

CAB, 2020: Bunch of Proposals for revamping CSR Framework

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Introduction: Revamping CSR Framework

Starting with being the first country to make CSR mandatory, the Government is all set to reinforce the concept of CSR by changing the approach of companies in implementing and meeting their CSR obligations.

The same is evident from the draft version of Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020¹ ('CSR Amendment Rules, 2020') recently rolled out on March 13, 2020 by the Ministry of Corporate Affairs proposing several changes in the existing provisions of CSR. This includes preparing detailed annual report on CSR, CFO certification, impact assessment for certain companies, transfer to National Unspent CSR Fund, corporatization and registration of implementing agencies, annual action plan, disclosures on the website and so on. All this will significantly impact the manner in which companies navigate the CSR framework from now on.

In light of its commitment towards ease of doing business the Companies (Amendment) Bill, 2020² ("Amendment Bill, 2020") was introduced in Lok Sabha on March 17, 2020. While the major theme of the Amendment Bill, 2020 revolves around decriminalization of offences, certain noteworthy changes are proposed to ease out the CSR obligations for the companies. This article attempts to analyze the proposed changes in the CSR provisions by the Amendment Bill, 2020 with the set of actionables proposed through the CSR Amendment Rules, 2020

Plenty of Positives for Corporates under new CSR regime

Credit allowed for excess amount spent on CSR for indefinite period

Where a company spends more than the amount required under the law, the question to ask is, whether the excess spending can be carried forward to be adjusted in future period?

¹ <http://feedapp.mca.gov.in/csr/pdf/drafrules.pdf>

² http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/88_2020_LS_Eng.pdf

Guidance Note of ICAI on ‘Accounting for Expenditure on CSR Activities’³ prohibits such excess amount to be carried forward to the subsequent years. It states that 2% of average net profits of immediately preceding three years is the minimum amount which is required to be spent under section 135 (5) of the Act and therefore the excess amount spent in a particular fiscal cannot be carried forward to subsequent financial year.

In order to promote ease of business for law abiding corporates, the Amendment Bill, 2020 proposes to permit the companies to adjust the excess amount spent in one year against the requirement to spend for subsequent financial years. Unless the final Rules prescribe otherwise, we may say that the excess amount spent can be carry forward for indefinite years. This will allows the companies to reduce future burden of CSR expenditure and provides flexibility in allocating the profits of the Company

Escape from Committee constitution | Compliance burden linked with size of CSR spend

The requirement of constituting CSR Committee triggers once the criteria prescribed u/s 135(1) is satisfied viz. net worth is 50 crore or more, turnover is 1000 crore or more or net profit os 5 crore of more in the immediately preceding financial year. However, companies may seek exemption in the followings events

1. Ceasing to meet threshold criteria for continuous period of 3 years

Exception to the above rule of constituting CSR Committee is prescribed under Rule 3 of the Companies (Corporate Social Responsibility) Rules, 2014 wherein company ceasing to meet the thresholds for three consecutive financial years, the CSR committee of such company may be dissolved and re-constituted on subsequent fulfillment of the said conditions.

2. Size of CSR budget to determine burden of compliance

Section 135(5) requires the companies to spend at least 2% of the average net profits of the company made during the three immediately preceding financial years.

There might be cases where the companies with small percentage of CSR budget are laden with heavy set of CSR compliances. Accordingly, an additional exemption to the requirement of constituting CSR Committee is proposed to be granted to the companies under the Amendment Bill, 2020 which is linked to the size of the CSR budget determined as above.

In case such CSR budget does not exceed **Rs. 50 lakhs**, the companies are exempt from the requirements of constituting CSR Committee and Board of Directors will be entrusted with all the duties of Committee.

³ <https://resource.cdn.icai.org/38254asb27888csr.pdf>

Both the exemptions discussed above are independent of each other and therefore companies will qualify to claim exemption from setting up a CSR Committee by fulfilling any of the aforesaid criteria

The draft Rules, 2020 does not provide for such exemption and is expected to undergo change in accordance with the aforementioned.

No criminality | Simple Penalty Regime

The Companies (Amendment) Act, 2019⁴ intended to shift the CSR approach from “*comply or explain*” (COREX) to “*comply or suffer*” where non-compliance with the requirements of 135(5) and (6) attracts following penal provisions:

- Company to pay a fine of Rs. 50, 000 to Rs. 25 Lakh
- Every officer to pay a fine of Rs. 50,000 to Rs. 5 Lakh or imprisonment of upto 3 years, or both

However, Industry raised concerns for penal provisions for non-compliances over which the Government assured the CSR violation shall not be treated as criminal offence.

In line with said statement and based on the recommendations of Company Law Committee, fine and imprisonment has been replaced by the following penalty:

- On company: Twice the amount that was required to be transferred to the maximum of Rs. 1 crore
- On officer-in-default: 1/10th of the amount required to be transferred to maximum of Rs. 2 lakh

Companies burdened with loads of Actionables

Planning for CSR | Pre-Actions

Ensure projects selected for CSR do not fall under negative attributes

Strategic Planning w.r.t the CSR activities to be undertaken in line with its approach stated in the CSR Policy

⁴<http://ebook.mca.gov.in/notificationdetail.aspx?acturl=6CoJDC4uKVUR7C9Fl4rZdatyDbeJTqg3c+9Unnk2xevZ+9h/lvkVY3TGLaBTBGrakRRKnu3V8Do=>

Selection of type of projects – either short-terms [upto 1 year] or long-term [max upto 3 years]

Hiring qualified and registered implementing agency – Only section 8 companies, international organizations, entities established under Acts of Parliament or State Legislature

CSR Committee to formulate and recommend annual action plan

CSR monitoring and implementation | Post-Actions

Board to monitor the utilization of funds disbursed

Utilization Certificate from CFO

Mandatory CSR Impact Assessment – if average CSR spending \geq Rs. 5 crore in 3 immediately preceding FYs

Surplus from CSR Activity – to be used for same project or transfer to unspent account

Ensure asset created/acquired from CSR amount is held in name of section 8 company / public authorities

Ensuring limits of administrative overheads – [\geq 5% of total CSR expenditure for that FY or \geq 10%, if conducted Impact Assessment]

Unspent amount of ongoing projects to be transferred to Unspent CSR Account

Additional disclosures in Annual CSR Report and website of the company

Concluding Remarks / Ease of CSR norms

To become a Corporate Citizen in true sense, companies shall accept and develop a sense of responsibility towards CSR obligations. The above-mentioned provisions intend to bring about a better working as regards the expenditure and monitoring of the funds to be earmarked for the CSR activities. Although the provisions w.r.t CSR have been clearly identified in the companies Act read with the rules thereunder, the amendments might bring about a better implementation of the provisions. The major motivating factor in this regard shall be a shift from the COREX provision to penalty.

Our other write-ups on similar topics may be viewed at:

1. <http://vinodkothari.com/2020/03/mca-rolls-out-the-draft-of-the-amended-csr-rules-2020/>
2. <http://vinodkothari.com/2020/03/proposed-changes-in-csr-rules/>
3. <http://vinodkothari.com/2019/11/clc-report-moving-company-law-a-step-closer-to-ease-and-peace/>
4. <https://www.moneylife.in/article/norms-for-disqualification-of-directors-may-undergo-change/58842.html>
5. <http://vinodkothari.com/category/corporate-laws/>
6. <http://vinodkothari.com/2020/03/highlights-of-the-companies-amendment-bill-2020/>