

AccountAble™

Lokpal Disclosure for NGO Officers

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The Lokpal Act¹ is designed to reduce corruption in public life. It is aimed at politicians, government officers and those holding public office. However, by extension, it also covers officers of certain NGOs. These officers must declare their wealth annually. Lokpal can also look into complaints received against them.

This issue of AccountAble discusses compliance requirements for NGO officers and implications of this mechanism for NGO governance.

Applicability

The Act applies to three kinds of NPOs, whose officers are treated as 'public servants':

1. Those established by the Central Government, also called 'Government NGOs (or GONGOs);
2. Those which receive Central Government grants exceeding Rs. 1 crore annually;
3. NPOs receiving donations of more than Rs. 10 lakh annually from foreign sources.

1. GONGOS

Any Board, corporation, authority, company, society, trust or autonomous body² established by an Act of Parliament is covered under sec. 14(1)(f). Also included are organizations controlled or financed by Central Government.

Any person who is or was a chairperson, member, officer, or even just an employee of such organizations is treated as a public servant. Accordingly, they must declare their assets annually and are open to inquiries under Lokpal Act.

¹ The Lokpal and Lokayuktas Act 2013

² The legal form of the entity is immaterial for clauses (f) and (g). See explanation to sec. 14(1)

2. Government-funded NGOs

Any organization, whether society, trust, LLP, firm, company (including non-profit companies) is covered under sec. 14(1)(g), if it receives annual grant or subsidy exceeding Rs. 1 crore from Central Government.

Any person who is or was a director, manager, secretary or officer of such organizations is treated as a public servant. These people must declare their assets annually and are open to inquiries under Lokpal Act.

3. FCRA NGOs

So far as FCRA NGOs are concerned, three kinds of organizations are covered: societies, trusts and association of persons. However, the Act becomes applicable only if the annual receipt of FCRA donations crosses Rs. 10 lakh.³ In such a case, it does not matter whether the NGO is registered under FCRA or has only received prior-permission. In fact, it doesn't even matter if the NGO has received foreign donation without FCRA permission. The Lokpal Act will still be applicable.

Clarity on FCRA NGOs

The following discussion focuses on compliance for NGO officers covered under clause (h) of sec. 14(1).

Society, Trust or AOP

Only three types of organizations are covered under this clause.

1. Societies may be registered or unregistered. They may be charitable, literary, and scientific or not. Special types of societies, such as

³ Sec. 14(1)(h)

cooperative societies and MACCS⁴ would also get covered, if these were receiving donations from a foreign source.

2. Trusts are generally formed by registration of a trust deed under Registration Act, 1908. In some states, such as Gujarat and Maharashtra, these are formed and registered under special laws.
3. Associations of persons are like joint ventures or collaborations. These are typically unregistered and may or not be supported by a written agreement. These are formed when two or more persons (firms, companies, individuals, societies, etc.) join in a common purpose or common action.⁵ Even an NGO movement could be treated as an AOP, if there is significant degree of collaboration among members.

Non-profit Companies?

What does that leave out? Non-profit companies are a glaring, but clear omission.⁶ This means sec. 25 or sec. 8 companies getting foreign donations are not covered under sec. 14(1)(h). Therefore, directors and other officers of such companies do not have to comply with Lokpal Act just because of this clause.⁷

Contribution or Donation?

The Lokpal Act does not mention the term 'foreign contribution' at all. Instead, it refers to donations from a foreign source', as defined in FCRA 2010. Does this make a difference? It does.⁸ Only *donations* and *grants* from a foreign source are to be considered for Lokpal Act. Loans from a foreign source or subscription to

⁴ Mutually Aided Credit Cooperative Societies

⁵ CIT vs. Indira Balakrishnan, AIR 1960 SC 1172

⁶ Explanation to sec. 14(1) clarifies that companies etc. are covered only for clauses (f) and (g): "For the purpose of clauses (f) and (g), it is hereby clarified that any entity or institution, by whatever name called, corporate, society, trust, association of persons, partnership, sole proprietorship, limited liability partnership (whether registered under any law for the time being in force or not), shall be the entities covered in those clauses..."

⁷ They may still be covered under other clauses.

⁸ 'Foreign contribution' covers 'donation, delivery or transfer' of money and material from a foreign source. This usually means that not just donations, even interest-free loans are treated as foreign contribution.

share capital of a non-profit company are not donations and will not be considered for this.

Director, Manager, Secretary or Officer?

Going back to societies, trusts, etc. four types of officers are mentioned. These are directors, managers, secretaries and other officers. Who would these include? The phrase doesn't seem to be very clear. The term 'director' is standard for companies, but not so for societies or trusts. Similarly, a 'secretary' is standard in societies, but is often less powerful than president or chairperson. The term 'manager' is used for employees at various levels of hierarchy. Same is the case with 'officer'. Many NGOs have an Accounts Officer. Should he/she be treated as a 'public servant'?

WBSRA

It appears that the phrase should be interpreted as indicating a group of people who manage or control the organization. This is also how the term 'officer' is defined in sec. 2(e) of West Bengal Societies Registration Act, 1961:

'Officer means a member of the Governing Body, the President, the Secretary or any other office bearer of a society and includes also an employee of the society whose work is not of a purely ministerial nature.'

Who performs work of 'ministerial nature'? This refers to a person acting at the commands of another, or acts as agent for another, or under superior authority.⁹ Clerical or administrative work is covered under this, where discretion or judgement do not play a significant role.

Clearly this is a fairly wide definition, and includes governing board members, as well as employees forming part of executive management. However, this definition is not linked to Lokpal Act as yet.

Difficulties

Given the logic behind the Act, it appears all office bearers of a society would be covered. Chief Functionaries and people designated as CEO, CFO, COO would also be covered.¹⁰ People

⁹ Major Law Lexicon, P Ramanatha Aiyar, 2010.

¹⁰ What about a CFO or COO who has a consultancy contract with the NGO, instead of an appointment letter? In such cases, one should look at the substance

designated as directors could also be covered. In case of trusts, all trustees would get covered, in addition to senior management of the trust.

What about honorary board members or advisory committee members? Such people do not have executive powers. Should they also file the declaration? Mostly, it wouldn't make sense to include them.

However, sometimes an ordinary Board member exercises the real power in an NGO. In such cases, the concerned Board member should consider filing the declaration.

Past or Present, Inside or Outside...

What happens if a 'public servant' resigns from the Board membership or employment? They continue to be treated as public servants.¹¹ They can be investigated for a past offence - there is a time limit of seven years on this. The returns under sec. 44 should be filed by the public servant till all the foreign donations received by the NGO are used up.¹²

The Act applies to public servants whether in India or outside.¹³ This means a non-resident board member of an Indian NGO should also file the annual return (if the NGO receives foreign donations of Rs. 10 lakh or more). Thus, a PIO living in USA, and holding an office in an Indian NGO, will have to file the return of his/her global assets annually with the FCRA department.

Declaration & Returns

As discussed above, once you become a public servant, you must file a declaration along with a return of your assets and liabilities.¹⁴

of the relationship. If the CFO or COO has executive powers, then he/she would be treated as an officer. The form of the contract would not matter.

¹¹ Sec. 14(1)(h): '...who is or has been a director...'

¹² Gazette notification S.O.2156(E), dated 20-Jun-2016. This may create some difficulties. An NGO may continue receiving foreign donations for a long time, and thus remain covered by sec. 14(1)(h). In such a case, how long should a past office bearer file the annual returns?

¹³ Sec. 1(3)

¹⁴ Sec. 44(3); Rule 3 of Public Servants (Furnishing of Information and Annual Return of Assets and Liabilities and the Limits for Exemption of Assets in Filing Returns) Rules, 2014 (GSR 501(E), notified 14-Jul-14); Forms I-IV.

Due Dates

The return must be filed within one month of your becoming a public servant. After this, you must file an annual return of assets and liabilities as at 31-March. This return must be filed by 31-July each year.¹⁵

In Jul'16, the government extended the deadline for filing two returns (for 31-Mar-15 and 31-Mar-16). These returns can now be filed till 31-Dec-16.¹⁶ This applies only for the above two returns. Filing date for other returns remains unchanged as 31-July each year.

This was the fifth such extension, notified at the very last minute. By then many people had already filed their return. All these people must now file the returns¹⁷ again.

Competent Authority

For people working with FCRA NGOs, these must be filed with Minister of Home Affairs.¹⁸

People working in GONGOs should file this with the Minister in charge of their administrative ministry.¹⁹

For other government-funded NGOs, these returns must be filed with the Ministry that gave the higher grant during the year. Copies should be filed with other ministries giving grants to the NGO.²⁰

Public Disclosure?

The original Act called upon the concerned Ministry to publish the returns filed by public servants. This section was amended on 29-Jul-16. The Government now has the power to decide whether and how will these be published. The Government has not issued any directions so far. It is likely that the requirement of routine public disclosure may be dropped.

Strictly speaking, the returns should be filed for Mar'14 onwards.

¹⁵ Sec. 44(4); Rule 3, Public Servants ... Rules, 2014.

¹⁶ GSR 747 E, 29-Jul-16; FCRA Order dated 29-Jul-16

¹⁷ as at 31-Mar-15 and 31-Mar-16

¹⁸ Sec. 2(c)(vii) and Gazette notification S.O.2156(E), dated 20-Jun-2016.

¹⁹ Sec. 2(c)(v)

²⁰ Sec. 2(c)(vi). DOPT Gazette notification S.O. 2154(E) dated 20-Jun-16.

Forms

Altogether four forms must be filed annually:²¹

1. Form I: Name of spouse, dependent children, public position held by them, if any
2. Form II: Details of movable property such as cash, bank balances, investments, provident fund, loans and advances,²² vehicles, jewelry, gold, etc.
3. Form III: Details of immovable property such as land, house, shops, other buildings
4. Form IV: Details of loans taken, along with name of creditor²³

Penalties

There are two kinds of liabilities for NGO officers covered by the Act:

1. They are liable to inquiry, if a complaint is made against them to the Lokpal. Any member of the public can file such a complaint.²⁴ If the Lokpal finds evidence of corruption²⁵ against the public servant, a case would be filed. As an interim measure, Lokpal may also order confiscation of assets acquired through corrupt means.
2. If they do not file the annual declaration or do not declare all the assets properly, then it is presumed that the assets were acquired through corrupt means.²⁶

²¹ Forms I-IV, Public Servants ... Rules, 2014.

²² Exceeding Rs. 1 lakh or two months' basic pay, whichever is higher.

²³ Exceeding Rs. 1 lakh or two months' basic pay, whichever is higher

²⁴ A person making a false complaint to harass a public servant can be punished with prison and fine (Sec. 46). If an NGO makes a false or frivolous complaint against a public servant, then officers of the NGO are liable to pay compensation (sec. 47).

²⁵ Prevention of Corruption Act, 1988

²⁶ Sec. 45

Implications

The primary idea behind Lokpal is to improve probity in public life. Most people in public limelight, such as politicians, government officers, are used to such scrutiny. However, private individuals are not quite prepared for this.

This is especially true for wealthy individuals or business people, who are often reticent about disclosing their wealth in public. Many may find that the reporting requirements under Lokpal Act are too much for them. This may result in an exodus of such honorary members from boards of societies and trusts. That would be rather unfortunate.

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