

Social Sector Hotline

January 29, 2021

AMENDMENTS TO CSR RULES: A GAME CHANGER

- Mandatory impact assessment of CSR Projects by companies satisfying the 10 cr threshold;
- Targeted focus on creating 'impact' using CSR funds
- Role of International organisations in planning and developing CSR Projects;
- Mandatory registration of implementing agencies appointed by the company with Ministry of Corporate Affairs (MCA);
- Introduction of Administrative overheads with prescribed 5% cap on such expenses;
- Clarity regarding the scope of Corporate Social Responsibility and Role of CSR Committees;

BACKGROUND

Corporate Social Responsibility ("CSR") was for the first time introduced as a statutory obligation for companies by way of Companies Act 2013 under Section 135. Thereafter, the Companies (Corporate Social Responsibility Policy)

Rules were notified on 27th February 2014 ("CSR Policy Rules, 2014")¹ to lay down the specifications and procedure to be followed by the companies while discharging their CSR obligations.

The Companies Amendment Acts of 2019 and 2020 resulted in some major changes in the CSR provision under Section 135 of the Companies Act. To provide for the notified changes, the Ministry of Corporate Affairs (MCA) had released the Draft Companies (Corporate Social Responsibility Policy) Amendment Rules in March 2020 ("Draft Rules")² inviting public comments. Recently, on 22nd January 2021, the MCA finally issued the Companies (Corporate Social Responsibility Policy) Amendment Rules ("New Rules")³ giving effect to the changes introduced in CSR by the Companies Amendment Acts of 2019 and 2020.

KEY CHANGES INTRODUCED BY WAY OF 2021 AMENDMENT ARE AS FOLLOWS:

1. Changes in the definition clause

The New Rules have made substantial changes to the definition clause of CSR Policy Rules, 2014 by defining new terms like Administrative Overheads, International Organisation, and Public Authority. It has also made some changes in the existing definitions of Corporate Social Responsibility and CSR Policy. All these important changes are discussed as under:

i. Definition of Administrative Overheads

The latest amendment introduces 'Administrative Overheads' as a new term defined under Section 2(b) to refer to expenses incurred by the company for 'general management and administration' in relation to its CSR functions. The definition explicitly excludes expenses directly incurred for designing, implementation, monitoring, and evaluation of a particular CSR project from the ambit of administrative overheads.

As per Rule 7(1) of Draft Rules, the Board was required to ensure that administrative overheads incurred in furtherance of CSR do not exceed 5% of company's total CSR expenditure. The meaning of administrative overheads was however not specified under the Draft Rules. Assigning a definition to the term in New Rules is a welcome step as it gives greater clarity to the companies. In our opinion, the government should also mention a few examples of costs that qualify as administrative overheads for better understanding of the term's scope and ambit.

ii. Definition of Corporate Social Responsibility

As a result of New Rules, Corporate Social Responsibility is now defined under Section 2(d) to refer to activities undertaken by a Company in pursuance of its CSR obligation under the Companies Act. The amended rule further identifies the following activities which do not qualify towards CSR requirement of companies:

- Activities undertaken in pursuance of normal course of business of the company. However, in view of the COVID pandemic, an exception to this was created by way of MCA notification dated 24th August 2020 allowing companies engaged in research and development activity of new vaccine, drugs and medical devices in their normal course of business to undertake such research and development in relation to COVID-19 as their CSR obligation for three financial years (from 2020 to 2023). This exception has been duly incorporated in New Rules subject to the following conditions-
 - Such research and development activities shall be carried out in collaboration with any of the institutes or organisations mentioned in item (ix) of Schedule VII to the Act including Public funded universities, IITs, Indian Council for Medical Research (ICMR) etc.

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- Details of such activity shall be disclosed separately in the Annual report on CSR included in the Board's Report.
- b. any activity undertaken by the company outside India shall not be considered as CSR except for training of Indian sports personnel representing any State or Union territory at national level or India at international level.
- c. contribution of any amount directly or indirectly to any political party under section 182 of the Act by a company shall not qualify as CSR;
- d. activities benefitting employees of the company as defined in section 2(k) of the Code on Wages, 2019.
- e. activities supported by the companies on sponsorship basis for deriving marketing benefits for its products or services;
- f. activities carried out for fulfilment of any other statutory obligations under any law in force in India;

iii. Definition of CSR Policy

Section 2(e) now defines CSR Policy to refer to a statement containing the approach and direction given by the board of a company, taking into account the recommendations of its CSR Committee, and includes guiding principles for selection, implementation and monitoring of activities as well as formulation of the annual action plan.

The New Rules are more comprehensive as they discuss the method of development of CSR Policy in greater detail. Earlier, the relevant provision was found in Rule 6 of CSR Policy Rules, 2014 which provided that modalities of execution and implementation schedule of CSR projects form a part of CSR Policy, but neither described the procedure to develop the same nor identified the persons responsible to do so. The New Rules have removed this ambiguity by making the Board of directors responsible to select CSR activities, oversee their implementation, and decide the overall CSR Policy. As a result of the new provision, the erstwhile Rule 6 dealing with CSR Policy has been omitted.

iv. Definition of International Organisation

The 2021 amendment introduces a new term 'International Organisation' defined under Section 2 (g) to refer to an organisation notified by the Central Government as such under section 3 of the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), to which the provisions of the Schedule to the said Act apply.

The High Level Committee ('HLC') on Corporate Social Responsibility 2018, headed by Injeti Srinivas, had recommended the introduction of International Organisations in India's CSR regime.⁴ The recommendation has been duly incorporated pursuant to which companies are allowed to take help of International Organisations in designing, monitoring, and evaluating their CSR Projects, and in assisting them with capacity building of their personnel under Rule 4(3) of New Rules.

It is to be noted that the Draft Rules also proposed engagement of International Organisations with respect to implementation of CSR Projects subject to prior government approval, but the same has not been notified in the New Rules.

v. Definition of Ongoing Project

The term 'Ongoing Project', referred to indirectly under CSR Policy Rules 2014, has finally been defined to mean 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 also includes projects that were initially not approved as multi-year but are later extended beyond one year by the Board on reasonable justification.

Ongoing Projects entail certain added responsibilities for companies such as the requirement to monitor their implementation as per approved timelines under Rule 4(6) of New Rules. An attempt to define Ongoing Projects is definitely a welcome step but ambiguity remains with respect to Projects the implementation of which goes beyond the stipulated time period of 4 years. As per the current rules, companies may not be able to undertake such projects as their CSR activity because they shall not qualify as ongoing projects and any unspent amount in that regard shall automatically be transferred to the Fund specified in Schedule VII as required under Section 135(5) of the Companies Act.

vi. Definition of Public Authority

The term 'Public Authority' has been newly defined under Section 2(j) to mean Public Authority as defined in Section 2(h) of the Right to Information Act (RTI Act), 2005. Under the RTI Act, Public Authority has been defined as any authority, body or institution of self-government established by (a) the Constitution; (b) any other law made by Parliament; (c) any other law made by State Legislature; (d) notification issued or order made by the appropriate Government, and includes any— (i) body owned, controlled or substantially financed; and (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government.

2. Changes in rule 4 - CSR Implementation

The title of Rule 4 has been changed from CSR Activities under CSR Policy Rules 2014 to CSR Implementation as a result of the 2021 Amendment. Under the New Rules, a company is allowed to undertake its CSR implementation either by itself or through another company established under Section 8 of the Companies Act, a registered public trust or a registered society established (i) either by the company itself, or (ii) by the Central Government or State Government. In addition to the above, a company may also take help of (i) any entity established under an Act of Parliament or a State legislature, or (ii) a Section 8 company, registered public trust or registered society, not referred to above but having an established track record of minimum three years, for its CSR implementation.

It is to be noted that the Draft Rules had omitted references to registered public trusts and societies for CSR implementation which were present in the original CSR Policy Rule 2014. Such an omission was objected by the stakeholders and resultantly public trusts and societies have now been duly mentioned as allowed implementing agencies under the New Rules. Such a move is appreciated as it gives companies access to a wider range of entities to fulfil their CSR obligations.

The New Rules further require all such implementing entities intending to undertake CSR activities to register

themselves with the Central Government by filing form CSR-1 electronically for all CSR projects effective from

1st April, 2021. A unique CSR Registration Number shall be generated for all companies submitting Form CSR-1. In this way, a list of all such participating entities is maintained by the MCA which increases the chances of timely fulfilment of proposed activities. This past performance record of implementing agencies can be referred to by the companies and help them decide their engagement for future CSR activities.

Under Rule 4(5) of the New Rules, the Board is required to satisfy itself that the funds are utilised for purposes approved by it. In case of ongoing project, the Board is required to monitor the implementation of the project with reference to approved timelines and year-wise allocation. The Board has also been given the power to make modifications to ensure smooth implementation.

3. Changes in Rule 5 - CSR Committees

Pursuant to the New Rules, the CSR Committee has been given the task of formulating and recommending to the Board an annual action plan in pursuance of its CSR policy. The aforesaid plan shall include the following:

- a. list of CSR projects to be undertaken under Schedule VII of the Companies Act;
- b. manner of execution of such projects;
- c. modalities of utilisation of funds and implementation schedules;
- d. monitoring and reporting mechanism for the projects; and
- e. details of need and impact assessment, if any, for the projects undertaken.

The Board has also been given the power to alter the annual action plan in accordance with the CSR Committee's recommendation based on reasonable justification.

When compared to the original provision on CSR Committees under CSR Policy Rules 2014, the New Rules appear quite detailed. The earlier Rule 5 of CSR Policy Rules 2014 vaguely mentioned instituting transparent monitoring mechanism for CSR implementation without specifying its requirements. The New Rules make the process easier by laying down what all needs to be necessarily included by the company in its action plan.

4. Changes in Rule 7 - CSR Expenditure

Under the amended Rule 7, the Board has been given the responsibility to ensure that administrative overheads in relation to CSR do not exceed five percent of total CSR expenditure of the company. It is to be noted that the Draft Rules proposed an upper limit of ten percent for administrative overheads for companies undertaking impact assessment, but such a provision has not been directly notified in the 2021 amendment. Rather, under Rule 8(3)(c) of the New Rules, companies carrying out impact assessment have been allowed to claim five percent of total CSR expenditure or fifty lakh rupees, whichever is less, as a CSR Expenditure.

Furthermore, the New Rules clarify that any surplus from CSR activities shall not be considered business profit and (i) need to be either ploughed back into the same project or, (ii) transferred to the Unspent CSR Account or, (iii) transferred to a Fund specified in Schedule VII within a period of six months from the expiry of the financial year.

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:-

- i. The excess amount for set off shall not include the surplus arising out of CSR activities in pursuance of sub-rule (2); and
- ii. 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.

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.

As argued in the Report⁵ of the High Level Committee on Corporate Social Responsibility 2018, the rationale behind allowing companies to use the CSR amount for capital creation or acquisition is to encourage sustainable and effective initiatives. 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.

5. Changes in Rule 8- CSR Reporting

The New Rules have added Rule 8(3) as per which companies having average CSR obligation of ten crore rupees or more in three immediately preceding financial years are required to undertake impact assessment through an independent agency of their CSR projects. The impact assessment reports are required to be placed before the Board and annexed to the annual report on CSR. 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.

Thus, after the notification of New Rules, companies qualifying the mentioned threshold shall be mandatorily required to carry out impact assessment of their CSR contributions. It is hoped that such a requirement will result in more meaningful contributions by companies towards the society. There is however scope for clarity with respect to the provision allowing companies to claim five percent towards CSR expenditure for impact assessment. Prima facie, it gives an understanding that such companies have the option to claim ten percent in total as their CSR expenditure - five percent for administrative overheads and five percent for impact assessment. Although, the same has not been explicitly mentioned in such clear terms. A statement from the government in this behalf can remove this ambiguity.

6. Changes in Rule 9 - Display of CSR Activities on website

Rule 9 of the New Rules requires the Board to disclose the composition of the CSR Committee, CSR Policy and Projects on their website for public access. This provision is similar to the earlier Rule 9 under CSR Policy Rules

2014. Making the companies disclose their CSR Activities and contributions to society is important to help the public make informed decisions. The investors these days are becoming socially aware and want to engage with companies that take positive steps for the development of the society.

7. Introduction of Rule 10 - Transfer of unspent CSR Amount

The 2021 Amendment has introduced a New Rule 10 requiring companies to transfer the unspent CSR amount to any fund already mentioned under Schedule VII till "the Fund" referred to in Section 135(5) and 135(6) of Companies Act, 2013 is created or specified.

It is to be noted that the Draft Rules proposed the establishment of a National Unspent CSR Fund by the Central Government ("the Fund") for the purposes of Section 135(5) and 135(6) of the Companies Act. There has however been no mention of any such specific central Fund to be created by the Central Government under the New Rules of 2021.

CONCLUSION

The Companies (CSR Policy) Amendment Rules 2021 have overhauled India's CSR regime. Besides giving effect to changes introduced in Section 135 of Companies Act, as a result of Companies Amendment Act of 2019 (regarding transfer of unspent CSR amount) and Companies Amendment Act 2020 (regarding setting off of excess CSR expenditure), the New Rules have introduced new requirements like impact assessment of CSR contributions, engagement of International Organisations for CSR Projects in limited capacity etc. Even with respect to the concepts earlier present in the 2014 Rules, such as meaning of CSR, CSR Policy, CSR Implementation, the provisions of the New Rules appear to be more detailed and structured.

This is appreciated as it has in effect reduced the excessive discretion in the hands of a company, enhanced clarity, and introduced some uniformity by laying down the procedures to be followed in certain respects. Some provisions are still a bit vague, like Rule 10 of the New Rules talking about the transfer of unspent CSR amount to funds already mentioned in Schedule VII while not addressing the question of setting up a new Fund for the purposes of Section 135(5) and 135(6) of the Companies Act as was discussed in the Draft Rules of 2020. Concerns have also been raised regarding the five percent cap on administrative overheads under the New Rules and companies might find it difficult to abide by such provisions. Considering the overall scheme and the underlying intention, the New Rules paint a promising picture for India's CSR regime.

– **Rahul Rishi & Dr. Milind Antani**

You can direct your queries or comments to the authors

- The authors would like to thank Ms. Rakshita Agarwal for her contribution with the hotline

1 Available at http://www.mca.gov.in/Ministry/pdf/CompaniesActNotification2_2014.pdf

2 Available at <https://resource.cdn.icai.org/58749csr47857.pdf>

3 Available at http://www.mca.gov.in/Ministry/pdf/CSRAmendmentRules_23012021.pdf

4 Available at http://www.mca.gov.in/Ministry/pdf/CSRHLC_13092019.pdf

5 Available at http://www.mca.gov.in/Ministry/pdf/CSRHLC_13092019.pdf

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