

THE FOREIGN CONTRIBUTION (REGULATION) ACT (FCRA) AMENDMENT ACT, 2020 – A READY RECKONER

BACKGROUND & CONTEXT:

The Foreign Contribution (Regulation) Act has its origins in 1976 during the Emergency. It was essentially meant to keep a check on foreign influence in social, political, economic, and religious discussions in India.

The 1976 Act allowed non-profits to freely receive foreign donations, although they were required to report the amount received and spent each year. In 1984, the law was made stricter by making it mandatory for non-profits to register before receiving any foreign donations. They could also not pass on that money to other non-profits who were not registered.

In 2010, the 1976 Act was repealed and replaced by an even stricter law – Foreign Contribution (Regulation) Act, 2010 (2010 Act) along with the Foreign Contribution (Regulation) Rules, 2011 (2011 Rules) read with other notification / orders etc., issued thereunder from time to time.

Key changes introduced by the 2010 Act vis-à-vis the 1976 Act

Broadly, the 2010 Act introduced following three key changes that render the 2010 Act more stringent than the 1976 one:

- a) Under the 2010 Act, FCRA registration is valid **for five years**, and must be renewed thereafter, whereas under the 1976 Act it was a permanent registration.
- b) Under the 2010 Act, **only 50% of the foreign contributions could be utilised for administrative expenses**, whereas no such specific restriction existed under the 1976 Act.

Recent Amendments under the FCRA Amendment Act, 2020

On 20th September, the Foreign Contribution (Regulation) Amendment Bill, 2020 (2020 Amendments) was introduced in Lok Sabha that broadly redefined terms related to acceptance, transfer, and utilisation of foreign contributions under the 2010 Act. The Bill was passed by Lok Sabha on 21st September and subsequently by Rajya Sabha on 23rd to ratify it. The Bill was assented to by the President on September 28 and the Government has notified September 29, 2020 as the effective date of the Amendments coming into force.

The key amendments to the 2010 Act are as follows:

a) Prohibition to accept foreign contribution

Under the 2010 Act, certain ‘persons’ are prohibited to accept any foreign contribution. The 2020 Amendments adds “**public servants**” (as defined under the Indian Penal Code) to this list. Public servant is broadly defined to include any person who is in service or pay of the government or remunerated by the government for the performance of any public duty.

This brings in a wider range of individuals - government and PSU employees, officers in the military, navy or air force, police, judges, officers of Court of Justice, and any local authority established by a central or state Act – who are forbidden to receive foreign contributions.

b) Transfer of foreign contribution

Under the 2010 Act, foreign contribution could be transferred to another person who is also registered to accept foreign contribution (or has obtained prior permission under the Act to obtain foreign contribution), and to a limited extent and with prior permission, to a person who is not registered under the 2010 Act. However, the 2020 Amendments have changed this position and imposes a **blanket ban on transfer of foreign contribution to any other person** (‘person’ as defined in Appendix I).

c) Reduction on use of foreign contribution for administrative purposes

Under the 2010 Act, a maximum of 50% of the foreign contribution could be used for meeting administrative expenses of the recipient entity. The 2020 Amendments reduce this limit to 20%. (List of administrative expenses is mentioned in Appendix II).

d) Aadhaar for registration

The earlier 2010 Act allowed a person to accept foreign contribution if it has:

- (i) obtained a certificate of registration, or
- (ii) not registered, but obtained prior permission from the government.

The 2020 Amendments add that for such a prior permission, registration or renewal of registration, the applicant must provide the Aadhaar number of all its office bearers, directors or key functionaries, as an identification document. In case of a foreigner, they must provide a copy of the passport or the Overseas Citizen of India card for identification.

e) Designated FCRA account

Under the 2010 Act, foreign contributions had to be deposited in a single branch of a scheduled bank specified by the receiver of such funds. However, the funds could be utilised from other accounts. The 2020 Amendments further restricts the receipt of funds only in an account designated by the bank as “FCRA account” in such branch of the State

Bank of India, New Delhi, as notified by the Central Government and no other funds can be received or deposited in this account. The person may open another FCRA account in any scheduled bank of their choice for keeping or utilising the received contribution.

f) Restriction in utilisation of foreign contribution

Under the 2010 Act, upon a finding of violation of any provisions of the Act, the unutilised or unreceived foreign contribution may be utilised or received by such person, only with the prior approval of the Central Government.

The 2020 Amendments clarifies that in such a case, the government can also restrict the entity from further receiving any foreign contribution. The Government can take such actions if, based on a summary inquiry, and pending any further inquiry, it has reasons to believe that such person has contravened provisions of the Act.

g) Suspension of registration

Under the 2010 Act, the government could suspend the registration of a person for a period not exceeding 180 days. The 2020 Amendments add that such suspension may be extended up to an additional 180 days thereafter.

h) Renewal of registration

Under the 2010 Act, renewal of registration was typically procedural in nature and was granted based on information (historical information as well as further information submitted by the FCRA holder periodically). The 2020 Amendments allow the Central Government to initiate a fresh inquiry into the workings of the applicant before renewing the registration. Therefore, essentially the renewal process will be subject to the same level of scrutiny as carried out at the time of obtaining initial registration or approval.

i) Surrender of Certificate

The Act adds a provision where any person can voluntarily surrender their FCRA registration certificate. The Government may permit this, post an inquiry, to satisfy itself that the person has not contravened any provision of the Act. The management of the foreign contribution and related assets that have been created using the foreign contribution will then vest in an authority prescribed by the Government, once the certificate has been surrendered. These assets may include schools, colleges or any other infrastructure that has been created using foreign contribution. The 2010 Act provided for vesting, transfer and disposal of foreign contribution and assets by the Government only in the case where the FCRA registration was cancelled due to violations.

FREQUENTLY ASKED QUESTIONS

OVERALL CONTEXT:

1. What is the Government's rationale for these amendments?

The Minister of State for Home, Nityanand Rai in his statement in the Parliament said that the Amendments are intended to bring about “greater transparency” and “not against NGOs or an attack against a religion or community”. He further said that it will not stop foreign contribution but is in the interest of NGOs doing good work and that it was meant to “stop misuse of foreign funds by some people” and was required for an Atmanirbhar Bharat, and aimed to ensure that foreign funds are spent in the right direction.

2. What are some of the repercussions of this Amendment Act?

The Amendments which are expected to cause the most concern are:

- a. **Transfer of foreign Contribution:** Due to the blanket ban on transfer of foreign contributions, this could impact collaborations in the development ecosystem, especially for smaller, less visible grassroots organisations that may not meet the criteria or be able to submit detailed proposals to get access to grants from funders abroad. Equally, such grassroots organizations may not have the track record or meet the eligibility criteria to obtain registration under the FCRA. Intermediary organisations provide the necessary identification, monitoring and capability building of the smaller non-profits for them to thrive.
- b. **Cap on administrative expenses to 20%:** This cap on expenses may hinder efforts on internal capability building, attracting relevant talent and focus on innovation for non-profits. Expenses such as travel, rent, and hiring of talent come under the ambit of administrative expenses amongst others. Cap on these expenses may impact productivity of smaller non-profits.
- c. **Requirement of Aadhaar and prohibition of public servants:** The greater scrutiny (afforded by submission of Aadhaar numbers) of members of boards, trustees or other management/executive council members of non-profits may curtail interest in experts wanting to provide their expertise and advisory services to non-profits. This may deprive the sector of their knowledge, skills and their network which would be a significant loss for the impact sector.
- d. **Suspension of Account:** Extended suspension of FCRA account may affect operations significantly, in case the FCRA-registered organisation comes under Government scrutiny, thereby impacting projects on the ground.

IMPLICATIONS FOR NON-PROFITS & SERVICE PROVIDERS

1. For an FCRA-registered non-profit, what are the ramifications of the 2020 Amendments?

- a) As an FCRA-registered non-profit, if you have an acting 'public servant' on your governing board, then you will be prohibited from receiving any foreign contribution.
- b) Sub-grants from and to other FCRA-registered non-profits will no longer be possible.
 - Each FCRA-registered non-profit looking to collaborate on a project will have to enter into direct transaction with the foreign contributor to receive funds.
 - Service contracts for specific services provided to an FCRA-registered entity are not impacted. There is an applicability of 18% GST and the receipt through provision of such services must be within 20% of the total receipts for the service-providing non-profit. (Finance Act 2015).
- c) Local branch/office of International non-profits/think tanks that were incorporated/established in India to distribute funds locally from the foreign parent entity will no longer be able to do so.
- d) Non-profits will have to take into account their administrative expenses and ensure that they do not exceed 20% of the foreign contribution received. (The list of administrative expenses is mentioned in Appendix -II).
- e) Non-profits will have to ensure that they have the Aadhaar details of all members on their governing board while applying for FCRA registration or while seeking renewal of their registration.
- f) Non-profits will have to set up their designated FCRA bank account to receive foreign contribution in specific branches of State Bank of India in New Delhi, as notified by the Government. The funds can be moved to other bank accounts, however, for their utilisation.
- g) Given that the FCRA registration expires after 5 years, FCRA holders will be subject to inquiry after the end of every 5 years if they wish to renew their registration, rather than a simpler renewal process prior to the Amendments.
- h) Any non-profit that would prefer to surrender their FCRA registration may do so, but any assets that have been created using foreign contribution will be transferred to an authority prescribed by the Government. These assets may include any schools or institutions that may have been set up using foreign contribution.

There is no clarity on how these changes will impact the existing funds collected for on-going projects.

2. For a non-FCRA-registered non-profit, what are the ramifications of the Amendments?

- a) Earlier, non-FCRA registered NGOs could receive a portion of FCRA funds from FCRA-registered NGOs by taking prior permission from the Government (up to 10% of the foreign contribution). This will no longer be possible. This could impact collaborations in the development ecosystem. Service contracts for specific services provided to an FCRA-registered entity are not impacted, with the applicability of 18% GST. The receipt through provision of such services must be within 20% of the total receipts for the service-providing non-profit. (Finance Act 2015)
- b) If you wish to apply for an FCRA registration, it would be pertinent to keep in mind the necessary eligibility criteria and documentation required such as Aadhaar, affidavits to be signed by the office bearers/chief functionary, the prohibition of presence of public servants on Board, and the more detailed scrutiny that the organisation would come under after the Amendments come into force.

3. As a service provider to FCRA-registered NGOs, will this Act impact my services?

Any fees earned by a person in lieu of any services rendered by the person in the ordinary course of business is exempted from the definition of foreign contribution and does not fall under the ambit of the FCRA Law.

The only ramification of these Amendments may apply if the FCRA-registered non-profit considers the service fees as part of their administrative expenses, which may now be limited to 20% of total foreign contribution. Depending on the nature of services rendered, the non-profit may characterise the service fees payable as “administrative expenses”, if such services relate to the management or running of operations of the client itself (as opposed to a specific project). In such a case, the fees could be characterised as “professional charges”.

IMPLICATIONS FOR CSRS AND FUNDERS

1. For a CSR client who can only support FCRA-registered NGO partners, what are the implications of these Amendments?

- a) CSR Funders will have to ensure either by diligence or by taking a warranty from the non-profit partners that they do not have any 'public servant' on their governing board.
- b) CSR Funders will have to ensure their funds are not further distributed by the recipient entity by incorporating necessary restrictions in the terms of engagement with the non-profit partner.
- c) CSR Funders will also have to ensure that the 20% cap on administrative expenses is clearly marked in the budget/purpose of utilization shared by the non-profit partners.
- d) CSR Funders will also need to be aware of the date of validity of the FCRA registration of their non-profit partners, to ensure that projects do not get stalled midway due to delay in process of renewal of FCRA certificate.

2. As a foreign contributor to Indian non-profits, how will this Act impact my contributions?

- a) Foreign Contributors (FCs) will have to ensure, either by diligence or by obtaining adequate warranties from the recipient entities that such non-profit partners do not have any 'public servant' on their governing board, which would make them ineligible to receive foreign contribution.
- b) FCs will have to ensure their funds are not further distributed by the recipient entity by incorporating necessary restrictions in the terms of grant.
- c) FCs will have to ensure that the 20% cap on administrative expenses is clearly marked in the budget/purpose of utilization shared by the recipients.
- d) FCs will need to be cognizant of validity of FCRA certification of their recipient organisations.
- e) FCs, in case of a collaboration, will need to enter into separate grant agreements with each of their non-profits partners rather than through one anchor FCRA-registered non-profit which would further sub-grant it to other non-profits.

APPENDIX – I

SALIENT FEATURES OF THE 2010 ACT

Applicability: The provisions of the Act apply to:

- a) whole of Indian territorial jurisdiction,
- b) non-resident citizens of India, and
- c) an overseas branch or a subsidiary of a company that is registered in India.

Purpose: The preamble of the Act specifies that the primary purpose of the Act is:

- A. to regulate the acceptance and utilisation of “foreign contribution or foreign hospitality” by certain individuals or associations or companies; and
- B. to prohibit such acceptance and utilisation for any activities detrimental to national interest.

A. Regulation of foreign contribution

As per the 2010 Act, a “Person” can receive “foreign contribution” from a “foreign source” only if:

- a) it has a definite cultural, economic, educational, religious or social programme;
- b) it has FCRA registration or prior permission from the Central Government; and
- c) it does not fall under the list of persons categorically prohibited under Section 3 of FCRA, 2010.

For the purpose of this law, the definition of a “Person” includes

- a) an individual,
- b) a Hindu undivided family (HUF),
- c) an association (society or trust or partnerships), and
- d) a Section 8 company registered under the Companies Act, 2013 or a Section 25 company registered under the Companies Act, 1956.

Therefore, only those non-profits or charitable organisations (falling under the definition of a “person”) running the said above listed programmes and have obtained the FCRA registration or prior permission can receive foreign contribution.

The Act defines “foreign contribution” as donation, delivery or transfer made by a “foreign source” of

- a) an article beyond a specific value (excluding an article that has been gifted for personal use),
- b) currency (Indian or foreign), or
- c) securities issued by any incorporated company, mutual fund units, government securities, foreign securities, derivatives, or other similar instruments.

The Act further defines “foreign source” as

- a) a foreign government,
- b) an international agency (excluding UN and its specialised agencies),
- c) a foreign company or corporation,
- d) an Indian subsidiary of a foreign company (except where the foreign investment in such a subsidiary has been made in accordance with the foreign investment regulations),
- e) a registered foreign trust, foundation
- f) a foreign society, club or other association, and
- g) a foreign citizen.

B. Prohibition of foreign contribution

As per Section 3(1) of FCRA, 2010, the following are prohibited to receive foreign contribution:

- a) a candidate for election
- b) a reporter or other professionals associated with news industry
- c) a company associated with broadcasting of news
- d) a Judge, Government servant or employee of a government company
- e) a member of any legislature
- f) a political party or an organisation of political nature
- g) an individual or association specifically prohibited

APPENDIX – II

Rule 5 of 2011 Rules define “administrative expenses” to include:

- (i) salaries, wages, travel expenses or any remuneration realised by the Members of the Executive Committee or Governing Council of the person;
- (ii) all expenses towards hiring of personnel for management of the activities of the person and salaries, wages or any kind of remuneration paid, including cost of travel, to such personnel (except expenditure incurred on salaries or remuneration of personnel engaged in training or for collection or analysis of field data of an association primarily engaged in research or training);
- (iii) all expenses related to consumables like electricity and water charges, telephone charges, postal charges, repairs to premise(s) from where the organisation is functioning, stationery and printing charges, transport and travel charges by the Members of the Executive Committee or Governing Council and expenditure on office equipment;
- (iv) cost of accounting for and administering funds;
- (v) expenses towards running and maintenance of vehicles;
- (vi) cost of writing and filing reports;
- (vii) legal and professional charges; and
- (viii) rent of premises, repairs to premises and expenses on other utilities.

Sattva has been working with various corporates, non-profits and social organisations to help them define their social impact goals. Our focus is to solve critical problems and find scalable solutions. We assist organisations in formulating their long-term social impact strategy by strategically aligning with business to provide meaningful solutions to social issues.

We'd love to hear your thoughts and feedback on this topic. Do write to us: impact@sattva.co.in