

AccountAble™

Foreign Contribution (Regulation) Act 2010 (FCRA 2010) has a provision for compounding of offences. This allows the Government to enter into a compromise with the offender. They can simply pay a compounding fee, instead of facing court proceedings, and possibly a fine and imprisonment. This helps the Government keep litigation costs down, while earning some useful revenue. In theory, all the offences under the Act are eligible

for compounding. However, in practice, only notified offences can be compounded. FCRA Department had notified some offences for compounding in 2011 and then in 2013. Some of the penalties were lowered in 2016. It has now come out with a longer list and bigger fines. This issue of AccountAble explains what offences can be compounded as well as the procedure.

Compoundable Offences

Following notified offences can be compounded:¹

Nature of offence	Compounding Fee	Payable by
• Bureaucrat, judge, MP, MLA, politician, etc. enjoys foreign hospitality while abroad without permission or intimation	Rs. 10,000	Bureaucrat, judge, MP, MLA, politician, etc.
• NGO with FCRA permission or registration passes on foreign contribution to unregistered person	Rs. 1 lakh or 10% of contribution transferred, whichever is higher	NGO which transferred the FC
• NGO accepts foreign contribution without registration or permission or from a restricted source or for restricted purpose, area, etc.	Rs. 1 lakh or 10% of contribution received, whichever is higher	NGO which received the FC
• NGO spends more than 50% of foreign contribution on administrative expenses	Rs. 1 lakh or 5% of the excess expenditure on administration, whichever is higher	NGO
• NGO receives foreign contribution in wrong bank account	Rs. 1 lakh or 5% of amount received, whichever is higher	NGO
• NGO deposits local funds (including funds from UNO, etc.) in an FCRA bank account	Rs. 1 lakh or 2% of amount deposited, whichever is higher	NGO
• Bank does not report foreign contribution or source to MHA	Rs. 1 lakh or 3% of amount deposited, whichever is higher	Bank
• NGO does not file FC-4 or FC-1 for foreign contribution received in cash or kind	Rs. 1 lakh or 5% of amount received during the period of default, whichever is higher	NGO
• NGO does not maintain accounts or records of foreign contribution	Rs. 1 lakh or 5% of amount received during the period of default, whichever is higher	NGO

¹ Notification no. S.O. 2291(E), dated 5-Jun-2018, F.No. II/21022/23(088)/2015-FCRA-III(A).

Compounding of Confusion

If the FCRA rules were clearer, there may be fewer offences. As it stands now, many of the rules are makeshift. FCRA Department has issued clarifications on some, but many problems remain. The confusion is compounded by multiple interpretations and a generally weak capacity of NGOs when it comes to legal compliance.

Administrative Expenses

FCRA caps administrative expenses at 50% of the foreign contribution received. The use of word 'received' creates a problem. Let's say that an NGO received Rs. 50 lakh from a foreign source in March. Its total FC receipts for the year were Rs. One crore and total spending was Rs. 30 lakh. The question is — can this NGO spend 50% of total *receipts* on administrative expenses? That would mean it can spend the entire Rs. 30 lakh on administrative expenses without breaking the rule! In the following year, if its total FC receipts were lower, it would have a problem, as the amount available for administrative expenses would also drop. Fortunately, in practice, FCRA department seems to be using total utilisation as the base for calculating the cap on administration.

The items to be included in administrative expenses are another headache — due to a detailed but ambiguous rule 5. Therefore, many NGOs don't include salaries of program staff while calculating administrative expenses. However, FCRA Department treats salaries of all staff — whether program or administrative — as administrative expenses.

Which Bank Account?

NGOs must deposit foreign contribution only in the designated FCRA bank account. This is probably the simplest FCRA rule. However, this is also the most flouted. How does this happen?

Confusion about which bank account to use is the most common reason for this violation. Many NGOs open multiple bank accounts, sometimes for each project or each donor. Therefore, funds are sometimes deposited in an FC utilization account, instead of the designated account.

A foreign donor may transfer funds into the wrong bank account, sometimes without your consent. This is more likely if you've put up your bank details on your website. This will be treated as an offence on your part. A fund-raising intermediary (or a company doing CSR) may insist on transferring FC into your local bank account, just because the remittance is in rupees. The offence is again on your part. Rupee deposits also confuse some banks, who automatically assume that rupee amounts are local contribution - even

From the Bank to the Prison

In 2010, Delhi High Court confirmed a prison sentence for Mr. M. Kurian, after a long and exhausting legal battle which began in 1987. Mr. Kurian was the Executive Director of CROSS and had deposited Rs. 3.65 lakh in a non-FC bank account. Enforcing provisions of FCRA was a difficult task under the 1976 Act. Scrutinising bank deposits was another big problem. Armed with more intel (live monitoring of PFMS banks) and hefty compounding fees, the Department will now probably issue dozens of show cause notices each day. How to make sure you don't get one? Here are some simple ideas:

1. Make your FCRA accounts foolproof by asking your bank to add:
 - a. The suffix '-a/c FCRA Main' to your designated FCRA Account. Your account will now show up as 'XYZ NGO - a/c FCRA Main'.
 - b. The suffix '-a/c FCRA Utilisation' to all your FC utilisation accounts. These will now show as 'XYZ NGO -a/c FCRA Utilisation'.

These changes are not covered by rule 17A. You don't need to file FC-6 for these.

2. Modify bank instructions by asking your bank not to credit any funds in the FCRA Utilisation accounts, except for transfers from FCRA main account.
3. For each new donor, find out correctly whether they are a foreign source or non-foreign source. Share the correct bank account details accordingly.
4. Ask your FC donors to make out cheques / drafts favouring 'XYZ NGO - a/c FCRA Main' instead of simply writing XYZ NGO.
5. Avoid disclosing your FCRA or local bank account numbers on the internet.

if these are from a foreigner living in India. They are known to force NGOs to deposit these in local accounts. On the other hand, if you receive dollars from an NRI, your bank will most likely insist (quite wrongly) that these should be deposited into your FCRA account!

Bank Change: Intimation or Approval?

When does a change of designated FCRA bank account become effective? On filing form FC-6 or on receiving the confirmation of change from FCRA Department? Rule 17A asks for an intimation only. However, Sec. 17 asks you to deposit FC only in the account specified in your application for FCRA registration. This is a little ambiguous.

Therefore, it is advisable for you to wait for the FCRA Department to process your FC-6 and issue a new letter. A copy of the letter should also be given to the bank. Once this happens, you can start using the new bank account as designated FCRA account.

The Department may take a couple of months to issue a revised letter. Meanwhile, you can continue using the existing designated bank account for your FCRA transactions.

Bankers' Guilt

Since 2015, banks have been asked to report all foreign contribution to MHA within 48 hours. However, no penalty was specified for a default in reporting by the banks. Now defaulting banks must pay Rs. 1 lakh for each default in each customer's account.

This can create quite a problem. The banks are required to report these remittances on a daily basis. It is also likely that there will be several defaults in just one year. Will the banks have to pay Rs. 1 lakh for each default? Who will bear the cost for this? What happens in case of repeat offence - the law says you cannot compound an offence repeatedly.

How many Books?

Rule 11 asks NGOs to keep 'a separate set of accounts and records, exclusively, for the foreign contribution received and utilised.' This means that you cannot keep one common set of books for local contribution and foreign contribution. You also cannot record any entries for local contribution in FCRA books. Separate salary register, fixed assets register, investment register, etc., are also required for FC funds.

However, can you keep multiple sets of account books for foreign contribution? Many NGOs do so — some keep as many as 50-70 sets of books. Each set contains entries for one donor or project. This is done mainly to satisfy a desire on part of donors to keep 'separate accounts' for their own funds. However, what usually means 'separate ledger accounts', is often misunderstood as 'separate books of accounts'.

Use of the word 'a' with the singular 'set' in rule 11 means that you should not keep *multiple* sets of books for FCRA funds — you should keep *only one separate set*. Within this, you can create sub-ledgers to track project-wise utilisation. If you are using Tally, you should open only one separate company for FC funds, and then use groups or cost-centres to get donor-wise or project-wise expenditure.

Therefore, if you continue keeping multiple sets of books for FCRA funds, you could end up paying a big penalty.

Delayed FC Returns

NGOs with FCRA registration or prior-permission must file

form FC-4 each year. The form must be filed online by 31 December. The form must be filed even if the NGO has not received any FC during the year.

Then there is form FC-1 which must also be filed if an NGO has received any FC in the form of articles. This should also be filed online by 31 December.

Many NGOs face problems with online. Some lose their login details. In 2017, some NGOs which were upgraded from prior-permission to FC registration were not able to login to file the return. NGOs not getting any FC often forget to file FC-4.

NGOs which receive FC in kind mostly don't file FC-1. NGOs receiving computers, software, etc., from foreign MNCs or subsidiaries are not aware that they must report this in FC-1. This is also happening because of confusion around meaning of 'foreign source' when it comes to Indian companies.² In the past, this was not a big problem as compounding fees were nominal. Also these were based on the actual delay in filing. The new formula means that an NGO will have to pay Rs. 1 lakh (or 5% of the FC received, if it is higher) for a small delay of even one day. The penalty remains unchanged whether the delay is one day or one year. Also an NGO which didn't receive any FC and didn't file FC-4 will still have to pay Rs. 1 lakh.

What about compounding fees for older offences? For example, an NGO has not filed the FC-4 for FY 16-17. Will the compounding fees be calculated according to Jun'16 notification or Jun'18? If this case has not been compounded by 4th Jun'18, then the new rates will apply.

What if an NGO has not filed FC-4 for FY 14-15, 15-16 and 16-17? For each year, it may have to pay Rs. 1 lakh or 5% of the amount received in each year, whichever is higher. The fees could, therefore, come to at least Rs. 3 lakh for three years.

Multiple Offences

Compounding fee will be calculated separately for each offence, and then added together. In some cases, this could exceed the total amount of FC involved. The notification, therefore, caps the compounding fee at 100% of the foreign contribution.

Does this limit also apply when only one offence is committed? For instance, an NGO which has not received any foreign contribution fails to file FC-4. Will the compounding fee be Rs. 1 lakh or nil?

² Definition of 'foreign source' was amended in 2016 with effect from 1976. Indian companies (such as ICICI, HDFC, etc.) which were treated as foreign source merely because their foreign shareholding exceeded 50% are no longer a foreign source. However, Indian companies which are subsidiaries of foreign companies (e.g., Maruti Suzuki, Microsoft India, etc.) continue to be foreign sources as they are also covered under a different clause. Many people have missed this out.

It seems that this relief is available only when the fee mounts due to multiple offences. Therefore, in this case, the NGO will have to pay Rs. 1 lakh for not filing FC-4.

Repeat Offenders

If a similar offence is repeated by a person within three years, it cannot be compounded again. Secondly, compounding is feasible only before prosecution is started. If a complaint has been filed in the court, then compounding is no longer an option.

If the offence is for not filing a document or for filing it incorrectly? In such a case, the person may also be asked to file the missing documents before the offence is compounded.

Filing the Application

Make an application on plain paper or your organisation's letterhead for this. The application should be addressed to the Secretary, Ministry of Home Affairs. The application will be decided by the Director or Deputy Secretary. An application fee of Rs. 1,000 is to be paid for this. This is in addition to the penalty that will be levied if the Government agrees to compound the offence. The application fee can be paid by demand draft or banker's cheque favouring 'Pay and Accounts Officer, Ministry of Home Affairs', payable at Delhi (Rule 21).

Scan the application and send it by email to [## Compounding and Compliance](mailto:dirfcra-</p></div><div data-bbox=)

When traffic police stops you for jumping a red light, you have two options: pay a fine or appear before a magistrate. Many pay the fine on the spot. Others handover their license and try their luck in the court. For citizens, it is often a simple calculation: the hassle of a court appearance vs. the amount of the fine. The Government also does a similar calculation.

Court appearances are a costly affair for the government. The biggest cost is in terms of personnel. To prosecute an offender, the concerned departmental officers also have to appear repeatedly in court. With the courts being choked with cases, it is important for the government to stop filing cases for minor offences. Therefore, compounding makes a lot of sense for the government.

Will this work for FCRA as well? The department has very few officers — and a very small budget. It is not a revenue-earning department like Customs or Income Tax. The fines could help pay part of the cost of enforcement. They could also force NGOs to be more careful with their accounts and reports.

However, the amount of the fines is a problem. Many NGOs may be unable or unwilling to pay these hefty fines. They may choose to go to court. And drag the FCRA Department along. That will defeat the purpose of compounding.

mha@gov.in. Send the paper copy, along with the draft of Rs. 1,000 by registered post to:

Director (FCRA),
Ministry of Home Affairs (FCRA Wing),
1st Floor, Major Dhyan Chand National Stadium,
Near Pragati Maidan, New Delhi-110001

What is AccountAble: Each issue of 'AccountAble' covers a different topic related to NPO regulation or accounting. It is posted/emailed to about 3,000 persons in NPOs, Agencies, CSR Departments, Corporate Foundations and audit firms.

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Interpretation of law: Law discussed here is valid as of 5-Jun-2018. However, the interpretation is of general nature. Please consult your advisors before taking any important decision.

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