Representation Letter

on

DRAFT FCRA Rules 2011

Submitted to

Joint Secretary, FCRA Department

on 30th March 2011

MA Management Services (P) Ltd.

SMA Management Services (P) Ltd

Representation Letter on Draft FCRA Rules 2011
submitted to Joint, Secretary FCRA Dept.

CONTENTS
i. Representation Letter
ii. Background Papers on FCRA RoundTable
➢ Agenda FCRA RoundTable
➢ Comparative Study of FCRA Provisions
➢ Comparison of present forms and proposed forms
➢ Presentations

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30th March 2011

To
Honourable Minister of Home Affairs
Through Office of Joint Secretary (Foreign Contribution)
Ministry of Home Affairs
FCRA Wing
Jaisalmer House
26 Mansingh Road
New Delhi 110001

Sir,

We refer to a notice issued by the Ministry of Home Affairs, inviting comments on Draft Foreign Contribution (regulation) Rules 2011.

In this regard, a RoundTable discussion was held on 15th March 2011 with different stakeholders, including representatives of grass-root organisations, local and national NGOs, donor agencies, academicians & professionals associated with the NPO sector and Institute of Chartered Accountants of India. Most participants in the RoundTable had several comments to offer on the Draft Rules, accordingly a Working Group was formed for formulating this representation the Ministry.

At the outset, we welcome various positive developments in the Act, these include taking stipend and scholarships out of scope of FCRA, incorporating power of revision, allowing transfer of funds to unregistered bodies, etc. There is more transparency in the Act as the Govt. has now codified several of the procedures which were earlier internal practices of the Department. Organisations receiving more than Rs 1 crore would need to publish the same on their websites. Although some quarters have indicated their reservation for this process, however it will further add to the transparency in the sector. There is clarity on the education and other fees being received by the NPOs. The Act overall is certainly better structured.

While welcoming the above positives, we believe there are several areas which could do be refined further. Our suggestions/comments in this letter are divided broadly in two categories, one on issues which are errors / omissions in the Draft rules that would result in difficulties in the day to day smooth functioning of the FCRA organisations. The second category identifies issues which could have impact on the policies and genuine beliefs of the civil society organisations.

CATEGORY I

CHANGING OF FORM NUMBERS

In the rules all the forms have been renumbered, for example, form FC3 is now form FC6. The NGO community has been used to the old Form Numbers for more than three decades, and any renumbering would cause unnecessary mistakes. A large number of such mistakes can be easily avoided by ***retaining the old Form Numbers*** to the extent possible and giving new numbers only to the additional new forms. Such a move would make compliance with the Act easier.

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CROSS-REFERENCING OF RULES

It is observed that Rules have not been cross-referenced with provisions in the Act. Thus if one needs to read specific provision in the Act, one will need to search for it from among various provisions. Considering that NGO community by and large is not so well versed with legislation, ***cross-referencing of the rules with relevant sections*** of the Act will facilitate better understanding of the provisions and requirements of the Act. This will avoid confusion and mistakes.

APPLICATION FOR REGISTRATION / PRIOR PERMISSION

As per Rule 9(1a) a printout of online application needs to be submitted to the Department. within thirty days of the submission of online application itself. If not done then as per Rule 9(1b) the application lapses and as per Rule 9(1c) next application can be moved only after six months from the date of cessation of the application. It is not clear why the Department has made such a tough rule for submission of a hardcopy of the online application. Since there are no additional declaration or submission of new information required through this procedure, treating the application as ceased for a procedural requirement and then not allowing to apply for new application for another six months seems unreasonable. In case of such delays, Foreign Contribution promised by a foreign source could move to other organisations or even other countries, since no funding organisation would wait for another six-seven months and carry unutilised funds against its budget. It is suggested that the Department recognises that in 'real situations' such instances are likely to happen, and it ***allows revival of the application, on the basis of condonation***.

This can be easily done by adding an appropriate clause under Rule 9 only.

RENEWAL OF REGISTRATION CERTIFCATE

FCRA provisions now require renewal of FCRA registration certificate every five years. This provision seems to be inconsistent with the Govt. thinking, where Income Tax Department has now removed the requirement of obtaining renewal of S.80G certificate. It appears that the reason for such a provision is to provide an opportunity to the Govt. to monitor organisations which have registration but are not filing the annual returns[1]. While this may be a genuine concern of the Govt. it does mean that a large number of genuine organisations would also be put to trouble for helping the Govt. weed out non-serious organisations. Also what happens, if an NGO has not received any Foreign Contribution or received Foreign Contribution which the Department considers inadequate during the registration period, would the Department refuse to renew the registration. These questions are particularly relevant since the para 7 in Form FC-5 asks 'Reasons for seeking renewal of certificate' the Act / Rules do not specify what could be the grounds on which a renewal application can be refused. ***For transparency, it is requested that the rules / Form FC-5 should make it abundantly clear the grounds on which renewal could be refused.***

[1] As per information released by the Govt. there are more than 20,000 organisations which have received registrations but not filing their annual returns.

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Rule 10, it is further observed, specifies that the certificate of registration issued under the Act would be valid for five years. This rule seems to be superfluous considering that S.12(6) already states the same for registration certificates issued under the new Act and S.11(1) for the certificates already in existence on the date the Act comes into force.

RELATIVE

Section 4(e) of the Act allows 'relative' of persons prohibited under Section 3 to receive Foreign Contribution. Rule 6 limits this amount to Rs 1 lakh or equivalent in a financial year. In case a person receives more than this amount s/he has to intimate the Govt in Form FC-1. However it is observed that the Rule states 'Any person receiving Foreign Contribution ……'. A plain reading of the Rule is likely to be interpreted 'any person' with an enlarged scope not only to the persons defined under Section 3 to whom the Section 4(e) is applicable but to 'all persons' whether covered under the Act or not. This would mean that all individuals who receive more than Rs 1 lakh from any of their relative whether covered under the FCRA Act or not would need to file Form FC-1. This would turn out to be an enormous exercise involving a very large number of persons. There is a need to review, if the same is intended by the Act.

The rule should be suitably modified, one suggestion is as follows:

Any person ***covered under any of the categories specified under Section 3 of the FCRA Act 2010,*** receiving foreign contribution……..

TRANSFER OF FUNDS TO REGISTERED ORGANISATIONS

A large number of registered organisations get several of their programmes implemented through other local and smaller NGOs. This forms part of the programme strategy to benefit from these NGOs local knowledge as well as build their capacity. However before the funds are transferred, it is ensured that these NGOs have FCRA registrations or prior permission. Requiring that these organisations take prior approval for each such transfer will become a major bottleneck in expeditious transfer of funds, as number of transfers are frequent and large. This will affect the entire working systems developed and evolved by various organisations. In any case this information would be provided by the organisation through its annual return to the Department

The above requirement is based on Rule 23, that if any person intends to transfer the funds to any other organisation, including a registered / prior permission organisation, even then prior permission would need to be taken by filing Form FC-10. ***In the Act there is no specific provision which requires that a person before transferring of funds to another registered / prior permission organisation needs to obtain permission from the Govt.*** Closest that one comes to the above requirement is under Section 7, which states that funds may be transferred to unregistered bodies after taking permission from the Govt. Further S. 48 which empowers the Govt. to make rules does not cover S. 7 at all. Thus the above requirement does not seem to flow from any specific provision.

Rule 23(2), provides some indication about Government's thinking for bringing the above. The Rule states that the Govt. may permit transfer to registered / prior permission

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organisations in case they have not been proceeded against under any of the provisions of the FCRA Act. This can be achieved far more easily, if the said information is put on the Department's website, and the persons transferring the funds are required to ensure that funds are not transferred to any of the listed organisations. In any case since all the organisations file annual returns, which provides complete details of the organisations to whom funds have been transferred, Govt. can always ascertain if the organisations 'proceeded against' have received funds.

DEFINITION OF ADMINISTRATIVE EXPENSES

For the first time, the Govt. has taken steps to ensure that funds are not frittered away on unproductive activities, accordingly it has made a provision that not more than 50% of funds be spent on administrative expenses. While the intention of the Govt is laudable the problem lies in the fact that Govt. has itself attempted to define 'administrative expenses', rather than relying on experts to define the same. For example, Rule 5 has included expenses towards running and maintenance of vehicles, cost of writing and filing reports, etc. Problem lies in the fact that the rule has been defined on the basis of 'natural' classification and not 'functional' classification. To illustrate, cost of printing a brochure by 'natural' classification would be defined as 'Printing Cost', however if the brochure explains, say, advantages of immunisation programme, then it would be a Programmatic expenditure and chargeable under the appropriate programme cost and not under administrative expenditure. However if the brochure highlights the achievements of the organisation and thus promotes the organisation it would be regarded as administrative cost. Such nuances while could be easily explained, however often officials who are likely to implement such provisions go strictly by the letter of the law and not the spirit, hence it is suggested that the Rule be modified so that the expenditures are classified under three broad classifications,

- Core Programme Costs
- Programme Support Costs and
- Administration Costs

It is further suggested that ***Institute of Chartered Accountants of India (ICAI) should be roped*** in to provide a proper description of these different type of expenses. ICAI is also in the process of bringing an Accounting Standard to standardised accounting practices for the NPO sector. It would be most appropriate body to define the administrative expenses.

PAYMENT OF FEES FOR PENDING APPLICATIONS

Applications for registration and prior permission made under FCRA 1976 but which remain pending at the time the FCRA 2010 comes into effect will remain valid and will be considered under the new Act. However Rule 9(5) requires that the applicants would need to deposit the prescribed fee as applicable under the new Act.

Intention of the Govt. seems to be that since these applications would be considered under the new legislation and hence the applicant needs to deposit the fee as per the proposed Act. One estimate is that there could be as many as 3000 such applications. To enable these applicants to comply with the rules, the Department may need to write to

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each of such applicant. While most would comply with the requirement, there would always be cases who may not receive such intimation and hence may not be able to deposit the requisite fee. Non-deposit of fee would mean the application becoming invalid. Once rejected, it would not be possible to revive these applications for another six months. This could cause a lot of hardships. In any case, overall costs involved in serving of notice on all individual cases, hidden costs likely to be incurred by each person in deposit of the fee, etc. would be quite high. ***To enable easier compliance and to avoid hardships to applicants who submitted the applications when no such fee was applicable, it is suggested that the Govt. waive the fee on these applications as a one time gesture.***

OTHERS

Value of Article not specified
There are several discrepancies observed in the formulation of Rules. For example, S. 48 (2a) & S. 2(1)(h)(i) require the Govt. to define the value of an 'article'. However no rule has been formulated defining the same.

Rules for acceptance of gift / presentation not made
S. 48(2c) & S. 4(d) require that a gift or presentation made to a delegation be accepted only in accordance with the rules made by the Govt., however Rules 2011 do not have any such rule.

Maintenance of the format of Books of Accounts
S. 48(2t) & S. 19 require that accounts of foreign contribution received be maintained in prescribed manner. Earlier Rules (Rule 8) specified that a separate set of books of accounts and records shall be maintained, exclusively for foreign contribution received and utilised. The rules further specified that a cash book and a ledger be maintained on double entry basis of accounting. No specific rule has been included in the new Rules on the same, although Rule 16 (1) requires that the annual return (FC6) will be accompanied by a Balance Sheet, Income & Expenditure and Receipt & Payment Accounts. Thus Rules indirectly require that separate set of books be maintained in double entry format, however it will be better if this is made more specific to enable organisations to continue the past practice.

Disposal of Assets
S. 22 states that where any person authorised to receive Foreign Contribution ceases to exist or becomes defunct, all assets of such persons would be disposed off in accordance with the provisions contained in any law in force under which the person was registered or incorporated and only if no such law exists then the rules framed under this law (FCRA 2010) will come into operation. However Rule 14(3) states that the assets of such person 'would not be disposed of in any manner and the interim custody of such assets shall vest in the District Magistrate or any other office authority specified by the Govt.' The rule appears to be in conflict with the provisions of the Act.

Incorrect Referencing
Rule 14 (2) refer to Rule 12(2), however there is no such rule. This needs correction.

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CATEGORY II

ORGANISATIONS OF POLICIAL NATURE

Rule 7 identifies grounds on which organisations of different types can be declared as an organisation to be of a political nature, not being a political party. Sub-rule (v) states that organisation of farmers, workers, students, youth based on caste, community, religion, language or otherwise, which is not directly aligned to any political party, but whose objectives, as stated in the Memorandum of Association, or activities (as gathered through other material evidence) include steps towards advancement of **larger socio-economic** or political interests of the organisation.

Since most social organisations aim is to advance larger socio-economic status of the constituencies that they serve, this rule may cover almost the entire NGO community and hence the words 'larger socio-economic' needs to be dropped.

Similarly sub-clause (vi) states that any organisation by whatever name called which habitually engages itself in or employs common methods of political action like *bandh* or *hartal, rasta roko, rail rook, jail bharo,* etc. in support of public causes. It appears that the intention of the Govt. is to not allow any organisation to undertake activities which cause public disturbance using the foreign funds. However since many of the civil society organisations undertake demonstration and *dharna* to draw attention to their causes, such a rule could be misinterpreted by the officials implementing these rules. Hence either the rule should be dropped or at least following added

Provided that nothing will apply to organisations which undertake activities which are not against the public interest or do not violate any of the laws of the land.

TIMEBOUND PRINCIPLE OF RESPONDING REMOVED

Under the old Act, Govt. had imposed the principle of accountability on itself by ensuring that if it fails to reject an application within 120 days, the application for registration / prior permission would be taken as deemed, however the Govt. has now removed this time-frame. Provision of fixed time-frame was considered as a good law, since it was based on a general principle of fairness. The new provision, replacing the earlier one states that the Government will only provide reason for delay after 90 days, but is not obliged to either reject or accept the application within a particular timeframe. There is a general feeling of disappointment on the same, since the new provision are not based on the principle of fairness, requiring both the government as well as the general public to comply with provisions in a time bound manner. Though since the provision is included in the Act, scope for change is limited, but the Government could consider how it could be brought on a similar footing as that of the earlier Act.

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CONTRARY TO COMMUNITY RADIO POLICY OF GoI

As per S.3 (1g) no 'association' or company engaged in production or broadcast of audio news or audio visual news or current affairs programme shall accept foreign contribution. In this regard, it may be worth noting that as per a policy expanded in 2006 by the Ministry of Information and Broadcasting, only 'Non-profit' and 'voluntary organisations' are eligible for running Community Radio Service (CRS). The policy for the purpose of the funding, particularly specifies that the applicants will be eligible to seek multilateral and foreign aid. Since FCRA provisions now forbid acceptance of foreign contribution for undertaking any audio news programme, it will not be possible for voluntary organisations who accept foreign contribution to undertake CRS, even if these are funded from local sources. Thus the relevant provision in the FCRA Act is likely to stall the CRS policy of GoI.

BANK INTEREST TREATED AS FOREIGN CONTRIBUTION

Since bank interest is provided by investment of funds by Indian banks / agencies this should not be treated as foreign contribution.

Yours sincerely

Subhash Mittal
For and on behalf of participants who attended the RoundTable

Enc.: List of participants attached