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FOREIGN CONTRIBUTION (REGULATION) AMENDMENT ACT, 2020 – A MIXED BAG

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Introduction

The Foreign Contribution (Regulation) Amendment Act 2020 (Amendment Act) has been notified by the Central Government (Government) on 29 September 2020, to amend certain provisions of the Foreign Contribution (Regulation) Act 2010 (Act / FCRA).

As stated in the statement of objects, the Government claims that the object of the Act is to *strengthen compliance, enhance transparency and accountability in the receipt and utilisation of foreign contributions and facilitating genuine non-governmental organisations or associations who are working for the welfare of the society*.

The Amendment Act has come into force on 29 September 2020 amid several instances where organizations failed to ensure basic statutory compliances such as maintenance of proper accounts and submission of returns and it led to a situation where the Government had to cancel registrations of various organizations.

Key Highlights of the Amendment Act

- *Prohibition on "public servant" from receiving foreign contributions*

  The Amendment Act has amended and widened section 3 of the Act to add the category of "public servants", as defined in Section 21 of the Indian Penal Code, 1860, to the list of certain persons that are prohibited from receiving foreign contribution. This will prohibit persons in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government, from receiving foreign contributions.

  It appears the reason for inclusion of 'public servant' is to prevent those discharging public duty from being influenced through foreign funding and avoid any conflict of interest. However, this would preclude a section of altruistic individuals who fall within the definition of 'public servant' from organizing finances for undertaking activities that are intended for public welfare.

- *Prohibition on transfer of foreign contribution*

  The Amendment Act substitutes section 7 of the Act to prohibit persons authorized to receive foreign contributions under the Act from transferring such foreign contributions to any person. Earlier, non-government organisations (NGOs) registered under Act were permitted to transfer the foreign contribution received by such NGO to: (i) any other registered NGO;

and (ii) any other unregistered person, with prior permission of the Ministry of Home Affairs (MHA).

This seems to have been done to restrict NGOs from acting as fundraisers and channeling funds to other NGOs, as opposed to using the same directly for the object and purpose for which they were set up and for the purposes permitted under their registration under the Act.

FCRA registered NGOs will have to innovate the ways in which they collaborate for social projects to re-align with this new restriction to ensure continued funding for the ongoing plans.

- *Lowering the cap on administrative expenses*

The Amendment Act has amended section 8 of the Act to decrease the cap on using the foreign contribution for administrative expenses from 50% to 20%. The amendment seems to promote utilisation of such funds towards the objective of the grant.

The 20% ceiling on spending on administrative expenses appears to be a respectable threshold and in line with market standard. It may be relevant that the Companies Act, 2013 makes it mandatory for companies to make contribution of 2% of average net profits to be spent on projects of corporate social responsibility. Such activity can be implemented through certain NGOs. However, permissible administrative expenses implementing the corporate social responsibility projects is capped at a meagre 5% of the corporate social responsibility contribution made by the companies.

This is a welcome change as a number of philanthropists do not prefer to support NGOs due to their heavy administrative expenses leaving aside less funds for the philanthropic objective.

- *Opening of bank account in State Bank of India, Delhi*

Earlier under section 17 of Act, the foreign contribution recipient was permitted to receive foreign contribution in an account opened in any of the scheduled banks. The Amendment Act substitutes section 17 of FCRA requiring the recipient of foreign contribution to receive such amount only in an account designated as 'FCRA Account' opened in a branch of the State Bank of India (SBI) at New Delhi. However, it provides flexibility to the recipient to also open another FCRA Account in any of the scheduled banks in India for the purpose of keeping or utilising the foreign contribution which has been received from its 'FCRA Account' in the branch of SBI at New Delhi. The intent of the amendment appears to be to centralise the inflow and routing of foreign contribution, making it easier for the Government to supervise and monitor the funds received.

- *Power to prohibit a foreign contribution recipient from utilising/receiving its funds*

Under the Act, if a person accepting foreign contributions is found guilty of violating any provisions of the Act, the unutilised or unreceived foreign contribution could be utilised or received, only with the prior approval of the Government. The Amendment Act has now added a proviso to section 11 to provide that the Government may also restrict usage of unutilised foreign contribution if, based on a summary inquiry the Government believes that such person has contravened provisions of the Act. This amendment appears to be preventive and to enable the Government to preclude receipt and utilisation of foreign contributions when it finds that the recipient is prima-facie contravening the Act.

The summary nature of the enquiry however does not exclude the process adopted from the judicial scrutiny.

- *Identification requirements*

  The Amendment Act has introduced section 12A, enabling the Government to require any person who seeks permission or registration (or renewal) under the Act to provide Aadhaar cards of all its office bearers or directors or other key functionaries or, in case of foreigners, a copy of passport or overseas citizen of India card.

- *Increase in the maximum limit for the period of suspension*

  Under the Act, the Government could suspend the registration of a person for a period not exceeding 180 days. The Amendment Act has now amended section 13 of the Act to give the Government the power to suspend the registration certificate of a person for up to 360 days. The rationale for this change, especially when the emphasis is on making timelines shorter in other legislations, is unclear. This will provide a tool to the Government to keep the registration certificates under suspension for almost a year when it may not have solid grounds to finally cancel the registration. Needless to say, that the power to extend the suspension will have to be exercised judiciously.

- *Surrender of certificate*

  The Amendment Act has added section 14A allowing the Government to permit a person to voluntarily surrender their registration certificate, if it is satisfied that such person has not contravened any provisions of the Act and the management of its foreign contribution (and related assets) has been vested in an authority prescribed by the Government.

Conclusion

A closer look at the statistics shows that the active NGOs actually registered and operating under the Act constitute less than 1% of total number of NGOs operating in India. The Amendment Act hopes to ensure greater transparency and effective monitoring of the inflow of foreign funds and the utilization for the activities set out in their registration.

Certain aspects of the Amendment Act require further clarity. While the Amendment Act was notified on 29 September 2020, NGOs will have to wait for notification of the amendment rules under the Act, to specify *inter alia* designation of the branch of State Bank of India and procedures for opening a special account, before they can fully understand and comply to the new regulatory expectations. In the meantime, however, NGOs can continue to function as usual and operate their designated accounts.

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