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MORE QUESTIONS FOR FOREIGN NGOs/NPOs – FEMA AMENDMENTS

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The Reserve Bank of India (**RBI**) on August 31, 2018 notified the Foreign Exchange Management (Establishment in India of a branch office or liaison office or a project office or any other place of business) (Amendment) Regulations, 2018 (**Amendment Regulations**).

The limited amendments, at first glance, appear to simply clarify that the RBI and the Ministry of Home Affairs (**MHA**) oversee different kinds of not for profit entities – those which are engaged in activities within the purview of Foreign Contribution (Regulation) Act, 2010 (**FCRA**) and hence under the MHA, and all others who would continue to be under the aegis of the RBI.

However, while the intent may have been to clarify, additional questions are being raised due to the amendments.

The Foreign Exchange Management (Establishment in India of a branch office or liaison office or a project office or any other place of business) Regulations, 2016 (**Applicable Regulations**) enabled foreign companies to establish a Branch Office (**BO**) / Liaison Office (**LO**) / Project Office (**PO**). The Applicable Regulations under regulation 5(d) specifies that RBI approval was necessary when the applicant is *inter alia* a Non-Government Organisation or a Non-Profit Organisation (**NPOs**).

The Amendment Regulations have now added to regulation 5(d), a further statement that if any such NPO is engaged, partly or wholly, in any of the activities covered under FCRA it shall obtain a certificate of registration under the FCRA and not seek permission under the Applicable Regulations i.e. from the RBI for setting up a BO, LO or PO in India.

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The Amendment Regulations have further amended the declarations to be made by the applicant NPO to include the following additional declaration:

“We will not undertake either partly or fully, any activity that is covered under Foreign Contribution Regulation Act, 2010 (FCRA) and we understand that any misrepresentation made or false information furnished by us in this behalf would render the approval granted under the Foreign Exchange Management (Establishment in India of a branch office or liaison office or a project office or any other place of business) Regulations, 2016, automatically as void ab initio and such approval by the Reserve Bank shall stand withdrawn without any further notice.”

The questions which are raised are:

- 1) What are the activities which are covered under the FCRA and how does an NPO decide which is the appropriate authority for it to apply to?

The FCRA does not define activities which are exclusively subject to the FCRA and in fact broadly provides that the requirement for registration under the FCRA is for organisations “having a definite **cultural, economic, educational, religious** or **social** program...”

Since the RBI has simultaneously retained the authority to grant approvals to NPOs, there is confusion concerning (a) which would be these NPOs subject to RBI, since every NPO would invariably either be engaged or deemed to be engaged in some 'economic' or 'social' or the other activities specified under the FCRA – especially since FCRA traditionally identified in its annual reporting form a wide range of activities for foreign contribution and fund utilisation ranging 'welfare and empowerment of women' to 'environmental programs' and 'survey for socio-economic and other welfare programs' and it is debatable as to which NPO would be engaged in an activity not covered under the FCRA, and (b) whether registration under FCRA (as opposed to permission from the RBI) would need to be obtained by such international NPO based exclusively on the fact that charter documents of such entity may make a provision for undertaking social programs and activities even though there is no intention to undertake any social programs or activities within India or provide funding for any social activities in India.

Potentially, the answer lies in the background to the Amendment Regulations which was the alleged illegal diversion/disbursal of funds by various entities operating with RBI approval to other Indian NPOs in violation of

the FCRA and more importantly beyond the scope of activities permitted by the RBI. As it was not *per se* the official activities of these international NPOs which was the issue it is possible that RBI along with the MHA is attempting to curtail unlawful activities. However, since the unlawful activities were not arising out of a gap in law but plain violation of the law, the Amendment Regulations have added questions to which answers will possibly follow with approvals and rejections of applications made to the RBI.

Presumably, RBI will continue to entertain all international NPOs – even though the charter documents of the entity applying provide its main object as undertaking cultural, economic, educational, religious or social programs and activities.

- 2) Does the MHA intend to clarify/amend the procedure and the requirements/compliances for obtaining registration under the FCRA for setting up entities in the nature of LO, BO, etc., and not incorporated or registered entities in India?

Presently, the scope and applicability of the provisions of the FCRA as well as the registration form (required to be submitted for obtaining registration under the FCRA) is limited to a society, trust, association or persons and a section 8 company. The FCRA does not make a provision for an international NPO entity directly submitting the application for obtaining registration for setting up entities in the nature of BO, LO, etc.

While the amendments introduced seem to be another step taken by the Government of India in strengthening the regulatory regime for international NPOs intending to undertake any activities in India and to maintain strict control over foreign funds being remitted to India, from some of the questions being raised, it appears to be a work in progress which will require clarifications over a period of time.

Feedback

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