

## **FORMATION OF NGO**

A Non Governmental Organisation (NGO) is perceived to be an association of persons or a body of individuals. Such body with a definite name and objective may be a registered one or unregistered one. Legal character is acquired only after registration (incorporation) of the association of persons under any of the applicable laws.

### **Applicable Laws**

An association of persons with non profit motive may be registered under any of the following Indian Acts:

1. As a Charitable Trust
2. As a Society under the Societies Registration Act
3. As a licensed company under section 25 of the Companies Act, 1956

### **Formation of an NGO as a Trust**

Section 3 of the Indian Trusts Act defines “trust” as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another, or of another and the owner. According to Section 7 of the Indian Trust Act, a trust may be created by

(a) every person competent to contract and (b) by or on behalf of a minor.

### **Trust Deed**

The instrument by which the trust is declared is called the ‘instrument of trust’ or more popularly as the ‘trust deed’.

### **Contents of a Trust Deed**

A trust may be created by any language sufficient to know the intention and no technical words are necessary. A trust deed, generally, incorporates the following:

1. The name(s) of the author(s)/Settler(s) of the trust;
2. The name(s) of the trustee(s);
3. The name(s) if any, of the beneficiary/ies or whether it shall be the public at large;
4. The name by which the trust shall be known;
5. The name where its principal and/or other offices shall be situate;
6. The property that shall devolve upon the trustee(s) under the trust for the benefit of the beneficiary/ies;
7. An intention to divest the trust property upon the trustee(s);

8. The objects of the trust;
9. The procedure for appointment, removal or replacement of a trustee, their rights, duties and powers, etc.;
10. The rights and duties of the beneficiary/ies;
11. The mode and method of determination of the trust.

## **Registration**

In case of public charitable trusts, whether in relation to movable property of any immovable property and whether created under a will or inter vivos, registration is optional but desirable. However, in case of a charitable trust in relation to an immovable property, for claiming exemption u/s 11 of the Income Tax Act, it is essential that the instrument of trust is duly registered.

### **Registration of Trust Deed under Indian Registration Act**

An instrument assigning any right, title or interest in an immovable property of value exceeding Rs.100, is required to be registered under the Registration Act, 1908. Thus, a trust deed involving an immovable property must be registered.

### **Registration of Trust under Public Trusts Act**

A charitable trust is not required to obtain registration under the Indian Registration Act. However, in certain States like Maharashtra and Gujarat there is a Public Trusts Act, which requires such institutions trusts to get registered as such under the said Act.

## **Laws Applicable to Trusts**

1. Charitable and Religious Trusts Act, 1920
2. Religious Endowments Act, 1863
3. Indian Trusts Act, 1882

## **FORMATION OF AN NGO AS A SOCIETY**

An NGO may be formed as a society. A society may be defined as a company or an association of persons (generally unincorporated) united together by mutual consent to deliberate, determine and act jointly for same common purpose. As per the Societies Registration Act, 1860, (see Annexure 2, VI), a society can be

formed by minimum seven (or more) persons, eligible to enter into a contract, for any of the following purposes:

1. Grant of Charitable assistance;
2. Creation of military orphan funds;
3. Promotion of science, literature or the fine arts; instruction and diffusion of useful knowledge, diffusion of political education, foundation or maintenance of libraries or reading rooms for general use of the members or the public, public museums and galleries of paintings and other work of art, collections of natural history, mechanical and philosophical inventions, instruments or designs Besides, the State Governments are empowered to add more objects to the above list.

The chief advantage of forming a society are that it gives a corporate appearance to the organisation, and provides greater flexibility as it is easier to amend the memorandum and bye-laws of the society that in case of a trust, terms of which are strictly manifested in the trust deed. However, formation of a society requires more procedural formalities than in case of a trust.

### **Documents Required**

**A society for its inception requires –**

- Memorandum of association, an
- Rules and regulations.

### **Memorandum of Association**

It is the charter of a society. Memorandum of association depicts and describes the objects of a society's existence and its operation. This document should be drafted carefully and meticulously as to confer all powers on the society which will be reasonably required for total attainment of the objects. A specimen format of Memorandum of Association of a Society is given in Annexure 2.

The memorandum of association contains the following clauses:

1. The name of the society
2. The registered/principal office of the society.
3. The objects of the society

4. The names, addresses and occupations of the members of the governing body whether called as Governors, Councilors, Directors, etc., to whom, by the rules of the society, management of its affairs is entrusted, and
5. The names and addresses of the persons (at least seven) subscribing to the memorandum. The signatures of the subscribers should be duly witnessed and attested by the Oath Commissioner/Notary Public/Gazetted Officer/Advocate/Chartered Accountant/Ist Class magistrate.

### **Rules and Regulations**

The rules and regulations of a society are framed to guide the members of the governing body and to regulate the functions of the society and its internal management.. The rules and regulations generally provide for:-

1. The conditions of admission of members,
2. The liability of members for fines, forfeitures under certain circumstances;
3. The termination of membership by resignation or expulsion or upon death;
4. The appointment and removal of trustees and their powers;
5. The appointment and removal of the members on the governing body;
6. The requirement as to notice, quorum etc. for holding meetings and passing resolutions;
7. The investment of funds, keeping of accounts and for audit of accounts;
8. The manner of altering the objects and rules;
9. The matters to be provided in bye-laws;
10. The dissolution of society and the manner of utilizing the property upon dissolution;
11. Such other matters as may be thought expedient with reference to the nature and objects of the society.

**The bye-laws of the society are subsidiary to the rules and regulations and usually provide for:**

1. The business hours of the society;
2. The activities of the society in furtherance of its objects;
3. The matters relating to enrolment of members, their removal, rights, applications and privileges,
4. The manner in which the society shall transact its business;

5. The mode of custody, application and investment of the funds of the society and the extent and conditions of such investment;
6. The arrangements for day-do-day transactions, the expenditure to be incurred therefore, the staff to be employed and condition of services of such employees;
7. The conduct of the general meetings and the procedure therefore;
8. Such other matters incidental to the organisation and working of the society and the management of its business, as may be deemed necessary.

### **Registration Procedure**

When a NGO is constituted as a society, it is required to be registered under the Societies Registration act, 1860. After the Memorandum and Rules and Regulations of the society have been drafted, signed and witnessed in the prescribed manner, the members should obtain the registration of the society.

### **Process of registering an NGO under Society Registration Act, 1860:**

#### **Registration of Society/NGO**

##### **Place of Registration:**

The registration of a society is to be done under the Act wherever obtaining the registration and not in the State where the project is being implemented. Once the group of persons proposing to form a society have decided upon the name of the society and have prepared drafts of Memorandum and Rules and Regulations of the society, procedure adopted in following paragraphs may be adopted for getting the society registered.

#### **Signing of Memorandum of Association**

All the subscribers (**minimum seven**) should sign each page of the memorandum and the signatures should be witnessed by either an Oath Commissioner, Notary Public (Rs. 3/- Notarial stamp duty affixed), Gazetted Officer, Advocate, Chartered Accountant or 1st Class Magistrate with their rubber / official stamp and complete address.

Persons desirous of forming a society should also become members of the first governing body. An outsider cannot become member of the governing body in the first instance.

#### **Signature on Rules and Regulations**

The Rules should be signed by at least three members of the governing body. Following certificate should be given at the end of the rules and regulations: ""Certified that this is the correct copy of rules and regulations of the Society"".

File the required documents with the Registrar of Societies. Following papers should be filed with the Registrar of Societies for registration of a society under the principal Act or corresponding Acts enacted by various State Governments:

- Covering letter requesting for registration stating in the body of letter various documents annexed to it. It should be signed by all the subscribers to the memorandum or by a person authorised by all of them to sign on their behalf
- Memorandum of Association in duplicate along with a certified copy (as per Sec. 3 of the Principal Act). It should be neatly typed and pages serially numbered
- Rules and Regulations / Bye-laws in duplicate duly signed
- Affidavit on non-judicial stamp paper of appropriate value sworn by the President or Secretary of the Society stating relationship between the subscribers. The affidavit should be attested by an Oath Commissioner, Notary Public (Rs 3 Notarial Stamp affixed) or Ist Class Magistrate.
- Documentary proof such as House Tax receipt, rent receipt in respect of premises shown as Registered Office of the society or no objection certificate from the owner of the premises

### **Registration Fee**

Normally fee of Rs 50/- is payable as registration fee of a society and it should accompany the request for registration payable in cash or by Demand Draft. In Union Territory of Delhi the Registrar intimates the applicant society by a letter stating that all the formalities have been completed and the documents filed are acceptable. The applicant society is required to deposit the registration fee after receipt of this letter. Formalities of registration and requirement of documents etc. may differ slightly from State to State. The applicants may, therefore, contact in advance the Registrar of Societies having jurisdiction.

### **Registration Certificate**

On receiving the documents mentioned above the Registrar shall satisfy himself about the compliance of the provisions of the Act and correctness in his hand that the society is registered under the Principal Act 1860 or other corresponding Acts.

### **Presumption of Registration**

Presumption that the society was duly registered under the Act arises not on the Certificate of Registration granted by the Registrar but on the copies of the Rules and Regulations and Memorandum certified under Sec. 19 which constitutes them prima facie evidence of the matters therein contained.

## **FOREIGN CONTRIBUTION**

The Foreign Contribution (Regulation) Act, 1976 (FCRA) requires all Indian NGOs that receive foreign contributions to receive clearance from the Ministry of Home Affairs, in the form of either permanent FCRA registration or prior permission on a case-to-case basis.

## **REGISTRATION PROCEDURE UNDER FCRA**

### **The statutory provision**

**1.1** Under Section 6 of FCRA, it is clearly provided that any organisation having a definite cultural/ social/ educational/ religious/ economic object shall only accept foreign contribution after satisfying two conditions :

- (i) It must register itself with the Central Government.
- (ii) It must agree to receive foreign contribution only through one specific bank account.

### **1.1-1** The statutory provision

Provisions under section 6(1) and 6(1-A) are as under :

“Certain associations and persons receiving foreign contribution to give intimation to the Central Government : (1) No association [other than an organisation referred to in sub-section (1) of section 5] having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution unless such association—

(a) registers itself with the Central Government in accordance with the rules made under this Act ; and

(b) agrees to receive such foreign contributions only through such one of the branches of a bank as it may specify in its application for such registration,

and every association so registered shall give, within such time and in such manner as may be prescribed, an intimation to the Central Government as to the amount of each foreign contribution received by it, the source from which and the manner in which such foreign contribution was received and the purposes for which and the manner in which such foreign contribution was utilised by it :

Provided that where such association obtains any foreign contribution through any branch other than the branch of the bank through which it has agreed to receive foreign contribution or fails to give such intimation within the prescribed time or in the prescribed manner, or gives any intimation which is false, the Central Government may,

by notification in the Official Gazette, direct that such association shall not, after the date of issue of such notification, accept any foreign contribution without the prior permission of the Central Government. (I-A) Every association referred to in sub-section (1) may, if it is not registered with the Central Government under that sub-section, accept any foreign contribution only after obtaining the prior permission of the Central Government and shall also give, within such time and in such manner as may be prescribed, an intimation to the Central Government as to the amount of foreign contribution received by it, the source from which and the manner in which such foreign contribution was received and the purposes for which and the manner in which such foreign contribution was utilised by it.”

As per the provisions of Section 6 no association is entitled to receive foreign contribution unless it has either registered itself or has obtained prior permission.

**1.1-2 Organisation must already be registered -** Only those organisations are eligible for registration under FCRA, which are registered under Society Registration Act, 1860, the companies Act, 1956, the Bombay Public Trust Act, 1950 or as a public trust under general law. Though FCRA does not distinguish between registered and unregistered organisations, but the implications of section 6(1) virtually ensures that only registered organisations would be able to get themselves registered as a legal entity under FCRA. Section 6(1) categorically specifies that organisation having a definite cultural, economic, educational, religious or social programme shall only accept foreign contribution. In the absence of registration and written documentation, it may not be possible for an organisation to prove definiteness of its aims and objectives.

**1.1-3 Specification of bank branch -** Sub-section (1)(b) of section 6 of FCRA further specifies that the foreign contribution should only be received from one of the branches of a bank as specified in the application. It is necessary to open a bank account designated for receipt of foreign contribution. The account can be opened with Indian funds before applying for registration. It may be noted that, subsequently, this account should exclusively remain for crediting foreign contribution only. Under no circumstance domestic contribution should be mixed in this account. This foreign contribution does not necessarily mean foreign currency or exchange, and therefore an organisation may receive foreign contribution in Indian currency as subsequently receivable or otherwise, within the scope of FCRA

**1.1-4 Preventing acceptance of contributions -** The proviso to section 6(1) states the circumstances under which the Central Government may prevent the organisation from accepting foreign contribution without prior permission. The circumstances are :

(i) the organisation receives foreign funds from an account other than the branch of the bank through which it had agreed to receive at the time of registration.

(ii) the organisation fails to give intimation within the prescribed time or in the prescribed manner.



(iii) the organisation gives any intimation which is false.

If the organisation commits any of the above-mentioned violations, then the Central Government may by notification, direct such organisation to receive foreign funds only after taking prior permission. It may be noted that the proviso to section 6(1) uses the word “may” thereby implying it to be a discretionary power in the hands of the Central Government which it has to exercise in a just and fair manner, keeping in view the facts and circumstances of each case.

**1.1-5** Form for registration - Organisations desirous of registering themselves with the FCRA department are required to apply in Form FC-8 along with various documents.

### **Checklist of documents to be filed**

**1.2** The following documents must be filed for obtaining registration :

- i) Form FC-8 duly filled up in triplicate.
- ii) Audited statement of accounts of past three years.
- iii) Annual Report specifying activities of past 5 years.
- iv) Detail of the beneficiaries and detail of the socio-economic factors of the region in which the NGO is working.
- v) List and geographical detail of the state, and districts proposed for work.
- vi) Certified copy of the Registration Certificate.
- vii) Certified copy of the Bye-laws and Memorandum and Article of Association whichever is applicable.
- viii) Copy of certificates of exemption or registration issued by the Income Tax Department u/s. 80G and 12A.
- ix) Copy of any prior permission granted to the organisation.
- x) Copy of resolution of Governing Body of the organisation, authorising the registration under FCRA.
- xi) Copy of Power of Attorney or the resolution of Governing Body by which the Chief Functionary is authorised to submit FC-8.
- xii) List of present members of the Governing Body of the organisation and the office bearers.

xiii) Copy of any Journal or other publication of the organisation.

xiv) If the association is having any parent or sister or subsidiary organisation, which is registered under the FCRA then the registration number along with Ministry of Home Affairs file number should be mentioned.

xv) If the association has submitted any application earlier then its reference number should be mentioned.

xvi) If the association has received any foreign contribution with or without the prior approval of the Central Government, then the detail should be given. It may be noted that the onus of getting registered under FCRA lies on the association and therefore before accepting foreign contribution, it is the responsibility of association to ensure all the requisite formalities are complied with and registration is granted before accepting any foreign exchange.

### **Time limit for making application for registration**

**1.3** No specific time limit has been provided under FCRA for making an application, unlike Income Tax Act, which requires an organisation to apply within one year from its creation or registration under section 12A. Normally FCRA is granted after 3 years of active existence, therefore, the application should be made after three years though nothing in the Act prevents from making such application earlier.

**1.3-1** Application can be filed at any time - Consequently, in our opinion, application for registration under FCRA can be filed any time after the registration of the organisation. But, the organisation with a considerable past history of activities have a greater chance of convincing the FCRA authorities with regard to the genuiness and the relevance of their purpose.

### **Field Enquiry**

**1.4** The FCRA department may ask the intelligence bureau for a report. Some authorities from the intelligence bureau may visit the office and the project area of the organisation and inspect the books of account and other records available. On the basis of the reports submitted by the intelligence bureau the FCRA department decides whether to accept or reject the application.

The FCRA department issues a registration certificate and provides a permanent registration number. This registration number is required to be quoted in all future correspondences and filling of returns and forms.

### **Time limit for granting registration**

**1.5** There is no time limit mentioned under the FCRA either for granting or rejecting the application. Normally, the application is expected to be processed within a period of six months but it is found that applications for registration are delayed for even two to three years. The FCRA guidelines available on the website of the Ministry of Home Affairs, provide that the certificates from recommending activities (District Collector, etc.) are very important and help in expediting the process of registration. In the absence of a prescribed time limit, it is expected that the authority should dispose of the application within a reasonable time. The duration of such reasonable time will depend upon the prevailing facts and circumstances.

### **Undertaking by the Chief Functionary**

**1.6** The application form which is FC-8, was amended vide Foreign Contribution (Regulation) (Amendment) Rules, 1996[GSR 592(E), dt. 27.12.1996]. After the amendment an undertaking has to be given by the Chief Functionary, affirming that the informations are correct and the organisations would undertake to abide by the following :

(i) Inform within 30days regarding change of name, address, objects, etc. with evidence.

(ii) Not to accept any foreign contribution without prior permission, if more that 50% of the office bearers as were mentioned in the application for registration are changed or replaced.

(iii) Not to change the bank account or branch of the bank without prior permission.

(iv) Not to accept foreign contribution before the registration is granted or with prior permission only.

**1.6-1** Text of the undertaking : The text of the undertaking is a follows :

“ The Association named hereinabove affirms that the information furnished above is correct and undertakes :

i) to inform the Central Government (Ministry of Home Affairs) within thirty days, if any, change takes place in regard to the name of the Association, its address, its registration, its nature, its aims and objects with documentary evidence effecting the change ;

ii) to obtain prior permission for change of office bearer(s), if at any point of time such change causes replacement of 50% or more of the office bearers as were mentioned in the application for registration under the Foreign Contribution (Regulation) Act, 1976 and undertakes further not to accept any foreign contribution except with prior permission till the permission to replace the office bearer(s) has been granted.

iii) not to change the bank or branch of the bank without prior permission of the Central Government. The reasons for change of bank or branch of the bank shall have to be relevant and justifiable ; and

iv) not to accept any foreign contribution unless it has obtained either the registration number, as applied for hereinabove, or prior permission of the Central Government under sub-section (1-A) of Sec. 6 of the Foreign Contribution (Regulation) Act, 1976.”

**1.6-2 Nature and implication of the undertaking :** It is important that the nature and implication of this undertaking is properly understood by the functionaries of the applicant organisation. The following analysis is made in brief :

i) If there is any change in the name, address, the nature of registration, aims and objectives at any time after the submission of the application, then the FCRA authorities are required to be intimated within a period of 30 days.

ii) The office bearers of the association are required to continue in the office and any change which causes more than 50% of the office bearers as were mentioned in the application for registration, automatically debars the organisation from accepting foreign contribution. So in case where more than 50% of the office bearers are changed then it is required that the FCRA authorities are informed and due approval is taken. During the period between the date of change and the approval from FCRA authorities, the FCRA registration will remain suspended and the association cannot receive any foreign contribution. If it wants to receive foreign contribution it can do with prior permission only. This provision has been introduced to prevent the misuse and sale of FCRA registered associations.

iii) Under FCRA only one bank account is permissible for the purpose of receiving foreign contribution. Therefore, for the change in bank account, due information should be given to the FCRA authorities and the change should be effected only after receiving the permission for same.

### **NGOs bringing out newspapers/newsletters**

**1.7** NGOs engaged in publishing newspaper registered under the Press Registration of Books Act, 1867 are required to furnish details regarding such newspaper and also give a declaration in Form X (enclosed in Annex. 3.1). The Government Of India issued a notification in 1987 allowing NGOs which have publications other than newspaper as defined in section 1(1) of Press and Registration of Books Act, 1867. Further, a certificate is also required to be obtained from the Registrar of Newspapers of India, that the publication of the NGOs does not form in the category of newspaper as per section 1(1) and falls in the category B, which is permissible. The text of the notification is as under :

“S.O.760(E), Dated August 3, 1987 [F.No.II/21022/14(5)/87-FCRA-I], published in the Gazette of India.

In exercise of the powers conferred by Section 31 of the Foreign Contribution(Regulation) Act,1976(49 of 1976), the Central Government hereby exempts from the operation of the provisions of section 4(1)(b) any association(not being a political party), organisation or individual (not being a candidate for election) whose printed work is –

(i) not a newspaper as defined in section 1(1) of the Press and Registration of Books Act, 1867 (25 of 1867); or

(ii) not required to be registered under Part V-A of the said Act, though it may, in fact, be registered by the Registrar of Newspapers of India under the Part : subject to the condition that such Association (not being a political party), organisation or individual (not being a candidate for election) whosoever claim exemption under this order shall furnish a declaration in the Form annexed here to the Central Government and such declaration shall subsequently be furnished in each calendar year by 31st January.”

### **Certificate of Recommendation**

**1.8** Foreign Contribution Amendment Rules, 2000, inserted clause 10A in Form FC-1A, requiring the insertion of a certificate from a competent authority. This certificate can be given by any one of the following :

- (1) Collector of District
- (2) Department of the Statement Government
- (3) Ministry or Department of the Government of India

In this certificate the competent authority certifies the address and the field of activities in which the organisation is working. It also states that there are no adverse antecedents of the organisation, the proposed activities will be beneficial to the people living in that area and the detail of prior permission if taken earlier.

### **Refusal to grant registration**

**1.9** As far as the rejection or refusal of an application for registration is concerned, section 6 does not state anything clearly. Section 6(1) is completely silent about the grounds or the reasons on the basis of which an application can be rejected.

Any authority possessing the power to register has an implicit power to reject or refuse to register, as well, but the power of refusal should not be arbitrary, ambiguous and unreasonable and should be in consonance with the purpose and intent of section 10 of the Act. If the application of an association is refused, then the authorities have to communicate the reasons for refusal to the applicant. It is necessary that the order of rejection must contain the reason on the basis of which the refusal has been made, so that in case of an appeal the court could study the tenability of such reasons. The principles of “audi alteram partem” are very much applicable during the rejection of an application as basic principle of natural justice.

For further details visit <http://www.fcraforngos.org>

**Right to Information Act:**

Right to Information Act: <http://persmin.nic.in/RTI/WelcomeRTI.htm>