

CNK & Associates LLP

Flash: Foreign Contribution (Regulation) Amendment Bill, 2020

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The Foreign Contribution (Regulation) Amendment Bill, 2020 passed by the Lok Sabha

The Foreign Contribution (Regulation) Amendment Bill, 2020 ('the Bill') was passed by the Lok Sabha on 22 September 2020. The Bill seeks to amend the Foreign Contribution Regulation Act, 2010 ('FCRA 2010'), which is a throwback of the emergency era Act of FCRA 1976. It was hoped that with liberalisation, when foreign funding and investments were liberally allowed to enter India and when the suspicion of the ubiquitous "foreign hand" was receding, India would have done away with this Act or at least substantially diluted its rigours.

The avowed objective of FCRA 2010 is to safeguard "national interest". The rationale for the proposed amendments are articulated in the 'Statement of Objects and Reasons', which avers that the Bill will help in curbing misuse of foreign funds and was necessary for an Aatmanirbhar Bharat (self-reliant India). Unfortunately, the proposed amendments introduced by the Bill are only going to increase the regulatory hassles for organisations getting foreign funding. It seems there is no respite for the voluntary sector!

The amendments proposed by the Bill and its impact on persons / entities / organisations registered or approved under FCRA 2010 (or seeking registration or approval under FCRA 2010) (*hereinafter referred to as "organisation(s)"*) are analysed below:

Amendment to section 3 - Prohibition to accept foreign contribution ('FC')

Presently, amongst others, FC cannot be accepted by a Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government.

It is proposed to include a Public Servant (as defined under the Indian Penal Code - refer [Annexure 1](#)) in the list of persons prohibited from receiving FC. Further, the term corporation is defined to mean a corporation owned or controlled by the Government and includes a Government company as per section 2(45) of the Companies Act, 2013.

CNK Comments: *The scope of persons prohibited from accepting FC is sought to be widened and well-defined.*

Substitution of section 7 - Prohibition to transfer FC to other person

Presently, FC received by a registered organisation under FCRA 2010, can be transferred to another person, only if such other person is also a registered organisation under FCRA 2010. Transfer of FC to a person who is not a registered organisation under FCRA 2010 would require prior approval of the Central Government (CG).

It is proposed that FC received by a registered organisation under FCRA 2010, cannot be transferred to another person, even if such other person is a registered organisation under FCRA 2010.

CNK Comments: *This proposed amendment will create substantial difficulties for registered organisations which work with other registered organisations on collaborative projects i.e. make sub-grants / contributions, and will also impact registered organisations which do fund-raising to fund other registered organisations. Such organisations would now need to undertake projects on their own and cannot rely on sub-grant / contribution model to carry out their objectives in India.*

Amendment to section 8 - Restriction to utilize FC for administrative purpose

Presently, a registered organisation which receives FC in a financial year, shall not spend more than 50% of such FC to meet administrative expenses. However, administrative expenses in excess of 50% may be incurred with prior approval of the CG.

It is proposed to reduce the cap of 50% on administrative expenses to 20%.

CNK Comments: The proposed reduction in limit from 50% to 20% is likely to adversely impact several organisations which are manpower intensive, or which carry out activities through its own staff. Administrative expenses are defined in the Rules to include salaries and other emoluments paid to members of executive committee or governing council, expenses on hiring management personnel and salaries and emoluments of such personnel, legal and professional charges, cost of writing and filing reports, etc. However, salaries paid to field workers, personnel engaged in training or for collection / analysis of field data for research or training is not treated as administrative expenses. Similarly, salaries / expenses in furtherance of objective of a welfare organisation shall also not be treated as administrative expenses (e.g. salaries to doctors of a hospital, salaries to teachers of school, etc.). This position should be clarified through clear instructions, as the ground reality is that salary expenses in general are put under the scanner.

Amendment to section 11 – Registration of certain persons with CG.

Presently, if any registered organisation permitted to receive FC is found guilty of violation of FCRA 2010 or FCRA 1976, the unutilised amount or amount yet to be received of FC cannot be utilised or received without the prior approval of the CG.

It is proposed that the implication on the person found guilty will continue as presently provided. However, in case of a registered organisation where, on the basis of any information or report and after holding a summary inquiry, the CG has reason to believe that such organisation has violated provisions of FCRA 2010, it may direct the organisation to not utilise the unutilised amount or not receive the balance part of FC, without prior approval from the CG. Such action can be taken even where further enquiry into the matter is pending.

CNK Comments: The proposed amendment gives unfettered power to the CG to intervene and stop funding and utilisation thereof to any registered organisation pending inquiry, merely based on summary proceedings. These powers are susceptible to misuse and will cause hardships to genuine organisations.

Insertion of section 12A – Power of CG to require Aadhaar number, etc., as identification document.

Presently, FCRA 2010 does not mandate any specific identification document for office bearers or Directors or other key Functionaries ('key personnel') of any organisation, whether such individual is Indian or foreign.

It is proposed that any organisation seeking prior permission or approval or making application for grant or renewal of certificate, shall be required to provide as identification document, the Aadhaar number of all its Indian key personnel and copy of the Passport or Overseas Citizen of India Card, in case of a key personnel who is a foreigner.

CNK Comments: While Aadhar number is as such not a mandatory requirement for an individual, it appears that all Indian key personnel will now be compulsorily required to obtain and provide Aadhar number in order to comply with the proposed amendment as and when required.

Amendment to section 13 – Suspension of Certificate

Presently, with regard to a registered organisation in whose case the question of cancelling registration certificate on account of violation of FCRA 2010 is under consideration, the CG can suspend the registration for a period, which cannot exceed 180 days.

It is proposed that in addition to the initial outer limit of 180 days, the registration can now be suspended for a further period which cannot exceed 180 days.

The proposed amendment will empower the CG to suspend the registration of an organisation contravening the FCRA for a total period not exceeding 360 days (180 + 180) instead of the earlier limit of 180 days.

Insertion of section 14A – Surrender of certificate

Presently, there is no provision for a registered organisation to voluntarily surrender its FCRA registration.

It is proposed that a registered organisation can now surrender its FCRA registration certificate provided the CG is satisfied that such organisation has not contravened any provisions of FCRA 2010. Further, on surrender, the management of unutilised FC and asset, if any, created out of such FC would vest with the prescribed authority.

CNK Comments: *This amendment does not incentivise voluntary surrender of FCRA registration for an organisation with unutilised FC and asset created therefrom, as the same would vest with the prescribed authority. Such organisation may be forced to continue filing NIL returns even if FCRA registration is no longer required. However, any organisation which does not have any unutilised FC or asset created from FC would be inclined to surrender the registration if no longer required, and save itself the compliance of filing NIL returns and obtaining renewals.*

Amendment to section 16 – Renewal of certificate

Presently as per FCRA rules, a registration certificate issued to an organisation is required to be renewed after 5 years of its date of issue. FCRA 2010 does not prescribe any conditions to be fulfilled for granting renewal of registration certificate.

It is proposed that the CG will renew the certificate once it is satisfied that the organisation has fulfilled all the requisite conditions applicable for granting a fresh registration certificate to any organisation.

CNK Comments: *The proposed amendment would entail that the renewal process will not be straight-forward and would be subject to a stringent verification process (possibly as stringent as that at the time of the initial approval).*

Substitution of section 17 – FC through scheduled bank (Related amendment to section 12 - Grant of certificate of registration)

Presently, a registered organisation can receive FC in a single account only maintained through a branch of any bank as may be specified in the application for grant of certificate. The person can then open one or more accounts in one or more banks for utilising the FC received for undertaking projects. The concerned bank would report details of the FC received to the authorities in such form and manner as may be prescribed.

It is proposed that a registered organisation will open an “FCRA account” with designated branch of SBI at New Delhi and receive FC in India only through this account. The FC so received can then be transferred to another FCRA account in India with any scheduled bank for maintaining funds or their utilisation. Subsequently, funds kept in FCRA account with SBI in New Delhi or FCRA account with such other bank can be transferred to one or more accounts in one or more scheduled banks for utilisation towards projects. Designated SBI branch at New Delhi would report details of the FC received to the authorities in such form and manner as may be prescribed. The details of FCRA account with SBI at New Delhi would now need to be provided with the application for registration under section 12.

CNK Comments: *The proposed amendment requires an applicant organisation to have a mandatory account with SBI, New Delhi irrespective of the actual location of its office or operations. It appears that this requirement may also apply to already registered organisations. Also, this may create operational inconvenience for registered organisations which are not based at New Delhi or have preferred banking relationships with other banks.*

Annexure 1

Public Servant as defined under Section 21 of The Indian Penal Code:

“The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:

Every Commissioned Officer in the Military, [Naval or Air] Forces

Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;]

Every officer of a Court of Justice [(including a liquidator, receiver or commissioner)] whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorised by a Court of Justice to perform any of such duties;

Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Every officer of [the Government] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Every officer whose duty it is as such officer, to take, receive, keep or expend any property on behalf of [the Government], or to make any survey, assessment or contract on behalf of [the Government], or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of [the Government], or to make, authenticate or keep any document relating to the pecuniary interests of [the Government], or to prevent the infraction of any law for the protection of the pecuniary interests of [the Government] ;

Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;]

Every person --

- a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government
- b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956)”

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