduced in Lok Sabha on September 20, 2020. The Bill amends the Foreign Contribution (Regulation) Act, 2010. The Act regulates the acceptance and utilisation of foreign contribution received by certain 'persons' including individuals, associations, section 8 company, HUF etc. It may be noted that, FCRA 2010 regulates only certain 'persons' as defined in the Act. The primary recipient of foreign contribution in India are charitable and religious institutions and the FCR Bill, 2020 is like to create hardship and also result in an unprecedented churning of the NPO sector.

1.02 The bill has been introduced in Lok Sabha on 20th September 2020. The proposed amendment shall come into force on such date as the Central Government may, by notification in the Official Gazette, notify.

1.03 A non-technical analysis of the key changes introduced in proposed bill dated 20th September 2020 have been provided in this issue.

INTER CHARITY DONATIONS PROHIBITED FROM FC FUNDS

2.01 **Existing**: Section 7 of the FCRA 2010 states that the FC funds could be transferred or sub-granted to another organization which is registered or is having prior permission under FCRA. It is also stated that such funds could be transferred to an organization not registered under FCRA with the prior approval of the Central Government. The said application is to be filled in form FC-5 under the current regulations.

2.02 **Proposed:** The proposed amendment to section 7 states that both the above options would not be available to a FCRA registered organization. In other words, such organizations would not be entitled to transfer or sub-grant any

of the FC funds to any organization, whether registered or unregistered under FCRA.

2.03 **Context & Implications:** The Concept of Mother NPO and Grassroot NPOs has been withdrawn, which will affect many large national level NPOs funding 100s of downstream organizations.

It will also affect many NPOs, who are off-shoot of International agencies though registered in India and primarily function as grant making entities ushering development work through FC registered local partner organizations.

This amendment is a deviation from the normally accepted norms of charitable activity; the Supreme Court and other Courts of India had in the past ruled that working through another organisation is at par with implementing direct activities. This dictum will no longer apply to FC registered organizations.

The existing funds collected on behalf of other institutions cannot be transferred to such organisations. Such organisation have to apply the funds directly for charitable/religious purposes. A revision of grant contracts with the donors might be necessary in this regard.

It needs to be noted that such changes will have far reaching impact on the ongoing project contracts and thousands of employees and stake holders involved in this sector. There are many large organisation which run PAN India programmes through small charities; any abrupt closure of all such organisations is against the principles of equity and natural justice. Such NPOs should have been given an opportunity to close existing obligations; it would defy natural justice if a transition period is not provided.

Further, no reasonable cause has been cited in support of this amendment because under the current law FC funds can be granted only to another FC registered organisation; all FC registered organisation both the grantee and sub-grantee report to the Central Government on quarterly and annual basis regarding the fund received and activity thereof. Therefore, the argument that, the trail of FC fund is lost is not reasonable. Further, the

affected organisations and stakeholders deserved an opportunity to explain or clarify that the apprehensions of the law makers were unfounded. This amendment is against the principle of natural justice which states that **"No party should be condemned unheard"**

This amendment will also affect online appeal of donations from international sources by aggregator NPOs. It will no longer be possible to raise funds on behalf of the grassroots level organisations from international sources.

2.04 **Way Forward:** The importance and need of the national level institutions needs to be substantiated. The continuation of already contracted activities could be explored through advocacy or judicial intervention.

Affected organisations should make representations exploring the possibility of seeking sufficient time period for transition and execution of the existing contractual obligations.

REDUCTION IN LIMIT OF ADMINISTRATIVE EXPENDITURE

3.01 **Existing**: Section 8 of FCRA Act, 2010 prescribes that the administrative expenditure in any year should not exceed 50% of the total FC funds received in that year. It may be noted that Rule 5 of FCR Rules, 2011 excludes salaries of programme staff and other field level personel.

3.02 **Proposed**: The draft bill has proposed to revise the ceiling limit of admin expenses to 20% of the total foreign funds received in a particular year. In other words, a FC registered organization cannot spend more than 20% of the FC received in that particular year on administrative expenses.

However the option to spend more than 20% on administrative expenses with prior approval of Central government still remains.

3.03 **Context & Implications :** The 50% limit may look on the higher side, but it is necessary to meet many expenditures in the nature of salary and travel which were actually incurred for programme purposes. Many NPOs have very high component of salaries and travel which are specifically towards programs. The FCR Rule 5 also defines the meaning of administrative expenditure and what is covered within its ambit. Now bringing the threshold to 20% will effectively reduce the cushion for program management costs. Therefore NPOs have to recalibrate their cost structure to adapt to these reduced thresholds. However, the problem arises when all expenditures pertaining to salaries, travel etc. are perceived as administrative expenditure. This amendment will increase litigations due to the lack of any acceptable standard or norms for determining what is "administrative expenses"

3.04 **Way Forward :** The chart of account and the methodology of booking programme and admin expenses have to be revisited and redesigned by organisations. Greater clarity would be required in booking expenditure under 'program heads' and 'natural heads'.

FCRA BANK ACCOUNT WITH STATE BANK OF INDIA

4.01 **Existing**: Section 17 of the FCRA Act, 2010 states that the organizations which has been granted prior permission or granted registration shall receive foreign contributions in designated bank account only. Currently, FCRA registered organizations can open designated bank accounts as well as utilization bank accounts with any core banking compliant bank integrated with the public financial management systems (PFMS). Hence there were two layer of bank accounts, one designated bank account for receiving foreign contribution and second utilization bank account for utilizing the FC received.

4.02 **Proposed:** (1.) FCR Bill, 2020 provides for three type of bank accounts :

a. ***Statutory Designated Account :*** The FCR Bill, 2020 states that the designated bank account, in which all the foreign contributions are received, should be opened in the specified branch of State Bank of

India at New Delhi as the central government may by the notification specify in this behalf.:

b. ***Defacto Designated Account :*** Such person may also open another FCRA Account in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from their FCRA Account in the specified branch of State Bank of India at New Delhi, such bank account will become the *"Defacto Designated Account"*.

c. ***Utilisation Account :*** Further, such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilising any foreign contribution received by him in his FCRA account in the specified branch of the SBI, New Delhi or kept by him in another FCRA Account in a scheduled bank of his choice:

4.03 **Context & Implications:** The rationale of asking all the NPOs from all over the country to open a bank account in a particular bank in New Delhi, remains unfathomable. May be the Central Government wants to create another layer for receipt of foreign contribution for monitoring purposes and greater use of artificial intelligence.

This law is likely to cause operational and procedural hassles to institutions located outside New Delhi.

This provision may directly affect the operation of the payment gateways operated by Indian Institutions (other than scheduled bank) as the new provision specifically requires the foreign contributions to fall in a central government notified account directly from foreign sources. The payment gateways receive funds from foreign sources on behalf of NPOs; the legality of such activity is a subject matter of interpretation under the current law as well.

4.04 **Way Forward:** We have to wait for the rules to be framed in this regards, most likely the existing designated bank account and utilisation bank account will not be disturbed.

EXTENSION OF THE PERIOD FOR COMPLETING SUSPENSION PROCEEDINGS

5.01 **Existing**: Currently FCRA 2010 provides the power to the Central Government to suspend the registration pending cancellation of certificate, for a period up to 180 days. In other words, once the registration is suspended the suspension proceedings have to be completed within 180 days; resulting in either cancellation or restoration of registration.

5.02 **Proposed**: The proposed amendment states that period of suspension can be further extended for a period of 180 days. In other words, the period of suspension can be extended to a period of 360 days from the date of the issue of the order.

5.03 **Context & Implications :** It has been seen in the past that the FCRA department was finding the difficult to complete the suspension proceedings within 180 days.

It will create lots of hardship to those organisation whose registration is restored after completion of the suspension proceedings because during suspension the bank account are freezed and the organisations virtually comes to a stand still. There is a provision for getting approval for use of 25% of the available funds during the suspension period, but normally such approval are not given in time.

The suspension provisions even before FCR Bill, 2020 are quite draconian and the organisation is virtually closed even before the completion of proceedings. There are rulings directing FCRA department to exercise caution and hold the natural justice before initiating suspension proceedings. However, the proposed amendment does not create any additional issue which could be constitutionally challenged.

5.04 **Way Forward :** One year is too long a period to keep an organisation freezed pending inquiry, the provision as a whole needs rationalisation through advocacy or judicial intervention.

AADHAR OF BOARD MEMBERS AND COPY OF PASSPORT AND OCI CARD

6.01 **Existing**: The current FCRA form states that Aadhar number is optional in case of registration/prior permission/ renewal.

6.02 **Proposed:** It has been proposed that any organizations applying for FCRA registration/prior approval /FCRA renewal should mandatorily provide Aadhar number of all the board members (office bearers, directors and key functionaries) in their application to MHA. Also, the copy of passport or overseas citizen of India card (OCI) in case of foreigners, should be provided therein.

6.03 **Context & Implications :** The database of board members could possibly help the Central Government in monitoring the presence of Board Members in other FCRA registered organistion. In case of OCI and PIO through passport details the movement of such persons in and out of India could also be monitored. Technically, no legal issues arises, though privacy of data and information could be a contention.

6.04 **Way Forward :** Individuals should analyse their presence on various FC registered organisation. OCI and PIO may analyse their movement and the nature of Visa and contractual relationship with Indian and foreign entities.

SURRENDER OF FCRA REGISTRATION

7.01 **Existing**: Under the current FCRA 2010, there is no provision for surrender of FCRA Certificate.

7.02 **Proposed**: The FCR Bill, 2020 proposes that the FCRA registered organizations would now have the option to voluntarily surrender their registration. However, such surrender can be done only after MHA is satisfied that there has been no contravention of the FCRA provisions by the said organization.

It is very important to note here that, on surrendering the FCRA registration, assets created out of foreign contributions and management of the unutilized foreign contribution shall be vested with the authority prescribed by Government in this regard.

7.03 **Context & Implications:** This provision will enable many dormant organisation to surrender the certificate. However, this provision would have been more relevant in the old FCRA 1976 because after FCRA 2010 the registration certificate is valid only for 5 years, earlier it was perpetual in nature. Therefore by virtue of not applying for renewal, the registration automatically ceases to exist.

7.04 **Way Forward:** It may be advisable not to avail FC registration at the time of renewal after 5 years which also is a deemed surrender of FCRA Certificate.

INQUIRY AT THE TIME OF RENEWAL OF FCRA

8.01 **Existing**: Section 16 of the FCRA Act, 2010 prescribes the procedure with respect to FCRA renewal, which should be done after every 5 years. However the said section does not empower the department to make any inquiry at the time of processing the renewal application, though FCRA department can initiate audit and inspection under section 20 and 23 respectively at any given point of time. However, in both the sections 20 and 23 the Central Government should have reasonable reason for initiation of such inquiry or audit.

8.02 **Proposed**: It has been proposed that the central government is empowered to make inquiries and satisfy itself with respect to compliance of Section 12(4) prior to FCRA renewal. It may be noted that Section 12(4) is the provision under which verification at that time of granting registration is made. In

other words, the government may also make similiar inquiries before granting renewal of FCRA registration. Hence, by the proposed amendment renewal process has become similar with that of process of registration or Prior permission.

8.03 **Context & Implications:** This amendments empowers the government to formally conduct inquiries and record reasons for non-renewal. In the past, denial of renewal was lawfully difficult and challengeable, if the organisation had otherwise complied with all the provisions of FCRA 2010.

By applying Section 12(4) for renewal application, the Bill seeks to equate a fresh applicant with an already FC registered and compliant organization. Further more, such inquiries can be conducted even if the FCRA department does not have reasons to be believe that there is any violation. In other words, an inquiry and verificiation of records can be conducted even on suspicion. It may be noted that there is no provision under the FCRA 2010 to initiate any proceeding whether audit, suspension or cancellation without having reasons to believe or any evidence on record. By making all renewal application subject to inquiry under Section 12(4) it authorises the authorities to conduct verifications without having any evidence of non compliance or any recorded reasons to believe. Such powers are arbitrary and could be misused.

Further, this provision is practically not feasible as it pre-supposes inquiry of, say, 20,000 organisation within a period of six months when the renewal becomes due. Therefore, this provision might be used to verify the records and activities of selected organisations which are under suspicion. Earlier it was not permissible to initiate inquiries based only on suspicion now it will be possible.

8.04 **Way Forward:** Organisations have to plan well, remain vigilant and compliant. Even small errors such as the content of the website or some printed material etc. (technically in violation of FCRA 2010) may result in non-renewal.

PUBLIC SERVANTS DEBARRED FROM RECEIVING FC

9.01 **Existing**: Section 3 of the Act states the persons debarred from receiving foreign contribution such as judges, government servants etc.

9.02 **Proposed:** It has been proposed to include "public servants" under the debarred category. In other words, public servants as defined under section 21 of the Indian Penal Code, would also be barred from receiving foreign contribution.

9.03 **Context & Implications:** The inclusion of "public servants" increases the number of persons under barred category. It may be noted that under Lokpal the definition of "public servants" was much broader then what is defined under section 21 of the Indian Penal Code, however, those aspects are not being discussed in this note.

9.04 **Way Forward :** This provision does not directly have an impact on the NPOs, the person falling in the category of public servant cannot accept foreign contribution.

RESTRICTION ON USE OF FUNDS UNDER PRIOR PERMISSION

10.01 **Existing**: Section 11 of the Act states that if a person registered or granted prior permission, is found **"guilty"** of any contravention under this act, then the central government may impose restrictions on receipt and utilization of the foreign contribution.

10.02 **Proposed:** The FCR Bill, 2020 states that, in case of prior permission, specified restrictions can be imposed on the basis of any information or report after holding a summary inquiry and the FCRA department has reasons to believe

that a person who has been granted prior permission contravened any of the provisions of this Act. In other words, such restrictions can be imposed even if violations are suspected. It is not necessary that the contravention has been proved or attained finality to impose such restrictions.

10.03 Context & Implications : Under the existing law if a person holding prior permission or registration was found guilty then the government had the power to restrain the person from using the unutilised fund and also from receiving foreign funds. The FCR Bill, 2020 retains the existing provision for organisations which are registered under FCRA, but those organisations which are working based on prior permission, the government now onwards can take coercive action even before such person is found guilty of any contravention of the Act. This provision looks to be against the principle of natural justice and could be challenged.

10.04 Way Forward: The compliance of FCRA, 2010 in all respect is very important as even small violation may result in punitive measures.

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