

# AccountAble™

127. FCRA Bill 2006 – Analysis - 1

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The new FCRA Bill, 2006 has generated a significant amount of debate and concern among NPOs<sup>1</sup>. Such debate could help the legislature identify key issues and address these.

In this issue of AccountAble, we look at some of the debatable changes.

## Assessment

Overall, the FCRA Bill 2006 is an improvement over both the FCRA, 1976 as also the FCMC Bill 2005.

FCRA 1976 was designed to prevent foreign funds from influencing elections in India. Later, this Act was extended to NPOs as well. However, the provisions were not reworked for the purpose. As the Act was never designed for NPOs, this created certain problems in implementation. The new Bill tries to overcome these.

The new Bill is a makeover of the ill-fated FCMC Bill 2005, which never made it to the Legislature. FCMC Bill 2005 had raised a storm of protests. The new Bill addresses some of the con-



<sup>1</sup> The term NPOs includes public benefit organizations (NGOs), which are engaged in social action or relief of poverty etc, as well as other public utility organizations (educational, health and religious organizations), which are not treated as NGOs.

cerns that were expressed. Accordingly, some of the harsher provisions have been modified. However, some issues still remain.

## Key Issues

What are the issues in the new FCRA Bill that may be difficult to implement for the Department? Or may affect the vibrancy and effectiveness of the NPOs?

### Activities 'Detrimental to National Interest'

As mentioned earlier, the object of the Act has widened now. It is intended to ensure that activities detrimental to national interest are not funded by foreign contribution<sup>2</sup>.

This is easier said than done. In a nation like India, with its enormous diversity, it is not easy sometimes to build a common understanding of what is in national interest.

For instance, one group may feel that nuclear arms are in national interest, whereas another group may think quite the opposite. This kind of debate surrounds many different issues, such as large dams, the Government's economic policies, labour policies, etc.

Further, it is even more difficult to provide a working definition of national interest. In such a situation, the potential for litigation around the Act could be significant.

### Defining Foreign Source

<sup>2</sup> Preamble to the FCRA Bill 2006

The definition of 'foreign source' is very important if the FCRA is to be implemented effectively. The Bill offers an inclusive definition, as is the case with the present FCRA 1976. This means that other sources, not listed in the section, may also be treated as foreign, if the facts support this view.

The clause has been copied more or less word-by-word from the present FCRA. However, this is also a good time to rectify an unintended problem with the definition. The clause says that any company, where more than 50% of the nominal capital is held by foreigners, will be treated as a foreign source.

This clause was fine in the older days when foreign investment was not permitted. However, now there are many Indian companies who may end up being treated as a foreign source. Further, due to extensive trading on the Stock Exchange, the percentage keeps fluctuating from day to day. Sometimes, it may even be difficult for the company to say definitely whether more than 50% of its capital is held by foreigners. Examples include well-known companies such as HDFC and ICICI.

In such a situation, it may become very difficult for Indian NPOs to accept and properly account for funds from such companies.

### Coverage of the Media

The Bill continues to bar journalists from accepting foreign contribution<sup>3</sup>. However, they can accept remunera-

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<sup>3</sup> Section 3(1) of FCRA Bill 2006

tion and fees etc. for their work. Similarly, publishing groups can accept remittances from foreign sources in ordinary course of business<sup>4</sup>.

It seems, therefore, that the FCRA Bill is perhaps trying to target hidden foreign influence on journalists. The Bill now extends its coverage to electronic media as well. However, apparently some gaps still exist.

For instance, the prohibition does not cover news syndicates, broadcasters, content carriers, producers, news anchors, directors, consultants, and contractors, among others. The clause also does not cover collection and gathering of news, for sale or supply to newspapers and electronic media.

### Cap on Administrative Expenses

The FCRA Bill specifies a cap of 50% on administrative expenses funded out of foreign contribution<sup>5</sup>. This concern has possibly emerged out of high reporting of establishment expenses in form FC-3 in the last few years.

However, it must be remembered that many NPOs may not be clear about the correct meaning of administration expenses. They may be reporting salaries of program staff also under this head. Similarly, the FCRA Department may not be fully informed of the problems and pitfalls of functional classification of expenses.

While the concern about wasteful spending may be justified, it is difficult to argue that the provision is in line with the stated objectives of the Bill. It cannot be imagined that excessive spending on administration would be detrimental to

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<sup>4</sup> Section 4 of FCRA Bill 2006

<sup>5</sup> Section 8 of FCRA Bill 2006

the national interest. If such a provision is to be implemented, then perhaps the Income Tax Department would be the right agency for this. Even now, the Tax Department scrutinises payments to key persons to ensure that an NPO's funds are not siphoned out and that NPOs are not used as a tax shelter.

Secondly, it is difficult to imagine that the Government should be the arbiter of how much an NPO should spend on administration. This is entirely an internal matter of the NPO. It is for the General Body and Board of an NPO to control and regulate its spending.

Further, if required, it would be more appropriate for the donors and the concerned NPOs to discuss this, rather than the Government intervening through a law on its own.

Thirdly, the provision would be extremely difficult to implement. It would lead to endless correspondence, clarifications and arguments. The auditors would also come under pressure from their client-NPOs. Ultimately, some of the NPOs may resort to financial adjustments to sweep some of the administrative expenses under the carpet or out of the account books.

All this would not only affect accountability of NPOs adversely, it would also prevent the FCRA Department from focusing on its main task.

### Registration or License?

What does the word registration<sup>6</sup> mean? Normally, it means that an organisation's name is entered in a register, which is maintained by a Government official. This official is called a Registrar.

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<sup>6</sup> Chapter III of FCRA Bill 2006

The applicant has to just submit certain documents. The Registrar verifies the documents for genuineness and completeness. He or she then registers the organisation.



Such registration does not involve any approval on part of the Government.

However, when it comes to

FCRA, the word 'registration' assumes a different meaning. There are extensive requirements as to what the organisation can or cannot do. The concerned officers also have to exercise their judgement as to whether the organisation is doing meaningful work and whether it is in the interest of the people or not.

Further, they are also required to look into the future. For instance, they have to see whether the foreign contribution is likely to prejudicially affect national interest in future<sup>7</sup>. Or whether it could lead to commitment of an offence<sup>8</sup>.

From this perspective, it would be better to look at the FCRA registration as an approval or a license to receive foreign contribution.

### Renewal of FCRA Registration

When periodic renewal of FCRA registration was first mentioned in FCMC Bill, many NPOs protested against the same. However, the Government has retained the provision<sup>9</sup>, though with some modifications.

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<sup>7</sup> Sec. 12(3)(f) of FCRA Bill 2006

<sup>8</sup> Sec 12(3)(g) of FCRA Bill 2006

<sup>9</sup> Section 16 of FCRA Bill 2006

The renewal will still be required every five years. However, the new provision reduces the amount of discretion that the Department will have. If the documentation is satisfactory, and there is no record of any previous violation of FCRA, then the Department will be required to renew the registration.

The intention behind this provision appears to be that of weeding out defunct organisations. In such a case, it would be more useful to automatically cancel FCRA registration, if the FC-3 is not filed for, say, three consecutive years.

Alternatively, registration could be renewed simply by filing of an application and deposit of required fees before the due date. The six-month period mentioned in the clause seems to indicate that some processing and re-verification is likely.

Further the proviso<sup>10</sup> regarding refusal to renew appears to lead to double jeopardy for the same offence: an NPO will first be fined for an offence; later the NPO could be denied renewal of FCRA for the same offence.

The proposed requirement of periodic renewal is likely to increase work-load of the Department, without any clear regulatory benefit.

*Continued in AccountAble 128...*

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<sup>10</sup> Provided that the Central Government may refuse to renew the certificate in case where a person has violated any of the provisions of this Act or rules made thereunder.



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