

## Social Sector Hotline

September 25, 2020

### FCRA PROVISIONS FURTHER TIGHTENED, NON-PROFITS TO FACE INCREASED GOVERNMENT SCRUTINY

- Prohibition to accept foreign contributions by 'public servants';
- Restriction on transfer of foreign contributions to any other person or organization;
- Furnishing of Aadhaar details by office-bearers at the time of FCRA registration;
- Restrictions on utilization of foreign contributions;
- Reduction in allowable expenses for administrative purposes from 50% to 20%;
- Additional extension on the tenure of suspension in respect of registration

#### BACKGROUND

The upper house of the Parliament of India (Rajya Sabha) passed the Foreign Contribution (Regulation) Amendment (FCRA) Bill, 2020 (the "**Bill**") on September 23, 2020 to amend the provisions of the Foreign Contribution Regulation Act, 2010 ("**FCRA 2010**"). The Bill will now be sent to the President of India for his assent.

The original Foreign Contribution Regulation Act, 1976 ("**FCRA 1976**") was passed by the then government during Emergency<sup>1</sup>. The main purpose of FCRA 1976 was to curb democratic dissent on the pretext of foreign interference. The preamble of FCRA 1976 stated that it was "*An Act to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain persons or associations, with a view to ensuring that parliamentary institutions, political associations and academic and other voluntary organizations as well as individuals working in the important areas of national life may function in a manner consistent with the values of a sovereign democratic republic, and for matters connected therewith or incidental thereto.*"

While the stated objective to enact an Emergency-era law in 1976 was to protect parliamentary and political institutions, many would argue that FCRA, 1976 achieved exactly the opposite to its stated objectives. The FCRA, 1976 was repealed and introduced with even more stringent norms in its new avatar in the form of FCRA 2010.

The current government dispensation has now introduced the Bill which proposes to further tighten the already over-regulated law, which may have several negative implications for the *non-profit* sector. Several critics have argued that instead of improving the existing legislation, the Bill seeks to further regulate and over-bureaucratize the *non-profit* eco-system in India.

#### Amendments introduced in the FCRA Amendment Bill, 2020

The Bill seeks to significantly amend the existing provisions under FCRA 2010 in respect of:

- i. Prohibition to accept foreign contributions by 'public servants';
- ii. Transfer of foreign contributions to any other person<sup>2</sup>;
- iii. Furnishing of Aadhaar details by office-bearers at the time of FCRA registration;
- iv. Restriction in the utilization of foreign contribution;
- v. Reduction in allowable expenses for administrative purposes from 50% to 20%;
- vi. Receiving foreign contributions in foreign-contribution designated bank account exclusively with the public-sector bank State Bank of India<sup>3</sup>; and
- vii. Additional extension on the tenure of suspension in respect of registration

#### ANALYSIS

##### Inclusion of 'Public Servants'

The Bill proposes to include the category of 'public servants' under the list of persons prohibited from receiving foreign contributions under Section 3(1)(c) of the FCRA 2010. The FCRA 2010 prohibited a 'government servant' from receiving foreign contributions. However, the Bill seeks to bring the broader category of 'public servant' within this prohibition. The interpretation of this term is sought to be derived from the definition provided under Section 21 of the Indian Penal Code, 1100%.

It is important to note here that although the terms 'government servant' and 'public servant' seem synonymous, they are different. While 'government servant' would mean a person who works for the government through any civil service or post and is employed by the government, 'public servant' has a broader connotation. Public servants also include all persons who work in social service and welfare of the public to strengthen the functioning of the State, for example a judge or an arbitrator. A public servant can include any person who is in service or on the pay-roll of the government or the State, or remunerated by the government or the State for the performance of its public duty.

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Further, the Parliament failed to explain the rationale of prohibiting public servants from associating themselves with non-profits. Participation by public servants earlier boosted non-profit services as it provided a platform for professionals, academicians, technocrats and imminent citizens coming from diverse backgrounds to contribute towards development goals.

The FCRA 2010 being a regulatory legislation must regulate and not prohibit. The Bill does not provide for any explanation clause-wise and simply provides for a general 'Statement of Objects and Reasons', wherein the rationale behind introducing such major changes had not been dealt with. The Bill fails to explain how prohibiting public servants from associating themselves with non-profits would be in public good.

Such a move seems to be an attempt to plug the gap that arose in the case of cancellation of FCRA license of senior advocates Ms. Indira Jaising and Mr. Anand Grover's non-profit organization Lawyers Collective in 2016. Ms. Jaising had then argued that the prohibition to receive foreign contributions under the FCRA 2010 extended to 'government servants' while she was a 'public servant'. Therefore the restriction of accepting any foreign contributions could not be extended to a 'public servant'. After the passage of this Bill, such difference would now however not hold any ground.<sup>4</sup> The Bombay High court<sup>5</sup> had granted interim relief to Indira Jaising and Lawyers Collective against the 'coercive action' of the Central Bureau of Investigation ("CBI"), and further stayed the direction allowing to cease any asset under the provisions of FCRA<sup>6</sup>. However, the freezing of the FC-designated account of the organization was not invalidated. The CBI has challenged this order before the Apex Court, and the matter is under adjournment.<sup>7</sup>

### **Prohibition on Transfer of Money by NGOs with FCRA License to Each Other**

Another significant amendment proposed is the restriction on non-profits registered or having approval under the FCRA 2010 to transfer foreign contributions received by them to other associations/ persons.

Section 7 of the FCRA 2010 has been substantially amended to bring effect to this prohibition.<sup>8</sup> This means that a non-profit organization registered or having prior permission under the FCRA 2010 cannot sub-grant foreign contribution(s) to another non-profit from its own corpus even if the latter is registered or has permission under FCRA 2010 to receive such contributions. This comes as a huge blow to relatively smaller non-profits who were earlier largely dependent on such onward-grants/funds to be operational on the ground as service providers. This may also affect non-profits that collaborate with one another for projects and programs, and may not be in a position to collaborate on projects that require scaled-up interventions and/or program executions on the ground.<sup>9</sup> Non-profits that engage in collaborative research projects will now be disabled from sub-granting their fund receipts to institutions that either work in parallel or at a downstream level. Further, this may also pose unique operational challenges for several think-tanks and non-profit research and advocacy organizations that engage with multiple stakeholders in non-profit ecosystem. It has been argued that restrictions on sub-granting provide better transparency. However, a better alternative in ensuring transparency would have been to mandate stricter parameters for annual reporting and utilization norms.<sup>10</sup>

### **Reduced Percentage of Administrative Expenses**

The FCRA 1976 did not put any restriction on the utilization of the foreign contributions received and the persons or associations were free to allocate as much portion of their foreign funds for administrative purposes. Thereafter, the FCRA 2010 put a threshold limit of 50% on foreign funds received for utilization towards administrative purposes, which curtailed the discretion of the persons/associations on such utilization. The Bill further reduces the flexibility and brings down this threshold to 20%. This adversely impacts research organizations, think-tanks and advocacy firms which depend on such funding for meeting their administrative expenses.

Administrative expenses constitute an important provision in running non-profits as it includes expenses on salaries, transportation costs incurred in the course of field work, paying fees to experts and such similar expenses. Therefore, a reduced percentage incapacitates the involvement of these professionals. This may lead to a decline in talent acquisition and retention of human capital in the non-profit space. Further, the cap on administrative expenses would also incapacitate non-profits from allocating expenses towards field-based projects or project monitoring & evaluation work, and non-profits would feel discouraged and restricted to expand their outreach.

### **Identification through Aadhaar/Passport/Overseas Citizen of India Card**

The Bill mandates the identification of all office-bearers, director and key personnel of NGOs or associations eligible to receive foreign contributions through Aadhaar Card, or passport or Overseas Citizen of India card in case of a foreigner. This may be argued to be an over-regulation as instead of easing norms to attract private sector professionals to be a part of the non-profit sector, it may actually discourage professionals and prominent citizens to join non-profits as trustees or key personnel(s). It is also unclear how this step would increase transparency towards better administration of FCRA 2010 provisions.

### **Extension of Period of Suspension**

The Bill also opens up the possibility for the Central government to increase the period of suspension for any alleged contravention under Section 13<sup>11</sup> of the FCRA. Earlier, the period could be extended only up to 180 days, however, through this Bill, the Central government can further extend the period of suspension for additional 180 days. It now technically allows the government to suspend the license of a non-profit for an entire year. This would be a major blow to non-profits as it would be starved of funds till the time the concerned agency/(ies) do not complete its investigation.

### **Receiving foreign contributions in FC designated account in a public sector bank**

The Bill proposes to amend Section 17<sup>12</sup> of the FCRA 2010 to mandate receipt of foreign contributions solely into the FC-designated bank account maintained with the State Bank of India branch at New Delhi. Although it does allow subsequent transfer and utilization of such money to another account(s) in a scheduled bank, it is still a major issue for non-profits that are spread across the length and breadth of India. It creates unnecessary hurdles for non-profits to open and manage FC-designated accounts in Delhi. It also increases their operational and administrative costs.

It also leads to over-scrutiny of financial affairs of non-profits and increases their transaction costs, which are already

financially burdened and cash-starved. It may also be argued to be in violation of the fundamental rights of non-profits in respect of Article 19(1)(g)<sup>13</sup> of the Constitution of India as it disables them to operationally administer their FC-designated account locally. Now, such non-profits would feel compelled to either set up a branch office or have a designated person in New Delhi to manage its FC-designated account.

The State can impose restrictions on the individual's right to practice profession, trade or occupation under Article 19(6) in the interest of general public. However, in *Sivani v. State of Maharashtra*<sup>14</sup>, the Apex Court laid emphasis on the aspect of reasonability with respect to this restriction. It was held that such reasonability must not be based on an abstract or general notion, rather the State must ensure that such restriction has been made after considering or striking a balance between 'rights of individuals' and 'social control' in the interest of general public. Therefore, the reasonability of restriction must be ensured.

From a compliance perspective, the Bill seeks to create an artificial bearer on non-profits that are located in rural and remote areas. The Bill does not explain how restricting the FC designated account to a specified branch of SBI at New Delhi would be a 'reasonable restriction' in the interest of general public under Article 19(6) and whether before introducing such restriction, it had considered how non-profits situated in remote areas would open and operate such FC-designated account in New Delhi. In fact, such restriction may lead to a substantial increase in administrative costs for such non-profits, and more so when the cap on such expenses has already been reduced to 20% in the Bill.

### Broader Powers of Central Government

Vide amendment in Section 11, the Bill seeks to give greater powers to the Central government to decide the types of organizations that should cease to receive foreign contributions. It empowers the Central government to stop the utilization of foreign contributions which have been received but not utilized by organizations if on receipt of any information or report and holding a summary inquiry, it is of the opinion that such organization has contravened any provision of the FCRA. The Central government can stop utilization of remaining foreign contributions and further prohibit receipt of additional foreign contributions by such organization. Earlier, such powers were available only if persons/associations were "found guilty" of violation of the FCRA.<sup>15</sup> The provision relating to 'summary inquiry' should be re-examined.

### CONCLUSION

Non-profits work in the areas of social and public welfare and therefore are heavily dependent on foreign contributions. Over-regulating this sector might discourage a plethora of non-profits to be operational active on the ground. While it is important to regulate this sector, and State intervention should be welcome where necessary, the Bill seems to advocate and prescribe over-regulation and disproportionate regulatory interventions. This may ultimately make non-profits less bi-partisan, reduce its operational, organizational and financial autonomy and consequently their social and public-welfare outcomes. The Bill may also create an artificial barrier between well-funded urban-centric non-profits and (non-profit) service-providers that operate in the periphery. It may also hamper thousands of professionally-run albeit relatively smaller non-profits to scale-up their operations and outreach. Further, imposing a threshold limit on administrative expenses funded through foreign contributions may also result in many from a compliance perspective shutting down their operations.

Non-profits have always been seen as supplementing the gaps left by governmental programmes even in this current Covid-19 pandemic. While government efforts are always warranted and duly welcome, non-profits have more often than not provided the last-mile reach for policy interventions. Instead of strengthening the role of the non-profit ecosystem, the amendments may lead to curtailing their activities, outreach and scalability.

– Puja Saha & Rahul Rishi

You can direct your queries or comments to the authors

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<sup>1</sup> Under Article 352 an 'emergency' can be proclaimed if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation, made a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation. Such proclamation can be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger. This Emergency led to curb on elections and civil liberties.

<sup>2</sup> Section 2(m) of the FCRA defines "person" to include (i) an individual; (ii) an Hindu undivided family; (iii) an association; (iv) a company registered under section 25 of the Companies Act, 1956 (now Section 8 of Companies Act, 2013)

<sup>3</sup> State Bank of India is an Indian multinational, public sector banking and financial services statutory body headquartered in Mumbai, Maharashtra. The Government of India controls majority equity shares in SBI.

<sup>4</sup> Fatima Khan, Modi govt tables FCRA amendments, opposition & NGOs call it fatal blow to civil society work (September 20, 2020, 7:09 P.M), <https://theprint.in/india/governance/modi-govt-tables-fcra-amendments-opposition-ngos-call-it-fatal-blow-to-civil-society-work/506851/>

<sup>5</sup> Lawyers Collective & Ors. v. Central Bureau of Investigation & Anr [WP/3841/2019]

<sup>6</sup> Section 22 of the FCRA states that "Disposal of assets created out of foreign contribution. Where any person who was permitted to accept foreign contribution under this Act, ceases to exist or has become defunct, all the assets of such person shall be disposed of in accordance with the provisions contained in any law for the time being in force under which the person was registered or incorporated, and in the absence of any such law, the Central Government may, having regard to the nature of assets created out of foreign contribution received under this Act, by notification, specify that all such assets shall be disposed off by such authority, as it may specify, in such manner and procedure as may be prescribed."

<sup>7</sup> Central Bureau of Investigation v. Lawyers Collective & Ors. [SLP(Cr) No. 010033 - / 2019]

<sup>8</sup> The Bill replaces section 7 of the FCRA with following clause:

No person who—  
(a) is registered and granted a certificate or has obtained prior permission under this Act; and  
(b) receives any foreign contribution,  
shall transfer such foreign contribution to any other person.

<sup>9</sup> The Foreign Contribution (Regulation) Amendment Bill 2020 (September 20, 2020), <https://capindia.in/the-foreign-contribution-regulation-amendment-bill-2020/>

<sup>10</sup> Suvojit Chattopadhyay, The Proposed FCRA Amendment Will Deal Another Blow to India's Non-Profit Sector (September 21, 2020, 2:00 P.M), <https://thewire.in/government/foreign-contribution-regulation-amendment-bill-2020>

<sup>11</sup> Section 13 of the FCRA states that:

*Suspension of certificate.*

(1) Where the Central Government, for reasons to be recorded in writing, is satisfied that pending consideration of the question of cancelling the certificate on any of the grounds mentioned in sub-section (1) of section 14, it is necessary so to do, it may, by order in writing, suspend the certificate for such period not exceeding one hundred and eighty days as may be specified in the order.

(2) Every person whose certificate has been suspended shall

(a) not receive any foreign contribution during the period of suspension of certificate:

Provided that the Central Government, on an application made by such person, if it considers appropriate, allow receipt of any foreign contribution by such person on such terms and conditions as it may specify;

(b) utilise, in the prescribed manner, the foreign contribution in his custody with the prior approval of the Central Government.

<sup>12</sup> Section 17 of the FCRA states that:  
*Foreign contribution through scheduled bank.*  
*(1) Every person who has been granted a certificate or given prior permission under section 12 shall receive foreign contribution in a single account only through such one of the branches of a bank as he may specify in his application for grant of certificate:*  
*Provided that such person may open one or more accounts in one or more banks for utilising the foreign contribution received by him*  
*Provided further that no funds other than foreign contribution shall be received or deposited in such account or accounts.*  
*(2) Every bank or authorised person in foreign exchange shall report to such authority as may be specified—*  
*(a) prescribed amount of foreign remittance;*  
*(b) the source and manner in which the foreign remittance was received; and*  
*(c) other particulars, in such form and manner as may be prescribed.*  
<sup>13</sup> Protection of certain rights regarding freedom of speech etc  
(1) All citizens shall have the right  
(g) to practise any profession, or to carry on any occupation, trade or business  
<sup>14</sup> AIR 1995 SC 1770  
<sup>15</sup> Parliament: Centre introduces Bill to amend FCRA, civil society organisations call it a 'fatal blow' (September 21, 2020, 8:54 PM), <https://scroll.in/latest/973600/parliament-centre-introduces-bill-to-amend-fcra-to-make-aadhaar-mandatory-for-foreign-contributions>

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