
CSR AMENDMENTS IN COMPANIES (AMENDMENT) ACT, 2020 AND CSR POLICY (AMENDMENT) RULES, 2021

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About Us



- Vinod Kothari and Company, company secretaries, is a firm with over 30 years of vintage
 - Based out of Kolkata, New Delhi & Mumbai
- We are a team of qualified company secretaries, chartered accountants, lawyers and managers.

Our Organization's Credo:

Focus on capabilities; opportunities follow

Coverage

- Companies (Amendment) Act, 2020
- Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021



CSR PROVISIONS OF COMPANIES (AMENDMENT) ACT, 2021



Introduction of penal provisions- shift from 'COPF to COPP'

- Companies (Amendment) Act, 2019
 - Introduced new sub-section (7) to section 135
 - Section provided for penal provisions
 - Shift from Comply or Explain i.e. 'COREX' to Comply or Pay Fine i.e. COPF'
- Penal provisions include:
 - Fine on company
 - Min- Rs. 50,000
 - Max- Rs. 25 lakhs
 - Officers in default
 - Min- Rs. 50,000
 - Max- Rs. 5 lakhs
 - Imprisonment- Max 3 years
- Companies (Amendment) Act, 2020
 - Substituted earlier introduced sub-section (7)
 - Shift from 'COPF' to Comply or Pay Penalty i.e. 'COPP'
 - Notified w.e.f January 22, 2021
- Penal provisions include:
 - Penalty on company
 - Upto twice the amount required to be transferred to fund specified in Schedule VII or Unspent CSR a/c
 - Rs. 1 crore, whichever is lower
 - Penalty on officers in default
 - 1/10 of amount required to be transferred to fund specified in Schedule VII or Unspent CSR a/c
 - Rs. 2 lakhs, whichever is lower

Comparatives- CA 13, CAA, 2019 & CAA, 2020

Existing provisions under CA 13	Amendments introduced in Companies (Amendment) Act, 2019	Amendments introduced in Companies (Amendment) Act, 2020
Comply or Explain principle (COREX)	Comply or Pay Fine principle (COPF)	Comply or Pay Penalty principle (COPP)
<p>No penalty on Company</p> <p>Disclosure of not spending to be explained in Annual Report.</p>	<p>Company- Fine of min Rs, 50,000 & max Rs. 25 lakhs</p>	<p>Penalty upto twice the amount required to be transferred to fund specified in Schedule VII or Unspent CSR account</p> <p style="text-align: center;">Or</p> <p>Rs. 1 Crore (whichever is lower)</p>
<p>No penalty on Officers in default</p>	<p>Officers in default- Imprisonment of max 3 yrs</p> <p>Fine of min Rs. 50,000 & max Rs. 5 lakhs or both</p>	<p>Officers in default- Penalty of 1/10th of amount required to be transferred to fund specified in Schedule VII or Unspent CSR account</p> <p style="text-align: center;">Or</p> <p>Rs. 2 lakhs (whichever is lower)</p>

Other statutory amendments in CSR provisions

- Excess expenditure made in one year (>2%)
 - May be set off with spending requirements of succeeding years
 - Set off shall not include surplus arising out of CSR Profits
 - Pass board resolution
 - Set off has to be done within succeeding three FY
- No constitution of CSR committee
 - Where CSR expenditure does not exceed Rs. 50 lakhs
 - Functions of such committee shall be discharged by BoD
 - New insertion in section 135



CSR POLICY (AMENDMENT) RULES, 2021

AMENDMENT NOTIFICATION DATED 22 JAN 2021



22 Jan 2021 Amendments bring amended CSR provisions into effect

- Gazette Notification of 22 Jan makes supporting amendments to CSR Policy Rules, and another notification has put amendments into effect
- The amendments become effective immediately:
 - While some of the amendments will actually be relevant from 1st April, 2021, some of them will have immediate compliance implications
 - Most importantly – the need to spend FY 20-21 targets
 - Also, there may be some interesting consequences for group level foundations and trusts
- Highlights:
 - Spending mandate; consequences of not spending requisite amount
 - Retention of money for “ongoing projects”
 - Carry backward of CSR spending
 - Scope of CSR spending defined with carve-outs
 - Registration of implementing agencies
 - Impact assessment
 - Board responsibilities for spending
 - Enhanced disclosures
 - Ownership of capital assets created out of CSR activities

Spending mandate and consequences of not spending

- Second proviso to sec. 135 (5), read with sec. 135 (6), elaborates the mandatory spending requirement
- Second proviso to sec. 135 (5):
 - If the company fails to spend the CSR target:
 - The board shall still explain the reasons for the same
 - Analyse the “unspent” amount:
 - If and to the extent it pertains to “ongoing project” – retain the money in a separate bank account [unspent CSR account] – within 30 days of the end of FY
 - Or else, transfer unspent money or money not retained for ongoing project to National Unspent Fund, within 6 months of the end of the financial year
 - While the time for transferring the money to Unspent Fund is 6 months, but companies will have to take a board decision on retention, disclose reasons for not spending etc.
 - Hence, the analysis of what may actually be retained by the Company will have to be done before approval of board report

Analysis of Unspent amount and Ongoing Projects 1/4

- “Ongoing Project” is defined in CSR Policy Rules [Rule 2 (I) (i)]
 - Multi-year project, stretching over more than one financial year.
 - However, not for longer than 3 years excluding the year of commencement
 - Should have commenced within the financial year to call it “ongoing”
 - Idea is to include a project which has an identifiable commencement and completion; recurring expenses which are segregatable by nature should not be included
 - For example, if Company contributes to the annual running exps of a Cancer Hospital, the spending for the next year cannot be regarded as an “ongoing project”
 - But, for example, installation of a new facility at the same Hospital, if already undertaken during the year, should be regarded as “ongoing”
- To regard it as an “ongoing project”, is it necessary that some spending must have been during the financial year?
 - If there is a binding commitment on the part of the company during the financial year, the fact that nothing has been spent during the year should not preclude it from “ongoing” status
 - The idea of retention of money is for something which would need to be spent based on committed funds
 - The essence of the retention is - Rolling the expense to the next year, and claim it to be expense of this year.

Analysis of Unspent amount and Ongoing Projects 2/4

- So, what is the Company expected to do end-of-year:
 - The CSR Target is based on average of 3 preceding years – hence, that is unimpacted by the current year's accounts
 - However, aggregation of all that is spent (Spending) during the FY needs to be done
 - $\text{Total Shortfall} = \text{Target} - \text{Spending}$
 - Identification of “Ongoing Projects”
 - Identification of further outlay required for Ongoing Projects upto the expected completion date (Ongoing Project Outlay)
 - $\text{Transferable Shortfall} = \text{Total Shortfall} - \text{Ongoing Project Outlay}$
 - Transfer Transferable Shortfall within 6 months of EoY
- Whose responsibility is it to identify Ongoing Project and Ongoing Project Outlay?
 - Going by Rule 4 (6), the identification of Ongoing Project, Ongoing Project implementation schedule, as well as Ongoing Project Outlay are board responsibilities
 - Non-compliance of sec. 135 (5) and (6) attract the penal provisions of sec. 135 (7)
- What happens to money retained for Ongoing Projects, but not spent there?
 - Transfer to Unspent Fund within 30 days from the end of third financial year
 - Assuming that the implementation schedule stretches only to the next financial year, can the Company still retain unspent funds for 3 years?
 - Does not seem logical

Leading Unspent Funds for Ongoing Projects 3/4

- Unspent Funds that go to National Unspent CSR Fund go irretrievably
- Hence, there may be a strong motivation on the part of companies to retain the Funds for Ongoing Projects
 - Timely identification of Ongoing Projects
 - Do Ongoing Projects have to be part of a pre-approved CSR “Action Plan”?
 - In reality, in most companies, it is not possible to identify all CSR projects at the start of the year. Spending opportunities keep arising through the year and the CSR Committee continues to approve the same
- Presumably, a Company may retain Unspent Funds, within 3 years of retention
- However, given the penal implications of sec. 135 (7), it should not be a good idea to have an ambitious retention plan
- Board disclosures in case of retention:
 - If funds have been retained for Ongoing Projects, is that itself an explanation for Unspent Funds?
 - Target Spending pertains to the financial year, and therefore, should have been expected to be spent during the year
 - Not spending during the year, and spilling over for Ongoing Project, itself should require explanation
- Comprehensive disclosure requirements for Ongoing Projects

Analysis of Unspent amount and Ongoing Projects 4/4

- Unspent amount of an ongoing project shall be transferred to a special account
 - This account will be known as Unspent CSR Account
 - Transfer has to happen within 30 days of end of FY
 - This account has to be opened for each financial year
 - This account will be like dividend account
 - i.e. one account every FY for all ongoing projects identified during that FY
- such amount shall be spent by the company within a period of 3 FYs from the date of such transfer
 - failing which, the company shall transfer the same to a Fund specified in Schedule VII
 - within a period of 30 days from the date of completion of the 3rd FY

Carry backward of CSR shortfall

- Concept of carry backward:
 - Shortfall of CSR spending in any year can be adjusted against excess spending in any previous year
- 3rd proviso to sec 135 (5) provides
 - if the company spends an amount in excess of the requirements provided under this sub-section, such company may set off such excess amount against the requirement to spend under this sub-section for such number of succeeding financial years and in such manner, as may be prescribed
- Rule 7 (3) provides for a time frame of 3 immediately succeeding years for adjusting that excess spending
 - The set off need not be spaced out – it may be in any of the 3 years
- However, puts conditions:
 - The excess shall not include surplus arising from CSR activities
 - The Board shall pass a resolution to this effect
- Board resolution to what effect? And in which year?
 - In author's view, excess spending in any year is a matter of fact – that is not something that requires a decision
 - However, the decision to adjust the surplus is a decision, and that should require a board resolution

Scope of CSR Expenditure, and exclusions

- Definition of CSR in Rule 2 (1) (d) seeks to exclude several items from CSR spending
 - Earlier definition defined what CSR includes, viz., by reference to Schedule VII, but revised definition has a list of exclusions.
 - Further, the expression “statutory obligation” is notable
 - 6 exclusions specified in Rules
 - However, in any case, Schedule VII still remains the list of activities/subjects
- Exclusions:
 - Activities undertaken in pursuance of normal business of the company
 - Activities outside India, except training of sports personnel
 - Contribution, direct or indirect, to a political party
 - Activities benefiting employees
 - Sponsorship for deriving marketing benefits for products/services
 - Activities for statutory obligations

Normal course of business activities

- Normal course may include sale/supply of goods or services
- Whatever goods/services the company supplies in course of business should not form part of CSR
- Mere absence of profit motive will not take an activity out of the normal course of business
- The only carve out, with several conditions, is for Covid research

Activities benefiting Employee

- Should employees be completely ousted as beneficiaries?
 - If the activities are intended for larger good, and there is neither a distinctive reservation for employees, nor a distinctive exclusion, does it offend the intent?
 - For example, if a Company runs a medical aid program in a hospital, does it mean the hospital should oust the employees?
 - The intent is that employer's obligation to employees, or employee welfare activities are not taken as CSR
 - Idea cannot be to deprive employees completely from social benefit programs
 - Same goes for families of employees
 - Hence, if employees are not targeted specifically, or have any special status, the spirit of CSR is not breached
- Meaning of "employees" in sec 2 (k) of Code on Wages, 2019:
 - "employee" means, any person (other than an apprentice engaged under the Apprentices Act, 1961), employed on wages by an establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and also includes a person declared to be an employee by the appropriate Government, but does not include any member of the Armed Forces of the Union;
 - Wages defined in 2 (y):
 - "wages" means all remuneration whether by way of salaries, allowances or otherwise, expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment

Sponsorships etc for deriving marketing benefit

- What is excluded is activities supported by companies “on sponsorship basis for deriving marketing benefits
- Sponsorship basis implies company being a sponsor of an event
- The event is intended for marketing benefit
- The idea is not to rule out marketing benefit from other CSR spending
- For example, Covid-related awareness is specifically permitted as CSR activity
 - Jan 13 2021 circular
 - There may be marketing advantage from that too
- Companies should not use CSR as a marketing or brand building tool
- However, the best strategic use of CSR is to align with the company’s business model – hence, some brand assets are likely to be created by CSR spending

Implementing agencies

- Rule 4 provides of carrying of CSR activities either by the company itself, or through the specified implementing agencies
- CSR activities have 2 ends:
 - The Company as the principal
 - The end beneficiary(ies) as the destination
- Implementing agencies are the intermediaries, typically carrying the following functions:
 - Aggregation of spending by several group companies
 - Identification of CSR opportunities
 - Coordination with the end beneficiaries
 - Monitoring of CSR implementation
- Implementing agencies essentially save the company from the drudgery and let the company focus on strategizing, deciding and spending
- Three modes of implementation
 - Self implementation
 - Joint implementation with one or more companies [Rule 4 (4)]
 - Implementation through agencies
- 4 types of agencies – Rule 4 (1)
 - Captives – sec 8 company, registered public trust, society
 - Govt agencies – sec 8 company, trust or society
 - Statutory bodies – entity under Act of Parliament or state legislature
 - Public agencies – sec 8 company, registered public trust or society
- These implementing agencies will need 2 registrations
 - MCA registration – in all cases
 - Income-tax registration – in case of 1 and 4

Income tax registration

- Captive as well as public implementing bodies need to have income-tax registration u/s 12A as well as 80G
- Public bodies additionally need minimum 3 years' track record too
- The expression “registered under section 12A and 80G of the Income Tax Act, 1961”:
 - Appears exactly after registered society
 - However, does it qualify all the 3 types of bodies – sec 8 companies, public trusts as well as societies?
 - It does not seem logical to attach the condition only in case of societies
 - Hence, it seems the condition qualifies all the three types
- Notably, this condition was not there in the draft Rules
- Sec 12A is the registration of trusts for claiming exemption of tax on their income, under sections 11,12 and 13 of the Income tax Act
- Sec. 80G to enable the donor to seek tax deduction for a donation
- CSR trusts may simply be canalising agencies
 - They may not have any income of their own – to need any tax exemption
 - And sec. 80G is mostly perceived as not applicable in case of CSR contributions
- So, the relevance of these registrations is not understandable

Registration with MCA

- CSR registration with the MCA is a new requirement – it was there in the draft Rules too
- Apparently, the requirement is only one of registration, not any accreditation or approval by the MCA
 - The rules provide for auto generation of CSR Regn number
- This requirement is applicable to all the 4 types of implementing agencies
- Obligation cast on the Company or the agency?
 - Rule 4 (1) obligates the board of the company to engage only 4 types of agencies
 - Rule 4 (2) requires these agencies to have registration
 - It may be deduced that the company cannot engage unregistered implementation agencies
- **Grandfathering provision**
 - Registration requirements kick off from 1st April, 2021
- Rule 4 (2), proviso grandfathers “CSR projects or programmes approved prior to the 01st day of April 2021
- So the key is the approval of the project or program before 1st April 2021
- Most companies will have to chalk out new CSR budgets for the ensuing financial year
- Hence, it would not be common to have an “approval” for a project this year, and initiation next year.
- Therefore, it seems only on-going projects may be carried out by unregistered implementing agencies

Impact assessment

- Rule 8 (3) brings in the requirement of impact assessment
 - If the CSR target of the company, in each of the 3 preceding financial years, is Rs 10 crores or more
 - The activity or the project has an outlay of Rs 1 crore or more
 - Since the requirement applies immediately, the CSR target for FY 2017-18, 18-19 and 19-20 will be relevant, to see the impact assessment requirement for FY 20-21
- Impact assessment to be carried by an independent agency
- Several questions remain unanswered
 - Who is the independent impact assessment agency?
 - What exactly will be the scope and the format of the impact assessment
 - By what time is the impact assessment to be done?
 - To whom is the impact assessment report addressed?

Meaning of impact assessment

- The purpose of impact assessment is to assess social impact, and hence, it is called “social impact assessment”
- Impact assessment may also include “social return on investment”
- Social impact assessment and “social audit” are closely related
- International Association for Impact Assessment has several publications on the topic, mostly in context of environmental projects:
 - <https://www.iaia.org/reference-and-guidance-documents.php>
- Several PSUs have carried out impact assessment of their various CSR projects
 - Examples
 - https://www.nmdc.co.in/CSR/NMDC_Kirandul.pdf

Time frame, scope and approach of impact assessment

- Social impact assessment takes a retro view on the CSR projects of the company – hence, it travels to concluded programs
- Rule 8 (3) seems to say that impact assessment will include CSR projects concluded at least 1 year before the study
- Hence, if done in FY 20-21, it will include projects which were concluded earlier on in FY 19-20 or before that
- Who does it:
 - Mostly academic or research entities with capabilities of field surveys, understanding the objectives of the CSR interventions
- Who is it reported to
 - Board of directors
- Is it a regular feature:
 - If the same project or similar activity is recurring in nature, it seems that impact assessment may be carried once
 - Hence, ideally impact assessment may be carried out on rotational basis, so as to cover all material projects, say, once in 3 years

Board responsibilities

- Several board responsibilities are imposed by the new Rules
- Importantly:
- Rule 4 (5): The Board of a company shall satisfy itself that the funds so disbursed have been utilised 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.
- Rule 4 (6): 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
- CSR Report shall form part of the board's report

Enhanced disclosures

- The following are on the 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.
- CSR projects are approved on ongoing basis
- Some of them are fairly minor in terms of expense
- It will be reasonable for the board to make a policy and disclose only material projects

Capital assets, surplus, etc

- Surplus from CSR to be ploughed back
- Rule 7 (2) 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
- Capital assets can be held by
 - a company established under section 8 of the Act, or a Registered Public Trust or Registered Society, having charitable objects and CSR Registration Number under sub-rule (2) of rule 4; or
 - beneficiaries of the said CSR project, in the form of self-help groups, collectives, entities; or
 - a public authority:
 - For existing capital assets - this has to be complied within 180 days i.e by 21st July, 2020 or additional period of 90 days with the approval of Board

Formulation of Annual Action Plan

CSR Policy

Existing definition

Relates to activities to be undertaken by the Co. in areas or subject specified in Schedule VII

Proposed definition

Statement containing approach and direction by the Board for selection, implementation and monitoring of CSR activities. Also, an annual action plan has to be formulated by CSR committee.



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