

Legislative Brief

The Foreign Contribution (Regulation) Bill, 2006

The Bill was introduced in the Rajya Sabha on December 18, 2006.

The Bill has been referred to the Department-related Parliamentary Standing Committee on Home Affairs (Chairperson: Smt. Sushma Swaraj).

Recent Briefs:

The Constitution (One Hundred and Sixth) Amendment Bill, 2006
December 1, 2006

The Forward Contract (Regulation) Amendment Bill, 2006
November 14, 2006

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Full Disclosure:

The author works with an organisation that receives foreign contribution under FCRA, 1976.

Highlights of the Bill

- ◆ The Foreign Contribution (Regulation) Bill, 2006 replaces the Foreign Contribution (Regulation) Act, 1976 (FCRA). The Bill seeks to regulate the acceptance and utilization of all foreign funds through donations, gifts or grants.
- ◆ The 1976 Act lists a number of organisations and individuals that are prohibited from accepting foreign contribution. The Bill adds organisations of a “political nature” and electronic media organisations to the list.
- ◆ The Bill requires all persons with a “definite cultural, economic, educational, religious or social programme” to register under FCRA to accept foreign contribution. The central government may deny, suspend or cancel certification under certain conditions.
- ◆ Organisations must renew FCRA certification every five years. Both the application and the renewal carry a fee.
- ◆ The Bill allows the central government to conduct separate audits for FCRA certified organisations and grants it the power of search and seizure.

Key Issues and Analysis

- ◆ Though the stated objective of the Bill is to strengthen internal security, it addresses only the voluntary sector and only foreign funding. This constitutes less than one per cent of gross inflow of foreign funds into India.
- ◆ Many of the objectives of the Bill are met by other laws in force such as the Unlawful Activities Prevention Act, 1967, the Prevention of Money Laundering Act, 2002, the Foreign Exchange Management Act, 1999, and the Income Tax Act, 1961.
- ◆ The new Bill prohibits all organisations of a “political nature” from receiving any foreign contribution. It gives the central government powers to classify any organisation in this category but does not provide any guidelines to define organisations of a “political nature.”
- ◆ The FCRA registration process under the Bill confers a number of discretionary powers to the authorised officer.
- ◆ There are a number of terms in the Bill including, “foreign source,” “foreign hospitality,” and “speculative business” that either lack clarity or are not defined.

PART A: HIGHLIGHTS OF THE BILL¹

Context

The Foreign Contribution (Regulation) Bill, 2006 replaces the Foreign Contribution (Regulation) Act 1976. The original Act was established to regulate the acceptance and utilization of all foreign funds through donations or gifts. According to the Ministry of Home Affairs FCRA 2004-05 Annual Report, “The primary purpose of this Act is to ensure that foreign contribution is utilized for genuine activities without compromising on concerns for National Security.” The new Bill tightens restrictions on foreign contribution primarily to the voluntary sector and political organisations. It provides for closer government monitoring, additional registration requirements, and expands the classification of individuals prohibited from accepting any foreign contribution.

Non Government Organisations (NGOs) and the voluntary sector in India have expanded over the last ten years, of which many are funded at least partially by foreign donors. The number of FCRA-registered associations increased from 16,740 in 1995 to 30,321 in 2005 (of which about 60-65% reported their foreign contribution acceptance).

Foreign contribution increased from Rs 2,169 crore in 1995-96 to Rs 6,256 crore in 2004-05 (with a 23 per cent jump between 2003-04 and 2004-05).² These funds constitute about 0.6% of the gross annual inflow of foreign funds into India.³ In comparison, the Indian corporate sector contributed about Rs 30,000 crore to Rs 35,000 crore to charitable institutions in 2006-07.⁴ In addition, individuals also donate to these institutions; we do not have reliable estimates of the total amount.

The major uses of foreign funds are establishment expenses (15%), relief and rehabilitation of victims of natural disasters (10%) and rural development (9%). The top foreign donors in 2004-05 were the Foundation Vincent E Ferrer, Spain (Rs 183 crore), World Vision International, USA (Rs 123 crore), Gospel for Asia, USA (Rs 110 crore), Plan International, USA (Rs 65 crore), and Compassion International, USA (Rs 60 crore).²

Key Features

Regulation of Foreign Contribution and Foreign Hospitality

- The 1976 Foreign Contribution (Regulation) Act (FCRA) introduced a list of individuals prohibited from accepting any type of foreign contribution: (a) candidates for election, (b) correspondents, columnists, cartoonists, editors, owners, printers or publishers of a registered newspaper, (c) judges, government servants or employees of any public sector corporation, (d) members of any Legislature, and (e) political parties or their office-bearers. The new Bill maintains the previous list and adds two more groups: “organisations of political nature,” and any association or group engaged in the production or broadcast of audio or audio visual news or current affairs programmes through any electronic mode. The Bill also allows the central government to add any person or organisation to this list. The Bill also prohibits any other individuals from accepting and transferring foreign funds to such groups. However, these persons may receive foreign contribution, for certain specified transactions such as salary, wages, international trade or from relatives.
- The central government can identify organisations as being of a “political nature” by publishing an order in the Official Gazette. The government must notify the identified organisation of such categorisation and the reasons for the same. That organisation has the right to make a representation to the central government within 30 days of the notification to challenge the classification.
- Both the 1976 Act and the new Bill require prior government permission for all members of legislatures, officer-bearers of political parties, judges, and government servants before accepting any foreign hospitality other than “a purely casual one”.
- The central government has the power to prohibit any persons or organisations from accepting foreign contribution or hospitality if it is determined that such acceptance would likely “affect prejudicially” (i) the sovereignty and integrity of India, (ii) public interest, (iii) freedom or fairness of election to any legislature, (iv) friendly relations with any foreign State, or (v) harmony between religious, racial, social, linguistic or regional groups, castes or communities.
- Foreign funds received as fees for service, costs incurred for goods or services in the ordinary course of business, and trade or commerce are excluded from the definition of foreign contribution.
- Funding from the United Nations, the World Bank and the International Monetary Fund is exempt from the requirements of the Bill. The central government can add other funders to this exemption list through notification.

Compulsory Registration of Associations to Receive Foreign Contributions

- All persons or organisations who have a “definite cultural, economic, educational, religious or social programme” (unless otherwise specified in this Act) must obtain a certificate of registration from the central government in order to accept foreign contribution. In addition to associations, societies and other organisations, the new Bill is applicable for individuals, Hindu Undivided Families, and Section 25 Companies (not-for-profit companies).
- Under the new Bill, registration expires every five years, and must be renewed within six months before the expiry of the certificate. The central government may also prescribe an application fee.
- The Bill details additional requirements for registration including ensuring that the applicant: (i) is not fictitious, (ii) has not engaged in activities aimed at forced or induced conversion from one religious faith to another, (iii) has not created communal tension, (iv) has not been found guilty of diversion of funds, (v) is not engaged in violent or seditious activities to achieve its ends, (vi) is not likely to use foreign contribution for “personal gains or divert it for undesirable purposes”, (vii) has not contravened any of the provisions of the Act and the FCRA certification is not currently suspended or cancelled within the last three years, (viii) has not been prohibited from accepting foreign contribution, (ix) has used the funds for the intended purpose, (x) and no one involved in the organisation has been convicted under any law in force.
- In the case of rejection of certification, the central government must record the reasons and provide a copy to the application giving information to the extent as specified necessary by the Right to Information Act, 2005.
- The central government may also suspend for 180 days or cancel certificates of registration to receive foreign contribution in cases of false statements in applicant registration or renewal, violation of FCRA certification or the FCRA Act, or if the central government thinks it is in the public interest to do so.

Regulation of Funds for Registered Organisations

- The Bill clarifies that income or interest from FCRA funds is considered foreign contribution.
- The Bill prohibits the transferring of foreign contribution by a registered organisation to an unregistered one.
- The Bill introduces a cap of 50% of foreign funds for administrative expenses. The government will define what constitutes administrative expenses. This cap may be exceeded with prior permission.
- The Bill specifies that foreign contribution may not be used for “speculative business.”

Accounts

- As in the 1976 Act, registered associations may only receive foreign contribution in a single account of a specified bank branch. The Bill permits opening multiple bank accounts for utilising the foreign contribution.
- Banks must report to the government the amount of foreign remittance, the source and manner in which the foreign remittance was received and any other particulars. As in the 1976 Act, registered individuals and groups must also provide the central government with such financial information.
- Every candidate for election who has received any foreign contribution 180 days before his nomination must provide the details to the central government.

Separate Auditing Structure, Inspection, Search and Seizure

- The central government may authorize a Group A post gazetted officer or “any other officer or authority or organization as it deems fit” to conduct an audit of accounts of any political party, person, organization, or association. The official has full rights to enter any premises to conduct such an audit, between sunrise and sunset.
- The Bill allows any authorised official to search and seize any accounts should he suspect the organisation to be in violation of this Act, and provides a procedure for the seizure and disposal, if necessary of such articles, currency or security. The Bill gives persons the right to appeal such a confiscation in certain circumstances.

Offences and Penalties

- Any person who violates this Act either through false statement, fraudulent registration, or violates any prohibitive order is punishable with imprisonment of up to three years and/or a fine. Anybody who accepts or assists any person, political party or organisation in accepting illegal foreign contribution may be punished by imprisonment of up to five years and/or a fine. Should an article, currency or security not be available for confiscation, a court can impose a fine of up to five times the value of the article or Rs 1,000 (whichever is higher). For any other violation, punishment can consist of imprisonment of up to one year.

PART B: KEY ISSUES AND ANALYSIS

Purpose of Bill

It is unclear whether the provisions in the Bill will fulfill the government's objective to ensure that "individuals working in important areas of national life...function in a manner consistent with the values of a sovereign democratic republic". It is also unclear whether the Bill is the appropriate means through which this goal may be accomplished.

Internal Security

The Bill is intended to help regulate foreign funds that could potentially be used for violent, fraudulent, or anti-national activities. The Bill does not cover national security issues regarding (a) all funds, whether sourced from India or abroad, and (b) all entities, including for-profit companies. Foreign funds currently received through FCRA are less than one per cent of all foreign funds entering the country. These are also less than one fifth of domestic donations to charitable institutions. Under the current law and the proposed Bill, there are loopholes for bypassing the FCRA requirements by channeling the funds through commercial firms as consultant fees, exports, etc.

Duplicate Laws

The 2006 Bill aims to tighten various requirements of the 1976 Act. However many of the objectives of the Bill are met by other laws in force such as the Unlawful Activities Prevention Act 1967,⁵ the Prevention of Money Laundering Act, 2002⁶ and the Foreign Exchange Management Act, 1999⁷. Also, auditing and reporting issues are covered by the Income Tax Act, 1961, as well as the laws governing companies, trusts, societies etc. The conduct of judges, bureaucrats etc. are part of their service rules, while that of candidates for election are covered by election-related rules. If there are any loopholes that need to be plugged, amendments to the respective Acts and Rules might be an efficient method to do so. These measures could cover the issues being addressed by FCRA, and make it redundant.

FCRA Registration Requirements

In order to be eligible to receive foreign contribution, the Bill requires voluntary organisations to register with FCRA to accept such funding. The registration process under the Bill confers a number of discretionary powers to the authorised officer.

Renewal of FCRA Certificate

Whereas the 1976 Act required a one-time registration for organisations to receive FCRA funding, the new Bill requires organisations to renew their FCRA certificate every five years. The renewal will also carry a fee. The organisation must apply for renewal within 6 months of the expiration of the certificate. Such requirements could increase cost and effort for organisations.

Approval/Rejection of Certificate

The Bill does not provide a time limit within which the FCRA authorities must either grant or deny a certificate of registration or renewal. The authority has to provide reasons for the rejection only to the extent required by the Right to Information Act, 2005. There is no process for review or appeal in case of rejection of application.

Religious Conversion

Before an organisation can receive FCRA registration the government must be satisfied that it has "not indulged in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another." The Bill does not define the word "inducement" or "indirectly" leaving it to the interpretation of the authorised official.

Forward Looking Statements

The authorised official is required to be satisfied that the organisation is "not likely to use the foreign contribution for personal gains or divert it for undesirable purpose." He is also required to determine whether the organisation has "prepared a meaningful project" for the targeted group intended to receive the foreign funds. These forward looking statements are subject to interpretation by the relevant officer.

Administration of Registration

Currently, all applications for FCRA certification have to be submitted to the Ministry of Home Affairs in New Delhi. The absence of regional centres for registration could increase the costs and effort for the applicants.

Organisations of a “Political Nature”

The new Bill prohibits all organisations of a “political nature” from receiving any foreign contribution. The central government has the powers to classify any organisation in this grouping but the Bill does not provide any guidelines of definitions of organisations of a “political nature.” While organisations, upon notification of pending status, have the right to represent themselves to the central government, the Bill does not lay out a process of appeal against such a decision.

Restrictions on Certain Categories

The Bill prohibits journalists, judges, bureaucrats, etc. from accepting foreign contribution. It is unclear whether this would prevent such citizens from accepting foreign awards from a foreign source that is not previously notified by the central government.

Definitions

Foreign Source

The Bill requires all voluntary organizations to register in order to receive foreign contribution from a “foreign source”. The definition of a foreign source includes all companies in which majority shareholding is held by persons who are not Indian citizens. This would include a number of companies such as ICICI Bank Ltd. and Infosys Technologies Ltd.

Foreign Hospitality

The Bill requires members of a Legislature, office-bearers of a political party, judges, government servants or employees of any government-controlled corporation or body to obtain prior approval with the government before accepting any type of foreign hospitality (including staying with foreigners on overseas trips). The definition of “foreign hospitality” exempts “purely casual” offers from such prior permission. The Bill does not define “purely casual.”

Speculative Business

The Bill prohibits persons from using FCRA funds for “speculative business.” The Bill does not define “speculative business.” (Incidentally, the Indian Trusts Act, 1882 lists the investments permissible by a Trust).

Subsidiaries

The Bill defines “subsidiaries” as the meaning assigned in the Companies Act, 1956. That Act defines a company as a subsidiary of another company if the latter controls the composition of the former’s board of directors or holds a majority of its equity share capital. This definition cannot be applied to many entities in the voluntary sector as they may be registered as trusts or associations, and may not have a “board of directors” or any “equity share capital.”

Finance and Administration

Administrative Expenses

The Bill caps use of foreign contribution for administrative expenses at 50 per cent. The central government has the power to determine what will qualify as administrative expenses. This gives discretionary powers to the government authority. It could be argued that the usage of funds should be agreed upon between the donor and the user, as long as it is not detrimental to national interest.

Single Bank Account to Receive FCRA funding

While the Bill allows organisations to utilise foreign contribution through a number of banks, it restricts acceptance of such funds to one registered bank branch. Some donors prefer that their funds are maintained in separate bank accounts. Additionally, such restrictions may pose practical problems for a group with a national presence. There could be a case for permitting multiple accounts and requiring consolidated reporting, as in the case of Income Tax for individuals. In any case, all banks are required to follow the Reserve Bank of India’s Know Your Customer policy to ensure that accounts are being opened by bona fide persons or organisations.

Separate Auditing Requirements

The Bill grants the central government the authority to conduct a separate auditing of accounts of FCRA registered organisations, including power to search and seize suspected accounts. This is a duplication of such powers as the Income Tax Act, 1961 and laws governing companies, trusts, societies etc., cover auditing and reporting issues.

Disposal of Assets

The Bill grants the central government the power to dispose the assets of organisations that are defunct or cease to exist in accordance to the provisions to the law through which the organisation was registered. Should no such

law exist, the central government has the authority, through notification, to dispose of all assets created out of foreign contribution. This provision may be problematic in some cases. For example, the change in management of a school may place its building at risk of disposal if it had been originally constructed using foreign funding.

Treatment of Interest

The Bill specifies that interest accrued or income derived from any foreign contribution shall also be considered FCRA funding. This could be an issue for groups which plan to use foreign contribution for the purpose of building a corpus fund. The income generated out of such corpus funds would be considered foreign contribution in perpetuity.

Offences and Penalties

The Bill punishes anyone who accepts or assists any persons, political parties or organisations receiving foreign contribution in contravention of any provision or rule in the Act with imprisonment of up to five years and/or a fine. The Bill does not distinguish between those individuals who do so knowingly and unknowingly.

If articles, securities or currency liable for confiscation are not available to confiscate, the Bill provides for a fine of up to five times the value of currency, etc. seized or Rs 1,000, whichever is more. Thus, authorities may prosecute for an offence of less than Rs 200.

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Notes

1. This Brief has been developed on the basis of The Foreign Contribution (Regulation) Bill, 2006 introduced in Rajya Sabha on December 18, 2006. The Bill has been referred to the Department-related Parliamentary Standing Committee on Home Affairs (Chairperson: Smt. Sushma Swaraj).
2. Ministry of Home Affairs, Annual Report, 2004-05.
3. Gross inflow in 2004-05 was Rs 1,135,250 crore, according to the Balance of Payments statistics released by the Reserve Bank of India.
4. The Receipts Budget 2007-08 (page 45) indicates Rs 5090 crore as revenue foregone on account of Section 80G deductions and Rs 353 crore on account of Section 80GGA. We have assumed that over 90% of the Section 80G donations fall in the 50% deductible bracket.
5. For example, Section 3 of the Unlawful Activities Prevention Act, 1967 allows the central government to ban organisations and Section 7 prohibits use of funds, etc.
6. For example, Section 3 of the Prevention of Money Laundering Act, 2002 prevents the use of funds generated through criminal activity.
7. The Foreign Exchange Management Act, 1999 regulates the cross border flow of funds.