

# COMPANIES (CSR POLICY) AMENDMENT RULES, 2021: STRUCTURING CORPORATE RESPONSIBILITY

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## Introduction

The amendment brought in the provisions of section 135 of Companies Act, 2013 dealing with Corporate Social Responsibility ("CSR"), which was pending for want of respective amendment in the Rules, has been made **effective from January 22, 2021** along with amendment in the CSR Policy Rules, 2021.

Further, the amendment in the Rules are not just limited to the changes made in the section, rather, it extends to make substantial changes in the implementation of the entire CSR activity. New concepts have also been introduced in the Rules like registering of implementing agencies by filing e-form CSR-1 with the MCA, CFO certificate, mandatory impact assessment.

With the coming into force of this amendment, the penal provisions for non-compliance CSR provisions have also come into force, changing the very nature of the CSR provisions. Earlier if the CSR amount was unspent, Company just had to give reasons in Board report and could easily escape from complying or spending any amount. However the new amendment has made it mandatory for the Companies to spend the required amount on CSR activities.

In this write up, we discuss the impact of the significant changes made in the CSR Rules by the MCA and key changes introduced by way of amendment.

## ACTIVITIES NOT COVERED UNDER CSR:

The following activities are **excluded** from the list of CSR activities:-

- (a) Activities undertaken in normal course of business;
 

Exclusion for three year till FY 2022-23, in case companies do expense for R&D activity of vaccine/ drugs/ medical devices related to covid-19, to such companies which are engaged in R&D activity of new vaccine, drugs and medical devices in their normal course of business. This exclusion will be allowed only in case the companies are doing such R&D in collaboration with organisations as mentioned in item (ix) of schedule VII and disclose the same in their board's report.
- (b) Activity undertaken outside India
 

Exclusion: training of Indian sports personnel representing any State at a national level or India at the International level.
- (c) Contribution of any amount to any political party under section 182 of the Act.
- (d) Activities benefitting employees of the company (Apprentice engaged under the Apprentices Act 1961 are not covered under the definition of an employee)
- (e) The activities supported by the companies on a sponsorship basis for deriving marketing benefits for its products or services;
- (f) Activities carried out for fulfilling statutory obligations

**CSR POLICY**

The Companies need to amend the existing CSR policy to incorporate the approach and direction of Board along with guiding principles for selection, implementation and monitoring of the CSR activities undertaken by the companies and the annual action plan. As per the amendment, the committee is required to draw a detailed annual action plan to undertake CSR program.

**CSR COMMITTEE RELAXATION:**

Where the amount to be spent by a company **does not exceed fifty lakh rupees**, the requirement for the constitution of the CSR Committee **shall not be applicable** and the functions of such Committee provided under this section shall, in such cases, be discharged by the Board of Directors of such company.

**ONGOING PROJECTS:**

An attempt to define Ongoing Projects is definitely a welcome step.

The term 'Ongoing Project', means a multi-year project undertaken by a company in fulfilment of its CSR obligation the maximum allowed duration of which is four years (three years excluding the year of commencement as mentioned in the New Rules).

The definition of ongoing projects have been defined in the Rules. As per the definition:

1. The ongoing project can be a program of maximum 4 years (including the first year of commencement); –

While the timeline of 4 years at one go has been provided, but ambiguity remains with respect to Projects the implementation of which goes beyond the stipulated time period of 4 years.

**Monitoring of Ongoing Projects:** In case of ongoing project, the Board of a Company shall monitor the implementation of the project with reference to the approved timelines and year-wise allocation and shall be competent to make modifications, if any, for smooth implementation of the project within the overall permissible time period.

**MODES OF IMPLEMENTING CSR ACTIVITIES:**

- Established by the company either singly or jointly with other company – Section 8 company, registered public trust, registered public society (not private), registered under section 12A and 80G of the Income Tax Act, 1961;
- Established by the Government – Section 8 company, registered trust (here both public and private), registered public society;
- Established under an Act of Parliament or State Legislature – any entity;
- Established by anyone – Section 8 company, registered public trust, registered public society (not private), registered under section 12A and 80G of the Income Tax Act, 1961; having track record of at least three years in undertaking similar activities.

On and from April 1, 2021, companies can undertake CSR activity only through implementing agencies which are registered with MCA.Registration has to be done by filing e-form CSR-1 with MCA, post which the implementing agencies will receive a unique CSR Registration Number. This e-form has to be verified by a practicing CA/ CS/ CWA.

On the SUBMISSION of the Form CSR-1 on the portal, a unique CSR Registration Number shall be generated by the system automatically.

### ROLE OF INTERNATIONAL ORGANISATION

The Rules prescribe that companies may engage international organisations for designing, monitoring and evaluation of the CSR projects or programmes as per its CSR policy as well as for capacity building of their own personnel for CSR. This provision, is directory and not mandatory.

### CSR SPENDING AND UNSPENT AMOUNT:

The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least 2% of the average net profits of the company made during the three immediately preceding financial years, or where the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years.

The company shall give **preference to the local area** and areas around it where it operates, for spending the amount earmarked for CSR activities.

If the **company fails to spend such amount**, in addition to giving the reason in Directors report the Company will have to **transfer** such unspent amount **to a Fund** specified in Schedule VII, **within a period of six months** of the expiry of the financial years.

### IF THE UNSPENT AMOUNTS RELATES TO THE ONGOING PROJECTS,

- (i) Such amount shall be transferred within a period of thirty days from the end of the financial year to a special account to be called the Unspent Corporate Social Responsibility Account.
- (ii) Such amount shall be spent towards CSR within a period of three financial years from the date of such transfer.
- (iii) If the Company fails to do so, the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year.

### SET OFF ANY EXCESS AMOUNT SPENT

The New Rules also allow a company to set off any excess amount spent by it in relation to its CSR requirements up to immediate succeeding three financial years subject to the following:-

1. The excess amount for set off shall not include the surplus arising out of CSR activities in pursuance of sub-rule (2); and
2. The Board shall pass a resolution to that effect.

Incorporation of such a provision is appreciated as it gives the companies the option of using the excess funds spent in previous years to meet their future obligations.

### CREATION OR ACQUISITION OF A CAPITAL ASSET

Under the New Rules, a company is further allowed to spend the CSR amount for creation or acquisition of a capital asset held by: (a) company established under section 8 of the Act, a registered public trust or a registered society, having charitable objects and CSR Registration Number; (b) beneficiaries of the said CSR project, in the form of self-help groups, collectives, entities; or (c) a public authority.

The idea is to not limit CSR amount to revenue expenses and instead use it to create capital assets that would yield future economic benefits.

### ADMINISTRATIVE OVERHEADS

The board shall ensure that the **administrative overheads shall not exceed five percent** of the total CSR expenditure of the company for the financial year.

Administrative overheads means the expenses incurred by the company for general management and administration of CSR functions in the company

Administrative overhead shall not include the expenses directly incurred for the designing, implementation, monitoring, and evaluation of a particular CSR project or program.

#### **SURPLUS ARISES OUT OF CSR ACTIVITIES:**

Any surplus arising out of the CSR activities shall not form part of the business profit of a company and shall be ploughed back into the same project or shall be transferred **to the Unspent CSR Account** and spent in pursuance of CSR policy and annual action plan of the company or **transfer such surplus amount to a Fund** specified in Schedule VII, **within a period of six months of the expiry of the financial year.**

#### **UTILIZATION OF FUND:**

The Board of a company shall satisfy itself that the funds disbursed to the entities for CSR have been utilized for the purposes and in the manner as approved by it and the **Chief Financial Officer or the person responsible for financial management shall certify to the effect.** This makes the role of monitoring all the more crucial. This clause makes the CFO apparently responsible for the entire CSR provision without him being part of the CSR committee or the board of directors.

#### **MANDATORY CSR IMPACT ASSESSMENT**

Companies having minimum 10 cr of average CSR obligation in last 3 years shall have to undertake mandatory impact assessment through an independent agency of their CSR projects. . I the report of such assessment is required to be formed a part of the annual report.

A Company undertaking impact assessment is allowed to book the expenditure towards Corporate Social Responsibility for that financial year not exceeding five percent of the total CSR expenditure or fifty lakh rupees, whichever is less.

#### **DISPLAY OF CSR ACTIVITIES ON ITS WEBSITE:**

The Board of Directors of the Company shall mandatorily disclose the composition of the CSR Committee, and CSR Policy and Projects approved by the Board on their website, if any, for public access.

#### **PENALTY FOR NON-COMPLIANCE:**

**Company:-** The company shall be liable to a penalty of **twice the amount** required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or **one crore rupees, whichever is less.**

**Officer of the Company:** Every officer of the company who is in default shall be liable to a penalty of **one-tenth of the amount** required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or **two lakh rupees, whichever is less.**

#### **CONCLUSION:**

In any case, the intention of government seems to be loud and clear that gone are those days when the companies used to take the CSR provisions lightly by putting cliché explanations in the annual report for unspent amount on CSR activity. One cannot ignore that, as per CARO-2020, the auditor is also required to comment on the CSR provisions specifically with respect to the amount unspent and whether transferred to the unspent account.

