

## Social Sector Hotline

May 06, 2011

### INDIA ROLLS OUT NEW FOREIGN CONTRIBUTION REGULATION ACT

#### INTRODUCTION

The Government of India has, vide a notification dated May 1, 2011 in the Official Gazette, brought into force The Foreign Contribution (Regulation) Act, 2010 ("**Act**"). The Act has been enacted to consolidate the law regulating the acceptance and utilization of foreign contributions in India. Prior to the Act, acceptance and utilization of foreign contributions was regulated by the Foreign Contribution (Regulation) Act, 1976 ("**Prior Act**"), which now stands repealed. Simultaneous with the Act, the Government of India has also notified The Foreign Contribution (Regulation) Rules, 2011 ("**Rules**").

We hereby give an overview of the significant changes brought about by the Act vis-a-vis its predecessor legislation *i.e.* the Prior Act; and the potential impact on individuals or organizations receiving foreign contributions.

#### DEFINITION OF FOREIGN CONTRIBUTION<sup>1</sup>

Remarkably, the definition of 'foreign contribution' under the Act specifically includes any 'security', as defined under the Securities Contract (Regulation) Act, 1956 *i.e.* any shares, scripts, stocks, bonds, debentures, debenture stock or other marketable securities of like nature. Thus, any of the above securities contributed by a foreign source will fall within the ambit of the Act. Interestingly, any contribution accepted from a company, as defined under the (Indian) Companies Act, 1956, of which more than one-half of the nominal value of its share capital is held offshore, will be recognized as foreign contribution.

Further, as a move from the Prior Act, any fee or cost received by any person<sup>2</sup> in lieu of services or goods rendered in ordinary course of business, whether within or outside India, shall be excluded from the definition of foreign contribution.

#### CERTIFICATE OF REGISTRATION OR PRIOR APPROVAL

The Act requires a person having a definite cultural, economic, educational, religious or social programme to obtain either a certificate of registration ("**Certificate**"), or seek a prior approval from the Central Government, before receiving foreign contributions. The Certificate once obtained under the Act, shall be valid for a period of five years, requiring renewal thereafter. While the intention of the government to discourage contributions being received by docile organizations is understandable, the requirement of renewal of the Certificate after every five years may add to the administrative hassles of certain organizations to some extent. Interestingly, the Act provides a breather to the associations registered or possessing prior permission under the Prior Act by deeming them to be registered under the Act for a period of five years from May 1, 2011.

A person applying for the Certificate should have undertaken reasonable activity in its chosen field for the benefit of society and the person applying for prior permission for receiving foreign contributions shall have prepared a reasonable project for benefit of society. The Act has reduced the prescribed time period taken by the Central Government, to grant a Certificate or give permission, to a maximum period of ninety days as opposed to a period of one hundred and twenty days prescribed under the Prior Act. However, under the Act, if the Central Government fails to grant the same in the prescribed number of days, contrary to the Prior Act, the Act does not specifically provide for a 'deemed approval' of the application on such failure of the Central Government. Further, in case the Certificate or prior permission sought by a person under the Act is denied, the Central Government would provide the applicant with written reasons for not granting the Certificate or prior permission.

#### PERSON PROHIBITED FROM RECEIVING FOREIGN CONTRIBUTIONS

The Central Government has wide discretionary powers to prohibit any person or organization from accepting foreign contributions. However, in addition to the list of people or organizations as were prohibited by the Prior Act, including but not being limited to political parties, candidates for election, members of the legislature, government servants and judges, the Act also prohibits the following from accepting foreign contributions: a) organizations of political nature as specifically notified by the Central Government; and b) association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode or form or any other mode of mass communication and their correspondent, columnist, cartoonist, editor or owner.

#### RESTRICTION ON UTILIZATION OF FOREIGN CONTRIBUTION

The Act mandates that a person receiving foreign contribution shall use it for the same purpose for which it has been received. Further, the Act prohibits transfer of foreign contributions to any other person not having a Certificate or prior approval of the Central Government. However, Central Government may permit such transfer, subject to an upper limit of 10% of the foreign contributions. Additionally, the Act precludes a person who has received foreign contribution from defraying more than 50% of such sum for administrative expenses, except with a prior approval of the Central Government. This imposes a positive restriction on the receiver as it shall prevent unnecessary expenditure at the cost of the cause for which the contribution is received.

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POWERS OF CENTRAL GOVERNMENT

The Act empowers the Central Government, in case it has grounds to believe that any political party, person, organization or association has contravened any provision of the Act, to cause their accounts or records to be inspected, searched or seized, upon recording the reasons for the same in writing. The Act further provides that the Central Government may cancel the Certificate on grounds such as furnishing of false information, violation of terms and conditions of Certificate, violation of the provisions of the Act or the Rules or acting against public interest. The Act expects a person, who has obtained a Certificate under the Act, to undertake reasonable activity in its chosen field for the benefit of the society for two consecutive years, failing which the Certificate may be cancelled. The Act also empowers the Central Government to suspend a Certificate vide a speaking order, pending consideration of its cancellation for the reasons discussed above. However, in case of suspension of the Certificate, a maximum of 25% of the unutilized amount may be spent, subject to prior approval of the Central Government.

MULTIPLE BANK ACCOUNTS

The Act provides that there shall be only one bank account for the purpose of receiving foreign contribution; however, multiple bank accounts may be maintained for the purpose of utilizing the amount received. From the perspective of deployment of foreign contributions, the flexibility of maintaining multiple bank accounts is a welcome change brought about by the Act.

ANALYSIS

The Act seems to have been introduced with an objective of allowing only genuine and operating organizations to receive the benefit of accepting foreign contributions. However, the obligation of renewing the Certificate every five years and that of undertaking reasonable activity in utilization of such foreign contribution in the manner specified at the time of application of the Certificate may increase additional administrative functions for non-governmental organizations or ‘not for profit’ organizations.

Further, as the Central Government has the discretion to notify organizations of political nature and the power to debar them from accepting foreign contributions, it may impact the nature of activities carried by any such organizations which fall under the shadow of political colour.

- Vivaik Sharma, Sambhav Ranka & Dr. Milind Antani\*

1 “Foreign Contribution” means the donation, delivery or transfer made by any foreign source, (i) of any article, not being an article given to a person as a gift for his personal use, if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf; (ii) of any currency, whether Indian or foreign; (iii) of any security as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 and includes any foreign security as defined in clause (o) of section 2 of the Foreign Exchange Management Act, 1999.

2 “Person” includes (i) an individual; (ii) a Hindu undivided family; (iii) an association; (iv) a company registered under section 25 of the Companies Act, 1956.

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