

# Tailoring still to fit: CSR Law continues to evolve with contemporary needs

As the CSR framework moves from ‘comply or explain’ principle to the rule of ‘comply or pay penalty’, we see how the CSR provisions in India have uniquely evolved over the years. On one side while there is penalty, on the other side, there is motivation - prominently in the form of an extended list of activities which can qualify for CSR.



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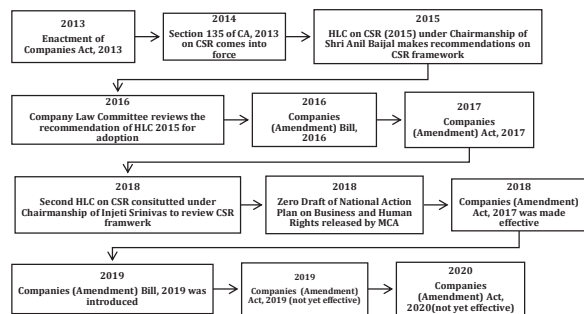
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Ever since 2013 when India became the first country in the world to enact CSR into a legal obligation, CSR law has constantly been evolving. During past 7 years, the statute has changed thrice, whereas the Rules have been changed 5 times, and there have been as many as fifteen changes in the Schedule. With the realization that a code short of a legal mandate with punitive force will not result into desired levels of compliance, the law changed from “comply or explain” to “comply or get prosecuted”. The punitive vehemence went to the extent of incorporating an incarceration provision *vide* the 2019 amendments Act while the rest of company law was moving to civil penalties. This amendment, of course, has been rolled back to a monetary penalty *vide* the 2020 amendment Act, even before the former amendment in 2019 became effective. Thus, the stance has changed from a mere responsibility, to a statutory obligation, to an imprisonable offence, to a penal offence.

Not only the change of the law, the periphery of activities within which spending may qualify has changed as many as ten times since 1<sup>st</sup> April, 2014, with as many as five changes/clarifications during the COVID-19 time itself.

Thus, Indian CSR is today much more than a self-inspired sense of responsibility or a part of sustainable business model— it is the rightful call of the legislature to mandate companies to spend, and spend in the manner that meets contemporaneous objectives of policymakers.

**Figure 1: Milestones in evolution of CSR provisions in India**



**Source: Compiled by the authors**

The way CSR has continued to focus on a social spend, the concept of business responsibility, which is where CSR had its origins, has actually spun off and developed into a different domain. Thus, business responsibility, business responsibility reporting (BRR), etc. are themes with the securities regulator is promoting, and are currently applicable only to larger of listed companies in India. The concept of BRR is non-existent in the Companies Act, 2013 (hereinafter referred to as ‘Act’) which continues to focus on social spending. Spending-focused CSR makes India another exception in the global landscape, as we see below.

## GLOBAL LANDSCAPE OF CSR

The term ‘Corporate Social Responsibility’ has been understood in the sense of responsibility in terms of impact on the society. The European Commission, in 2011, adopted a definition of CSR<sup>1</sup> as “as the responsibility of enterprises for their impact on society and, therefore, it should be company led. Companies can become socially responsible by

- integrating social, environmental, ethical, consumer, and human rights concerns into their business strategy and operations
- following the law”.

<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681>

## Tailoring still to fit: CSR Law continues to evolve with contemporary needs

The World Business Council, in a 1998 definition, defines it as “*continuing commitment by business to contribute to economic development while improving the quality of life of their workforce and their families as well as of the community and society at large*”<sup>2</sup>.

United Nations Industrial Development Organization defines CSR as follows:

“*Corporate Social Responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders. CSR is generally understood as being the way through which a company achieves a balance of economic, environmental and social imperatives (“Triple-Bottom-Line- Approach”), while at the same time addressing the expectations of shareholders and stakeholders*”<sup>3</sup>.

One may not have to get into developing a further inventory of definitions<sup>4</sup>; the global purview of CSR as the balancing of “triple bottom-line objectives” – highlighted in the definition above, is quite clear.

In this generic form, CSR provisions exist in almost 58 countries in the world, as mentioned in Wayner Visser’s 2010 publication *The World Guide to CSR: A Country-by Analysis of Corporate Sustainability and Responsibility*.<sup>5</sup>

The distinction between CSR provisions in India and other countries lies in the concept of spending. In India, the concept of CSR is almost entirely spending-faceted, whereas the part of responsible business behavior is taken as “business responsibility”. Business responsibility, and its reporting in terms of BRR, have diverged from CSR and the two seem to be developing into two different zones altogether. The following brief comparison between Indian CSR provisions and those of some major jurisdictions reveals the key differences:

**1. Europe (EU)-** CSR in EU<sup>6</sup> is developed and implemented in a strong and regulated manner. Traditionally, CSR was framed in voluntary terms within EU policy as well as being an integral part of European company’s strategy. However, EU is standardizing the corporate social implication through a more regulated and legislative way. CSR in Europe is as a response to stakeholder’s scrutiny through stakeholder-driven perspective. EU has several mandatory instruments for all member states, such as the Modernisation Directive, the European Pollutant Release and Transfer Register, the EU Emission Trading Scheme and the Integrated Pollution Prevention and Control Directive. However, there is no consensus on the common format and content for reporting on non-financial information. The Companies Act, 2006 of UK has compelled directors to act in the interests of the company’s shareholders, but taking into account the wider interests of stakeholders. Further, quoted companies additionally are also required to disclose, to the extent necessary for an understanding of the business, information on environmental, workplace, social and community matters in their annual reviews.

<sup>2</sup> <http://www.wbcsd.org/DocRoot/hbdf19Txhmk3kDxBQDWW/CSRmeeting.pdf>

<sup>3</sup> <https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr>

<sup>4</sup> [https://mpr.aub.uni-muenchen.de/75040/1/MPRA\\_paper\\_75040.pdf](https://mpr.aub.uni-muenchen.de/75040/1/MPRA_paper_75040.pdf)

<sup>5</sup> [http://aei.pitt.edu/43368/1/Mullerat\\_CSR\\_Europa.pdf](http://aei.pitt.edu/43368/1/Mullerat_CSR_Europa.pdf)



- 2. USA-** CSR in the USA<sup>6</sup> is often characterized by voluntary societal engagements by businesses as they are not obliged to undertake social and environmental responsibility practices. American corporate citizenship policies are intended to support major areas of responsible corporate conduct in the realms of social responsibility and environmental sustainability. American culture might be described as more individualistic, pragmatist and perceives rights as freedom from state intervention, continental European culture is more community-oriented and perceives rights as freedom to participate in social goods and decisions. Further, reporting of social responsibility is voluntary and unregulated.
- 3. China-** The Company Law, 2006<sup>7</sup> of China provides that companies in the course of business should comply with law and administrative regulations, conform to social morality and business ethics and act in good faith and undertake social responsibility. Though, CSR is a part of the legislature in China, the reporting on such activities is still unregulated. The Code of Corporate Governance for listed companies in China in 2001 explicitly emphasizes the importance of companies’ social responsibilities and encourages to incorporate these responsibilities as part of business operations. However, the legislature has not adopted the Code and hence not binding on companies.
- 4. Australia-** Principle 3 of ASX Corporate Governance Principles and Recommendations<sup>8</sup> provide that companies should promote ethical and responsible decision making. This is required to align sustainability of business with environmental impact. There is no specific CSR reporting requirement under the Australian law, however, companies opt for voluntary disclosure. Further, there are many laws in Australia which regulates behavior of businesses.

<sup>6</sup> [https://www.researchgate.net/publication/294428397\\_Corporate\\_Social\\_Responsibility\\_in\\_European\\_Context](https://www.researchgate.net/publication/294428397_Corporate_Social_Responsibility_in_European_Context)

<sup>7</sup> <https://journals.iupui.edu/index.php/iiclr/article/download/17659/17814/>

<sup>8</sup> <http://www.clarkekann.com.au/LiteratureRetrieve.aspx?ID=137756>

Tailoring still to fit: CSR Law continues to evolve with contemporary needs

5. **South Africa-** Until 2015, the CSR practice in South Africa<sup>9</sup> was based on 'voluntarist' principle. The Broad Based Black Economic Empowerment (BBBEE) Act has amended the provisions relating to CSR. The significant change also includes penalties in certain circumstances. Companies are required to spend 6% of payroll on skill development by top 100 listed companies.

## EVOLVING LANDSCAPE OF CSR IN INDIA- FROM ENDEAVORED SPENDING TO MANDATED SPENDING

Having thus seen the striking differences between the Indian approach and the global approach to CSR, we review the evolution of legislative stance of the Indian law evolve over time. The provisions of the Act pertaining to CSR were enacted with the guiding principle of 'comply or explain,' (COREX) i.e., any non-compliance of the provisions shall require a disclosure in Board's Report, along with reasons. The COREX stand was clear in public statements by the then Corporate Affairs Minister Sachin Pilot when he said: "This is the only law in the world that makes CSR a statutory requirement, but it will operate on self-implementation and self-regulation basis. It is not a government tax or a cess. The onus is on the conscience of the companies. Companies have been doing it for years, but now it will become more structured and transparent".<sup>10</sup>

After some 4 years of implementation of this voluntarist regime, the Report of High-Level Committee on CSR, 2018<sup>11</sup> gave some findings, some of which seem quite worrisome. First, the proportion of companies that were reporting spending on CSR was only a proportion of the companies that were, as per MCA data, liable to spend on CSR. See Table No. 1 below. Secondly, as per MCA data, the CSR spending of companies was approximately 57% of the desired expenditure, as per Table No. 2.

**Table No. 1: Profile of companies liable for CSR based on their reporting status**

Profile of companies liable for CSR based on their reporting status				
Company profile based on reporting status	FY 2014-15	FY 2015-16	FY 2016-17	FY 2017-18
Liable and reporting on CSR	9418	11671	12407	10868
Liable companies on whom Schedule III of Act is not applicable but reporting on CSR	1000	1284	775	716
Liable but not reporting on CSR	6130	5335	6350	9753
<b>Total no. of companies liable for CSR</b>	<b>16548</b>	<b>18290</b>	<b>19532</b>	<b>21337</b>

Source: Report of High-Level Committee on CSR, 2018

<sup>9</sup> [https://www.researchgate.net/publication/230770943\\_Corporate\\_social\\_responsibility\\_in\\_South\\_Africa\\_Emerging\\_trends/link/5aaf5d34458515e6e978e6/download](https://www.researchgate.net/publication/230770943_Corporate_social_responsibility_in_South_Africa_Emerging_trends/link/5aaf5d34458515e6e978e6/download)

<sup>10</sup> <https://www.hindustantimes.com/india/company-law-will-protect-investors-cong-leader-sachin-pilot/story-klr8uOed6UEunXhI4YY5N.html>

<sup>11</sup> [http://www.mca.gov.in/Ministry/pdf/CSRHLC\\_13092019.pdf](http://www.mca.gov.in/Ministry/pdf/CSRHLC_13092019.pdf)



The Code of Corporate Governance for listed companies in China in 2001 explicitly emphasizes the importance of companies' social responsibilities and encourages to incorporate these responsibilities as part of business operations. However, the legislature has not adopted the Code and hence not binding on companies.

**Table No. 2: CSR expenditure vs. CSR prescribed amount**

CSR expenditure vs. CSR prescribed amount				
Year of Filing	Total no. of companies liable for CSR (reporting + non-reporting)	Total CSR expenditure (in Rs. Crore)	Total CSR prescribed amount (in Rs. Crore)	Compliance in terms of CSR expenditure (%)
FY 2014-15	16548	10065.93	17140.42	59%
FY 2015-16	18290	14503.65	17044.45	85%
FY 2016-17	19532	14312.03	19789.90	72%
FY 2017-18	21337	13326.69	23247.90	57%

Source: Report of High-Level Committee on CSR, 2018

Among the observations of the Committee, it was noted that "...even after five years of the Act, CSR-eligible companies continue to cite delay in project identification, delay in implementation plans and lack of prior expertise as key reasons for not spending their prescribed CSR amount (Ref. Table 2.6) which are often not tenable. The Committee is of the view that mere statement of a reason for not spending is also not sufficient in itself. The justification for not incurring CSR expenditure in that year, despite being eligible to do so must be substantive. They must reflect the intent to spend as well as the inability to do so due to prohibitive and unavoidable circumstances. Even so, a tenable reason does not expel or extinguish the obligation to spend the stipulated CSR amount."

The Committee recommended that "The Committee is of the view that the unspent CSR amount for a particular year be transferred to a separate designated account created for the purpose. Such unspent amount, and the interest earned thereon, be spent within a period of three to five years, failing which the same be transferred to a fund to be specified by the Central Government which may be used for innovative, high-impact projects related to activities listed in Schedule VII. Adequate provisions be provided to ensure compliance. A penalty, 2-3 times the default amount, may be imposed subject to a maximum of Rs.1 (one) Crore upon the default being made good, but there be no imprisonment"



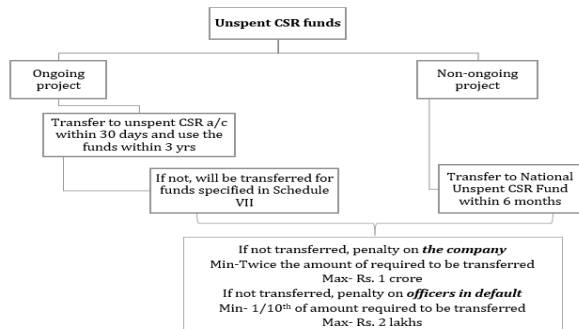
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The Companies (Amendment) Act, 2019 ('Amendment Act, 2019') proposed insertion of new sub-section to section 135 of Act for introduction of tough penal provisions to the section. The Amendment Act, 2019 proposed payment of fine as well as imprisonment in case of default in complying with the provisions of the section. This was then subsequently substituted to penalty by Companies (Amendment) Act, 2020. The High-Level Committee under the Chairmanship of Injenti Srinivas in its report dated 7<sup>th</sup> August, 2019 highlighted and proposed substitution of criminal offence in case of default in CSR provisions:

*"The Committee noted that CSR is a means to partner corporates for social development and such penal provisions are not in harmony with the spirit of CSR. The Committee stressed upon advocacy and sensitization to achieve the overall objective of CSR and proposes that the offence be de-criminalized and be made a civil offence"<sup>12</sup>.*

The Ministry has moved two-fold amendments in the provisions relating to CSR. Firstly, the Amendment Act, 2019 has proposed transfer of any unspent amount to separate fund/account and secondly penal provisions have been introduced in case companies fail to transfer the unspent amount to the prescribed funds. Secondly, it added a penal provision for non-compliance. The transfer requirements proposed by the Amendment Act, 2019 and penal provisions as prescribed by Companies (Amendment) Act, 2020 may be illustrated as in Figure 2:

Figure 2: Illustration on transfer of unspent CSR amount



Source: Compiled by the authors

Since the question of retention of unspent CSR funds by companies can only be for "ongoing projects", the meaning of that term becomes critical. While the Amendment Act, 2019 does not define as to what shall be regarded as "ongoing project" for the purpose of determination of transferability of unspent funds, however, the draft Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020<sup>13</sup> have defined 'ongoing projects' as:

*"Ongoing Projects" means a multi-year project undertaken by a Company in fulfillment of its CSR obligation having timelines not exceeding three years excluding the financial year in which it was commenced, and shall also include such projects that were initially not approved as a multi-year project but whose duration has been extended beyond a year by the Board based on reasonable justification.*

<sup>12</sup> [https://www.mca.gov.in/Ministry/pdf/CSRHLC\\_13092019.pdf](https://www.mca.gov.in/Ministry/pdf/CSRHLC_13092019.pdf)

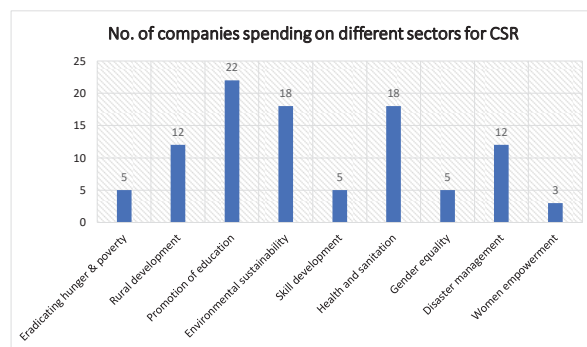
<sup>13</sup> <https://resource.cdn.icaai.org/58749csr47857.pdf>

Pursuant to the aforesaid clarification, ongoing projects shall be a multi-year project of 3 years or more. Accordingly, the transfer requirements have to be seen from the same perspective. However, the provisions have not been made effective.

CSR SPENDING: SECTORAL PREFERENCES OF LARGE COMPANIES

Schedule VII of the Act provides a broadly-worded list of activities that can be undertaken as a CSR activity under section 135 of the Act. However, it is interesting to study what are the sectors where Corporate India is spending. We have analyzed CSR spending by top 25 listed companies during financial year 2019-20<sup>14</sup>, with the objective to understand the most favorable activity of spending by companies under Schedule VII, and to identify how these sectoral preferences have changed over time. The sector preferences of companies are as follows:

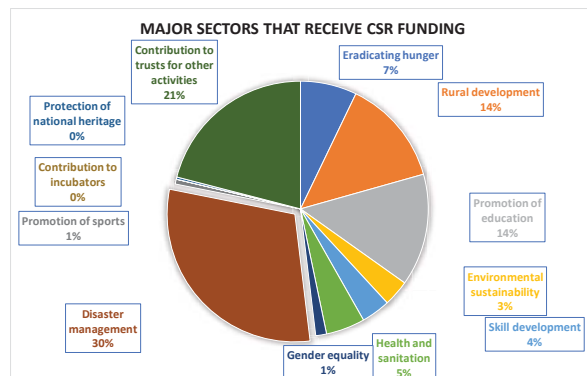
Figure 3: Graphically representation of data of companies spending on different sectors for CSR



Source: As per the data on CSR spending by companies as is available in public domain

The aforesaid chart represents the sectors in which top 25 listed companies, by number, have contributed for CSR activities. However, we also need to analyze the quantum of funding received by these sectors for CSR activities. Therefore, the major sectors that received the maximum funding during FY 2019-20 is as follows:

Figure 4: Major sectors that receive CSR funding



Source: Information gathered based on the data available in the annual report of FY 2019-20

<sup>14</sup> Analysis of the CSR spending as provided in annual reports of top 25 companies

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There are some important learnings from the above data. First, the fact that Corporate India is responsive to the needs of national calamities or pandemics is quite apparent, as one can see disaster management as the top item. Second, it is also apparent that using CSR as a part of business strategy or for sustainable business model seems less important for companies in India. Companies seem to have taken CSR as a glorified corporate philanthropy— hence, spending's which almost partake the character of donations/ monetary contributions abound in the list. For instance, education is a sector that has received 14.23% of total spending, and it is not difficult to appreciate that top 25 companies are not actively engaged in operating educational institutions. Most of the money seems to have gone by way of contributions to existing educational institutions. Environmental sustainability, which is one of the top objectives of CSR by global standards, has only received 3% of the total spending.

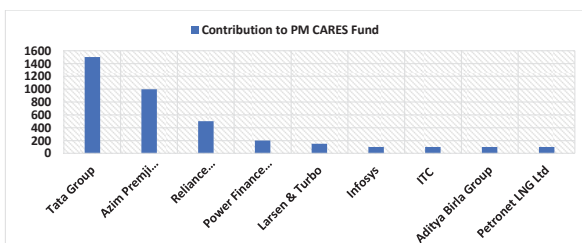
### COVID-19 & CSR – AN INDICATOR OF SWIFT RESPONSIVENESS

The outbreak of the global COVID pandemic, in the landscape of CSR, brought about several interesting developments. First, MCA continues to tweak the rules to permit companies to spend towards pandemic relief, even though, the various circulars have used a very reserved language (as we discuss below). Second, most companies have responded to the beckon call of the times and have contributed whole-heartedly to the evolving calamity. Third, the realization became more clear that the contributions to “funds” seem to limited to the funds under the control of the Central Govt., whereas healthcare and pandemic control are mostly at State and local authority levels. Therefore, various state govt bodies have continuously used devices to attract CSR contributions to pandemic relief activities of the states and the local bodies. This is an important tilt in the present CSR law and the reason for not permitting responsive spending on state and local body efforts seems difficult to appreciate.

### CIRCULAR FOR CONTRIBUTION TO PM CARES FUND

The MCA vide its office memo 28<sup>th</sup> March, 2020 has included contribution towards PM CARES Fund as an activity under Schedule VII of Act. Pursuant to the circular, many corporates have included contribution to PM CARES Fund as its CSR expenditure. While the pandemic had not yet shown its full impact till end of the financial year, yet, companies came forward with generous contributions during FY 2019-20, as shown by some major contributions (the above data is only illustrative and picked up from public domains):

Figure 5: Contribution to PM CARES Fund



Source: Information gathered from information available in public domain

### CONTRIBUTION TOWARDS PREVENTIVE HEALTH CARE AND DISASTER MANAGEMENT FOR COVID-19

The MCA vide its General Circular dated 23<sup>rd</sup> March, 2020 issued clarification that spending for activities mentioned in item no. (i) and (xii) of Schedule VII of Act for the purpose of COVID-19 shall qualify as CSR expenditure. Item no. (i) and (xii) provides for:

- Eradicating hunger, poverty and malnutrition, promoting health care including preventive health care
- Disaster Management, including relief, rehabilitation and reconstruction activities.

Pursuant to this clarification, various companies have focused spending for these activities during FY 2019-20.

### EMPLOYEE BENEFIT DURING COVID-19

Ministry vide circular dated 10<sup>th</sup> April, 2020 issued FAQs for clarification on spending being done by the company for COVID related activities. The FAQs clarified that payment made to employees or contract workers (temporary or permanent) during the time of COVID-19 pandemic is moral or contractual obligation rather CSR expenditure. However, any ex-gratia payment made to any temporary/daily or casual workers shall qualify as CSR if following conditions are fulfilled:

- Payment is made for the purpose of COVID-19
- Payment is over and above the wages of the worker
- Board declaration for disbursement of such wages have to be obtained
- Certificate from auditor for such payment

The requirement of obtaining certificate of auditor seems to be vague as auditor has no role to play at the time disbursement of funds to workers. If the Board has approved the payment, the same should suffice. Further, the auditor shall also rely on the approval of the Board.

### OTHER AMENDMENTS IN SCHEDULE VII

The table below will show the ambit of qualifying spending as continued to be tweaked as situations changed:

Sl. No.	Amendments	Effective date	Analysis
1.	Benefit for war widows and their dependents, Central Armed Police Forces (CAPF) and Central Para Military Forces (CPMF) veterans and their dependents including widows	23 <sup>rd</sup> June, 2020	To widen the scope of benefit of veterans
2.	Contribution to incubators or R&D projects in field of science, technology, engineering and medicine funded by CG or SG or PSU or any agency	24 <sup>th</sup> August, 2020	Introduced due to COVID-19 pandemic

Tailoring still to fit: CSR Law continues to evolve with contemporary needs

3.	Contributions to public funded Universities; IITs; National Laboratories and autonomous bodies established under Department of Atomic Energy (DAE); Department of Biotechnology (DBT); Department of Science and Technology (DST); Department of Pharmaceuticals; Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH); Ministry of Electronics and Information Technology and other bodies, namely Defense Research and Development Organisation (DRDO); Indian Council of Agricultural Research (ICAR); Indian Council of Medical Research (ICMR) and Council of Scientific and Industrial Research (CSIR), engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals (SDGs)	24 <sup>th</sup> August, 2020	Introduced due to COVID-19 pandemic
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Source: Compiled by the authors

## RESPONSIVE AMBIT OF CSR SPENDING

The Ministry by way of circulars/notifications or amended Rules, have time and again issued various clarifications as to what activities can be covered under CSR, what should be the minimum spending, how to allocate funds and how to monitor spending. In recent past, the Ministry have frequently issued various circulars to amend the activities of Schedule VII of Act to include activities done for the purpose of prevention of COVID-19 into the purview of CSR activities. Further, the Ministry has also proposed various changes in CSR provisions by virtue of Amendment Act, 2019 and Companies (Amendment) Act, 2020 read with draft Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020. Considering the aforesaid changes, it seems that Ministry is amending the provisions as and when required as per the current need of the hour.

The CSR spending by companies is in itself a challenging task as companies receive pressure from various municipalities, local powers-that-be, schools, NGOs and similar institutions located near the company for contribution towards CSR. Further, considering the frequent amendments being brought into force by the Ministry, it seems that CSR spending from FY 2020-21 shall become even more challenging for companies. The financial performance during the year may be under strain, for reasons which are quite obvious. However, the spending has to be based on past profits – hence, the newly-added force of mandate of law will find companies struggling to keep shareholder wealth intact, while at the same time spending on social obligations.

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## SHIFT FROM CORPORATE SOCIAL RESPONSIBILITY TO RESPONSIBLE BUSINESS CONDUCT

CSR is not a philanthropy or donation; it is targeted social spending for resolving societal/environmental issues surrounding the company. The whole intent of CSR is to make profit-making companies spend a specific portion of their profits for specified activities mentioned in Schedule VII of Act. Now, the most crucial question arises is whether companies can undertake a CSR activity which directly or indirectly relates to its business objective or activities?

MCA vide its General Circular dated 12<sup>th</sup> January, 2016 have issued FAQs for clarification relating to CSR. In this regard, any activities undertaken by the company in the normal course of business shall not qualify as a CSR activity. Therefore, it is important to first understand what is “normal course” of business?

In general, ordinary/normal course of business refers to something that the company does ordinarily for conduct of its business activities or a usual every day transaction. The Black’s Law Dictionary defines the term “ordinary course of business” as the “*normal routine in managing trade or business*”. Therefore, in general parlance, ordinary course of business refers to something that the company does ordinarily to conduct its business activities.

Accordingly, we understand that if company undertakes any activity which it undertakes in its normal course of business, it shall not qualify as CSR. On the contrary, MCA on 28<sup>th</sup> March, 2014 clarified by way of an affidavit that any activity carried out by a company under Schedule VII which is a part of its core business and if not done with profit motive, shall qualify as CSR activity. This was also quoted in the *Mohd. Ahmed (Minor) vs Union of India & Ors* dated 17<sup>th</sup> April, 2014 with an example as reproduced below:

*“a pharmaceutical company donating medicines/drugs within section 135 read with Schedule VII to the Act is a CSR Activity, as the same is not an activity undertaken in pursuance of its normal course of business which is relatable to health care or any other entry in Schedule VII.”*

### Tailoring still to fit: CSR Law continues to evolve with contemporary needs

Pursuant to above quoted example, it seems that any activity which is undertaken for normal course of business but not undertaken for profit motive shall also qualify as CSR activity. Following the same intent, MCA on 24<sup>th</sup> August, 2020 has issued Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020 which has omitted reference of normal course of business as follows:

*“(1) The CSR activities shall be undertaken by the company, as per its stated CSR Policy, as projects or programs or activities (either new or ongoing), excluding activities undertaken in pursuance of its normal course of business”*

The amendment in the provisions of CSR Rules is quite significant as, earlier, the concept of CSR was focused on spending for societal benefit, which in itself is wide enough to include every activity, including those activities in which the company may not be specifically involved. However, if we interpret the language of the amended Rules, as it reads, one may interpret that by omitting the exclusion of activities undertaken in normal course of business, the concept of CSR activity may be assumed to be shifted towards adding a social angle to the business model in which the company is involved. Therefore, it may be contended that an activity will qualify for CSR spending, even if the activity involves a product/service that the company deals with, in normal course of business.

However, it may be noted that the definition ‘CSR Policy’ as is provided in Rule 2(e) of the Companies (Corporate Social Responsibility Policy) Rules, 2014 still excludes activities undertaken for normal course of business which reads as follows:

*“CSR Policy” relates to the activities to be undertaken by the company in areas or subjects specified in Schedule VII to the Act and the expenditure thereon, excluding activities undertaken in pursuance of normal course of business of a company”*

Considering the aforesaid, one is in a quandary as whether the concept of excluding normal course of business is still alive. Further, the concept of aligning business objectives and CSR is practiced all over the world.

### CONTROL ON IMPLEMENTING AGENCIES

The existing provisions of Act provides that CSR activities allows companies to spend towards CSR either on its own or through other implementing agencies. However, pursuant

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to the amendments being introduced by the draft Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020 the same may become little restrictive. As per the existing provisions, the companies can spend through a section 8 company or a registered trust or society established by the company or government or any such other company or trust or society having a minimum track record of 3 years in similar projects. The proposed provisions have omitted the reference of registered trust and society established by the company or government. Further, for spending through any section 8 company, specific requirement of registration with RoC in CSR-1 shall be required.

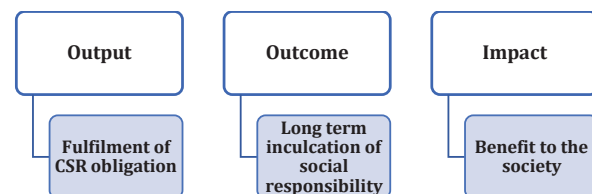
On considering the aforesaid, we understand that trusts incorporated by the companies does not specifically gets covered under the proposed provision. This shall become a significant change as companies mostly spent towards CSR through its own trust on such trusts which are formulated in collaboration with other companies. It only includes incorporated entities, and therefore, spending through trusts may cease to qualify, or trusts may be forced to convert themselves into ‘not for profit’ companies. Further, the Rules also prescribes that such incorporate companies have to register themselves with the RoC by filing e-Form CSR-1. This can also be a method of monitoring activities of implementing agencies by the Ministry. Though, the Rule suggests only for registration of implementing agencies, later, they may also ask such entities to report their activities to the Ministry. The intent seems to restrict companies from forming a CSR trust for transferring excess funds of the company without actual spending intention. It is notable that most of the large companies spend their CSR funds through their own trusts established for the purpose of conducting CSR activities.

### SOCIAL IMPACT STUDIES

We understand that CSR is not a one-time cheque issuing, *ad hoc* or stand-alone philanthropic activity. It is a continuous activity which should be closely monitored in order to ensure implementation. Conducting CSR activities without monitoring is like buying a product without any utility. In the book named ‘*Framework for assessing sustainability impact of CSR*’, Jon Birger and Jorgen Wettestad say:

*“What is then the object of our assessment- that is, what is CSR and how can we identify a starting point for assessing the sustainability impact of CSR? The assessment of the impact of CSR presupposes the existence of something that qualifies as CSR in the first place”*

Therefore, the first and foremost step of impact assessment is to identify, whether the activity corresponds with the CSR objective of the company. Before we understand how to evaluate CSR activities, it is important to understand the difference between ‘output’, ‘outcome’ and ‘impact’ which are used interchangeably by companies, however, are distinct.



Source: Compiled by the authors



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Therefore, while assessing the CSR activities, the company has to consider all the three i.e. output, outcome and impact. The existing provisions requires companies to monitor the CSR expenditure, however, there is no methodology or reporting prescribed for such monitoring.

In order to align the CSR spending with monitoring, the Ministry by way of draft Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020 has introduced the requirement of obtaining utilization certificate from the CFO. The objective of the certificate is to certify that the money spent for CSR activities has been utilized for the same purpose.

In furtherance to this, companies with CSR spending of Rs. 5 crores or more in any of the preceding three FYs are required to specifically conduct an impact assessment. However, whether any external facilitator has to do such assessment or internally, is still unknown. This assessment is also required to be disclosed in the annual report of the company.

Apart from this, the draft Rules, also requires companies to formulate an annual action plan for conducting and executing CSR activities. The brief contents of such policy are as follows:

- List of CSR projects
- Manner of execution of CSR activities

- Need of impact assessment
- Monitoring and reporting mechanism
- Modalities of utilization

## INTRODUCTION OF CONCEPT OF CARRY FORWARD AND CARRY BACKWARD

### A. Set off of CSR expenditure

The Companies (Amendment) Act, 2020 has proposed to set-off of any excess expenditure for CSR activities with spending requirements of succeeding years. In this regard, no limit has been prescribed for succeeding years.

### B. Transfer of Unspent amount

It is known that the existing provisions of CSR are based on the principle of 'comply or explain' i.e. in case any company is not able to spend prescribed amount towards CSR, the same has to be disclosed in the Board's Report.

Hence, Ministry vide Amendment Act, 2019 has proposed to transfer any unspent to a separate account. Earlier if there were any unspent amount in CSR funds, the same was required to be disclosed in the Board's Report of the company.



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## EVOLVING CSR RULES

### Recent amendments in Companies (Corporate Social Responsibility Policy) Rules, 2014

#### 1. R & D by pharmaceutical companies as CSR expenditure

Pursuant to the amendments introduced in the clause (ix) of Schedule VII of Act, the Ministry vide circular dated 24<sup>th</sup> August, 2020<sup>15</sup> has amended the provisions of Rule 2(1) (e) of CSR Rules, 2014 to exempt companies engaged in research and development activity for development of new vaccine, drugs related to COVID-19 as its normal course of business till FY 2022-23 from the restriction of normal course of business. In this regard, the amended Rules provide following conditions for qualifying the aforesaid activity as CSR expenditure:

- R & D should be carried out in collaboration with any prescribed institutes mentioned in item (ix) of Schedule VII to the Act
- Details of such activity has to be separately disclosed in Board's Report

#### 2. Omission of 'normal course of business'

Further, as discussed above, the definition of 'CSR Policy' still excludes activities undertaken for normal course of business, however, the Rules provide carve out only for such pharmaceutical companies.

MCA on 24<sup>th</sup> August, 2020 has issued the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020<sup>16</sup> which has omitted reference of normal course of business as follows:

*"(1) The CSR activities shall be undertaken by the company, as per its stated CSR Policy, as projects or programs or activities (either new or ongoing), excluding activities undertaken in pursuance of its normal course of business"*

By omitting the exclusion of activities undertaking in normal course of business, the concept of CSR activity may be assumed to be shifted towards development of specific business model in which the company is involved. However, as discussed above, the definition of 'CSR Policy' still excludes activities undertaken in normal course. Hence, the interpretation of the Rules has been left to the interpreters.


## OTHER PROPOSED EVOLVING CHANGES

Sl. No.	Particulars	Existing Provisions	Proposed Amendments	Proposed by
1.	Beneficiaries of CSR activity	No such provision	The draft CSR (Amendment) Rules, 2020 has prescribed that CSR activities should not significantly benefit the employees and their families. The Rules have defined that employees and their families should not be benefitted by CSR activity amount to 25% or more of the total CSR expenditure.	The draft CSR (Amendment) Rules, 2020
2.	Non-constitution of CSR committee	No such provision	Where the CSR expenditure does not exceed Rs. 50 lakhs, the CSR committee is not required to be constituted.  The functions of the committee shall be discharged by BoD.	The Companies (Amendment) Act, 2020
3.	Administrative overheads	Companies are allowed to utilize 5% of CSE expenditure as administrative overheads	Companies which conduct impact assessment shall be allowed to utilize 10% of CSR expenditure as administrative overheads.	The draft CSR (Amendment) Rules, 2020

Source: Compiled by the authors

## CONCLUSION

The amendments introduced in the Act, including the changes brought out by Companies (Amendment) Act, 2020, have tried to respond to the observed behavior of companies in complying with the provisions of section 135 of Act. At the same time, the constrained list of activities, which is extended/expanded based on call of times, reflects a crisis-

solver approach, whereas greater flexibility could have been allowed to companies to respond to the needs of the times as evaluated by companies. Obviously, it does not require the regulator to define what should be the social obligations of companies, as the institutional framework for the same, in form of the CSR committee and board responsibilities, is already in place. Therefore, in time to come, the MCA should consider making Schedule VII illustrative rather than restrictive. 

<sup>15</sup> <http://egazette.nic.in/WriteReadData/2020/221325.pdf>

<sup>16</sup> <http://egazette.nic.in/WriteReadData/2020/221325.pdf>