UPDATES

Foreign Contribution (Regulation) Amendment Act, 2020

23 October 2020

This update covers:

1 Background

The Foreign Contribution (Regulation) Act, 2010 (**Act**) regulates the receipt and utilisation of foreign donations to ensure that such contributions do not adversely affect internal security. In recent years, the registration of various not-for-profit organisations have been cancelled for violations of the Act such as misutilisation of foreign contribution, non-submission of mandatory annual returns and diversion of foreign funds for purposes other than those declared. In this backdrop, the Government of India decided to amend the Act and notified the Foreign Contribution (Regulation) Amendment Act, 2020 (**FCRA Amendment Act**) on 29 September 2020 with the objective of strengthening the compliance mechanism, enhancing transparency and accountability in the receipt and utilisation of foreign contribution and facilitating genuine non-governmental organisations or associations (**NGOs**) working for the welfare of society.

The Government has amended the regulatory regime governing foreign contributions with some far-reaching consequences for non-profit organisations such as the limitation on administrative expenses of NGOs, restriction on transferability of foreign contributions and suspension of registration during the pendency of an inquiry.

Here, we briefly discuss some of the key changes introduced by the FCRA Amendment Act.

2 Key Changes

2.1 Transfer of foreign contribution prohibited

Previously, the Act permitted the transfer of foreign contributions to other persons eligible to receive foreign contributions under the Act, i.e. persons registered under the Act or persons with prior permission, or with the prior approval of the central government. The FCRA Amendment Act now prohibits such transfers.

This prohibition could adversely impact the ability of smaller NGOs or social workers working at a grassroot level or in rural areas to collaborate with and receive foreign contributions through larger and better-networked organisations. Additionally, such restriction without a transition period could impact ongoing collaborations between these organisations and require them to work in isolation from each other.

2.2 Cap on administrative expenses lowered

The FCRA Amendment Act reduces the percentage of foreign contributions that can be utilised to defray administrative expenses from the earlier cap of 50% to 20% of the foreign contribution received in a year.

The Foreign Contribution (Regulation) Rules, 2011 set out a list of items categorised under the head of administrative expenses, including salary, travel expenses, costs associated with hiring personnel, overhead expenses like rent, electricity, water, cost of accounting and maintaining books, legal and professional charges, etc.

While the objective of this amendment seems to be to ensure that a larger portion of the foreign contribution is used for the stated charitable purpose, the administrative expenses of an organisation may depend on various factors such as the size of the project, the intended reach of the project, number of personnel required, etc. and the reduced cap may therefore adversely impact the efficient functioning of various NGOs.

2.3 Utilisation of foreign contribution during pendency of an inquiry restricted

Another significant amendment to the Act is the introduction of a provision allowing the government to prevent a person from utilising foreign contribution while an inquiry is pending.

This restriction could be triggered if the government has reason to believe, on the basis of any information received and a summary inquiry held by it, that such person has contravened a provision of the Act. Previously, the central government was allowed to prevent receipt or utilisation of foreign contribution only on determination of guilt for contravention of the Act. This amendment gives the central government wide-reaching powers to freeze the use of foreign contributions by organisations pending conduct of detailed inquiries, which could adversely impact the continuity of ongoing projects.

2.4 Time-period for suspension of registration extended

The FCRA Amendment Act also enhances the period for which the central government may suspend the registration of a person under the Act to 360 days (from earlier 180 days), pending a decision regarding cancellation of the certificate of registration.

The rationale for this amendment remains unclear and the change is not aligned with the general objective of ensuring speedy and efficient justice delivery.

2.5 Public servants prohibited from receiving foreign contributions

The FCRA Amendment Act has brought 'public servants' under the ambit of persons who are restricted from receiving foreign contributions. The addition of 'public servants' to the list will prohibit all persons in the service or pay of the government or being remunerated by fees or commission for the performance of any public duty by the government, from receiving foreign contributions. This is a welcome change in keeping with the theme of reducing corruption in India.

2.6 Mandatory identification requirements

The FCRA Amendment Act allows the central government to require all office bearers, directors and other key functionaries of organisations seeking prior permission, registration or renewal of their registration under the Act, to provide their Aadhaar number (passport or OCI card in case of foreigners). The amendment enables the government to create a database mapped by the Aadhaar number of all persons in control of organisations receiving foreign contributions and further popularises the use of the Aadhaar number.

2.7 Inflow of foreign contributions through a single designated bank branch

The FCRA Amendment Act makes it mandatory for all persons receiving foreign contributions to receive contributions in the first instance through an account designated as an FCRA account opened with a branch of the State Bank of India at New Delhi. From this primary FCRA account, the contributions can be transferred to other FCRA accounts in scheduled banks belonging to the same person.

This amendment appears to be aimed at centralising the inflow of foreign contributions and enabling easy monitoring and tracking of such funds. However, the cumulative impact of this amendment in regulating the inflow of foreign contributions remains to be seen.

3 Conclusion

While the objective of the FCRA Amendment Act is a step in the right direction, the purpose of some of the amendments is unclear and does not seem aligned with the stated objective of the FCRA Amendment Act. For instance, the transfer between registered/permitted entities, and transfer to those without registration/permission was already regulated and the government had oversight over such transfers to prevent subversion of the funds. Similarly, the central government was already empowered to suspend the registration once it was proven that the registered entity/person had contravened the Act.

Further, the amendments seem to fall short of filling some of the gaps in the compliance mechanism and addressing contraventions such as non-filing of returns. Some of the amendments are also likely to disrupt the efficient functioning of NGOs and social workers that rely on foreign contributions to fund their operations in India.