

Social Sector Hotline

November 20, 2020

FOREIGN CONTRIBUTION RULES AMENDED TO FURTHER TIGHTEN FOREIGN CONTRIBUTION NORMS

- Increased expenditure criterion for registration or obtaining prior permission;
- Clarification on 'organizations of political nature';
- Introduction of provision for voluntary surrender of FCRA certificate;
- Additional disclosure requirement on all office bearers and key functionaries;
- Obligation on the key functionaries and office bearers to disclose relationship with the governing body/Executive Council members.

After the Foreign Contribution (Regulation) Amendment Act, 2020 ("FCRA 2020") came into force on September 29, 2020, the Ministry of Home Affairs has notified the Foreign Contribution Regulation (Amendment) Rules 2020 ("New Rules").¹ The New Rules amend the Foreign Contribution (Regulation) Rules 2011 ("2011 Rules") and further tightens regulatory norms for organizations seeking certificate of registration under the Foreign Contribution Regulation Act, 2010 ("FCRA"). While it was anticipated that New Rules would provide certain regulatory relaxations to non-profits, it failed to provide any such concessions.

Our hotline on the FCRA 2020 amendments can be accessed [here](#).

AMENDMENTS INTRODUCED

The key amendments to the existing provisions of the 2011 Rules are:

- Clarification on 'organizations of political nature';
- Requirement of a designated FCRA account for registration, prior permission and renewal;
- Increased criterion for registration and prior permission;
- Clear consequences for non-renewal of certificate;
- Changes made to forms, i.e, provision for voluntary surrender of registration as well as additional disclosure requirements;
- Mandatory furnishing of Aadhar for transactions;
- Additional details required in Form for Annual Returns; and
- Tighter requirements for changes in the governing board;

Further, FCRA 2020 amended Section 17² to mandate receipt of foreign contributions solely into the FC-designated bank account maintained with the State Bank of India branch at New Delhi ("FCRA Account"). In line with this, the New Rules provide that any application seeking registration under the FCRA, which was made before the notification of the New Rules but not disposed of yet, will only be considered after the details of the FCRA Account has been furnished. Again, no clarification has been provided for such a mandate and whether before introducing such restriction, the government had considered how non-profits situated in remote areas would open and operate such FC-designated account in New Delhi.

SUMMARY OF CHANGES

We have highlighted the key amendments along with our analysis in the table below:

| S. No. | Particulars | Amendments |
|--------|--|--|
| 1. | Clarification on organizations of political nature | Rule 3 ³ of the 2011 Rules which provides guidelines for declaring an organization, which is not a political party, to be of a 'political nature'. This has been amended to include organizations (such as organization of farmers, workers, students, religion etc.) if such organizations " <i>participate in active politics or party politics, as the case may be.</i> " ⁴ This amendment is in line with the ruling of the Supreme Court ("SC") in <i>Indian Social Action Forum (INSAF) v. Union of India</i> ⁵ , where the applicability of the 2011 Rules was restricted by the SC barring organizations of farmers, student, religion, workers etc. from receiving foreign funding only if they engaged in " <i>active politics or party politics</i> ". |

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| 2. | FCRA Account | Similar to the FCRA 2020, the New Rules also provide for a designated FCRA Account with the State Bank of India branch at New Delhi, in contrast with the “exclusive bank account” provided in the 2011 Rules. This account is mandatory for registration, for obtaining prior permission for receiving foreign contributions, or for renewal of registration under the FCRA. |
| 3. | Requirements for registration/prior permission: ⁶ | Earlier one of the eligibility criteria for registration or obtaining prior permission under the FCRA was that the minimum expenditure on the aim and objects of the association (excluding administrative expenditure) during the last three financial years should be INR Ten Lakh USD 13,500 (approx.). The New Rules has increased this to INR 15 Lakh/USD 20,000 (approx.) (Rupees Fifteen Lakh), which should be the expenditure on “core activities for the benefit of the society”. Further, ⁷ if the amount of contribution on the date of final disposal of the application obtaining prior permission is over INR 10 Million/USD 135,000 (approx.), the Central Government may permit receipt of such foreign contribution in instalments, provided that the second and subsequent instalment will be released after proof of utilization of 75% of the first instalment and enquiry into nature of usage of the contribution. |
| 4. | Renewal of FCRA registration certificate | <p>The New Rules provide that:</p> <ul style="list-style-type: none"> ■ on the expiry of the validity of the FCRA certificate no person can either receive foreign contributions or utilize balance funds in the FCRA Account until the registration is renewed;⁸ ■ an application for renewal of the FCRA certificate shall be made to the Central Government in electronic form in Form FC-3C along with an affidavit executed by each office bearer, key functionary and member in Proforma 'AA' within six months from the date of expiry of the certificate of registration;⁹ ■ if application for renewal is not received before the expiry date of the FCRA certificate, the FCRA registration shall be deemed to have ceased from the date of completion of five years from the date of the grant of FCRA certificate of registration;¹⁰ ■ if the FCRA registration is ceased then the amount of foreign contribution lying unutilized in the FCRA Account and utilization account of the organization whose certificate of registration is deemed to have ceased and assets, if any, created out of the foreign contribution, will vest with the prescribed government authority under the Act until the certificate is renewed or fresh registration is granted.¹¹ |
| 5. | Voluntary surrender of FCRA certificate | Earlier there was no provision for surrender of the FCRA certificate. FCRA 2020 and the New Rules allows for voluntary surrender of the FCRA certificate of registration by submitting an application in electronic form in Form FC-7. ¹² However, as per section 14A of the FCRA 2020, ¹³ the surrender can take place only after the government has approved it after being satisfied that there were no violations of the FCRA provisions. Further, the management of foreign contribution and the assets created from the contributions has to be vested with the prescribed government authority. |
| 6. | Changes made to online forms | <ul style="list-style-type: none"> ■ There is an additional disclosure requirement on all office bearers and key functionaries to provide details of any pending prosecution against them. ■ Further, the requirement to disclose relationship with the governing body/Executive Council members has been placed upon key functionaries and office bearers as well. |
| 7. | Mandatory furnishing of Aadhar (unique identification) for transactions | Similar to the FCRA 2020, the New Rules also require Aadhar and PAN details to be provided in the Online Forms for registration, prior permission, renewal, changes in key members etc. |
| 8. | Requirements for changes in the governing board | Earlier intimation was required to be made to the Government within 30 days if there was change in more than 50% of the key members. However, under the New Rules, an intimation is required whenever a new key member is appointed, elected, resigns or dies within 15 days of such change. ¹⁴ Such changes will be effected only after the Government approval. |
| 9. | Additional details required in the Form for Annual Return | <p>In the Annual Return Form FC-4, the chief functionary is required to answer the following questionnaire in Yes or No. If the answer to any of the following questions is in affirmative, further details about the same have to be provided.</p> <p>The questions pertain to:</p> <ul style="list-style-type: none"> ■ Whether any foreign contribution was transferred to any FCRA registered association? ■ Whether any foreign contribution was transferred to any non FCRA registered association? ■ Whether any functionary of the association has been prosecuted or convicted under the law of the land? ■ Whether any asset created out of foreign contribution is registered in names |

- other than the name of association?
- Whether any domestic contribution has been credited in any FCRA Account?
 - Whether the association has received any foreign contribution in an account other than the designated FCRA receipt account?
 - Whether the association has utilized foreign contribution for any purpose other than the defined purposes in the FCRA certificate of registration or prior permission?
 - Whether the association has invested any foreign contribution in any speculative activity as defined in rule 4 of the 2011 Rules?
 - Whether the association or any of its functionary/office bearer has violated any of the conditions as enumerated under sub-section (4) of section 12 of the FCRA 2020?
 - Whether the association has made expenditure on administrative expenses exceeding 20% of the foreign contribution received?
 - Whether any fixed asset acquired out of foreign contribution has been sold out?
 - Whether any sale proceed of above fixed asset has been diverted/ has not been deposited in "FCRA Account"?
 - Whether any FD proceeds has been credited in any account other than the "FCRA Account"?
 - Whether any organization/entity not belonging to the association is being managed/financially supported by the association?
 - Whether any association has utilized any foreign contribution outside India?

CONCLUSION

Upon perusal of the New Rules, it is clear the current government dispensation has further tightened rules for non-profit organizations seeking foreign contributions. The introduction of a fiscal norm which mandates organizations seeking registration to spend at least INR 1.5 million/USD 20000 (approx.) on its core activities may prove to be counterproductive. Many existing non-profits in India are currently under-funded due to the ongoing pandemic and economic downturn, and any economic upsurge in the market is going to take a considerable time. Thus, corporations in general will have relatively lesser budget for philanthropic initiatives including CSR, which is bound to have a cascading effect on non-profits' fiscal health. In such a scenario, expecting non-profits to have a certain fiscal expenditure norm will only create additional regulatory barriers.

Article 13¹⁵ of the UN Declaration on Human Rights Defenders states that everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms, through peaceful means. This, in effect, obliges the State to ensure that its domestic laws, rules and corresponding regulations are designed to be consistent with the task of implementing and complementing human rights instruments. However, the amended provisions of FCRA 2020 and the New Rules seems to substantially deprive non-profits from scaling up and tends to limit them within stringent constructs of FCRA provisions. The true relevance and purpose of FCRA provisions should be to enable an eco-system where foreign contribution are utilized by non-profits in a manner that supplants India's charitable and social objectives. However, with the recent amendments, it needs to be seen whether non-profit eco-system would be bolstered or face increased operational challenges.

– Puja Saha & Rahul Rishi

You can direct your queries or comments to the authors

¹ Available at https://fcraonline.nic.in/home/PDF_Doc/fc_rules_12112020.pdf, last accessed November 19, 2020.

² Section 17 of the FCRA 2020 states that "(1) Every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as "FCRA Account" by the bank, which shall be opened by him for the purpose of remittances of foreign contribution in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify in this behalf"

³ Rule 3 of the 2011 Rules states that "(1) The Central Government may specify any organisation as organisation of political nature on one or more of the following grounds: -

(i) organisation having avowed political objectives in its Memorandum of Association or bylaws;
(ii) any Trade Union whose objectives include activities for promoting political goals;
(iii) any voluntary action group with objectives of a political nature or which participates in political activities;
(iv) front or mass organisations like Students Unions, Workers' Unions, Youth Forums and Women's wing of a political party;
(v) organisation of farmers, workers, students, youth based on caste, community, religion, language or otherwise, which is not directly aligned to any political party, but whose objectives, as stated in the Memorandum of Association, or activities gathered through other material evidence, include steps towards advancement of Political interests of such groups;
(vi) any organisation, by whatever name called, which habitually engages itself in or employs common methods of political action like 'bandh' or 'hartal', 'rasta roko', 'rail roko' or 'jail bhari' in support of public causes."

⁴ Rule 3 of the New Rules states that "(2) The organizations specified under clauses (v) and (vi) of sub-rule (1) shall be considered to be of political nature, if they participate in active politics or party politics, as the case may be."

⁵ (2020) SCC OnLine 310

⁶ Rule 9, Foreign Contribution Regulation (Amendment) Rules 2020.

⁷ Rule 9A, Foreign Contribution Regulation (Amendment) Rules 2020.

⁸ Rule 12 (5), Foreign Contribution Regulation (Amendment) Rules 2020.

⁹ Rule 12(2), Foreign Contribution Regulation (Amendment) Rules 2020.

¹⁰ Rule 12(6), Foreign Contribution Regulation (Amendment) Rules 2020.

¹¹ Rule 12(6A), Foreign Contribution Regulation (Amendment) Rules 2020

¹² Rule 15A, Foreign Contribution Regulation (Amendment) Rules 2020.

¹³ Section 14A of the FCRA 2020 states that "On a request being made in this behalf, the Central Government may permit any person to surrender the certificate granted under this Act, if, after making such inquiry as it deems fit, it is satisfied that such person has not contravened any of the provisions of this Act, and the management of foreign contribution and asset, if any, created out of such contribution has been vested in the authority as provided in sub-section (1) of section 15."

¹⁴ Rule 17A, Foreign Contribution Regulation (Amendment) Rules 2020.

¹⁵ Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration.

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