

Changes proposed in
Draft Companies (Corporate Social Responsibility Policy)
Amendment Rules, 2020.

A. Background

(i) Sustainable Development Goals (SDG): Sustainable Development Goals (SDGs) were adopted on September 25, 2015 by 193 countries as a follow up to the Millennium Development Goals. The Sustainable Development Goals provide a powerful framework for businesses to engage in corporate social responsibility. Corporate is required to support the government for achieving SDG through CSR. A total of 17 goals and 169 targets are set to be achieved by 2030 and the realization of the same calls for a collective effort from the government, the corporates and the civil society organizations. Government asked NITI Ayog to develop framework to implement SDG by regulatory mechanism like CSR and define policies, procedure, reporting, and implementation and decide responsibility. India ranks 116 of 157 on the SDG index, thus calling for immediate action through a collaboration between the corporate sector, civil society organizations and the government. SDG and CSR overlaps many area of activities which is required to achieve. Unless Corporate take its responsibility and act as a catalyst to achieve SDG its difficult to achieve it by the Government.

(ii) Corporate Social Responsibility (CSR) : While there is **no definition** as such of Corporate Social Responsibility, however its refers that the corporate beyond making profits ,building assets, generating employment , using resources of public, are responsible to spend in monetary terms for the benefit of community and the society at large and not just for their employees, customers, business partners, investors and vendors. CSR is alternatively referred to as “corporate citizenship,” which essentially means that a company should be a “good responsible user of common resources”. Thus CSR is nothing but activities of welfare carried out by the large corporates or business owners earlier for their employees only and now these activities to be made available to public at large. India is the first country to make CSR mandatory.

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(iii) Legal provisions in India : Section 135 of the Companies Act, 2013 (CA 2013) provides that CSR will apply to every Company having a Net Worth of Rs. 500 crores or more, Turnover of Rs. 1000 crores or more or Net Profit of Rs. 5 crores or more, during immediately preceding financial year. These companies are required to spend a **minimum of 2% of “ average net profit”** of the Company made during the three immediately preceding the financial years.

(iv) Approach of companies: After CA 2013 notified on 1st April, 2014 , majority of companies just want to comply with the 2% CSR mandate and not much bothered to find impact of their program on the society. Some were of the opinion that the provision is not mandatory as it has option to spend or report non- spend with reason. Whereas many were under ‘wait and watch’ mode till they receive the Show Cause Notice from the Ministry of Corporate Affairs. Further many were carrying out CSR activities for media coverage during natural calamities or disaster and not with the philosophy of philanthropy. The approach of financial and social inclusiveness was not achieved as the same is forced idea of philanthropy and unless it comes from the culture and governance of any company, outside force won’t have that impact. However, CSR mandated is a god move till the culture is developed.

(v) Challenges : There are few challenges like corporate are not ready to accept this new responsibility in fact they consider it as erosion of wealth of shareholders, the corporate being legal entity though driven by natural human as custodian sometime lack empathy, compassion and understanding of need for better human progress in society as inclusive community. There are also lack of domain experts, data and projects for CSR spent by the corporate.

(vi) Why there is a need to revise the Rule: The CSR Rules, 2014 are not clear and there are certain ambiguities in definition of CSR, CSR Policy, obligation of CSR Committee, CSR expenditure etc and hence there is certainly a need to revisit these Rules. There was no clarity for spend and reporting for an “Ongoing Projects”. It also lacs clear obligation that spend is mandatory and reporting with reason is just additional obligation. There is poor law enforcement for non-compliance.

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B. New changes in the draft CSR Rules, 2020

1. **CSR definition** is revised. This was an inclusive definition and now it is revised as specific definition with certain exclusion only like (a) business activities of the Company (b) activities undertaken outside India, (c) contribution to political party u/s 182 of the Companies Act, 2013 and (d) activities which benefits more than 25% to employees and their families.

Comment:

- (a) How to bifurcated expenses that the Company if incur for any capital asset like road, well, hospital, school or any other capital assets near its business location, which are used not just for business but also for the benefit of employees and general public at large. How will this be accounted?
 - (b) Definition reads that activities that significantly benefit the employees of the company and their families are not CSR, however in proviso in beneficiary “families” word is missing.
 - (c) One-off events such as sports event like marathons, sponsoring any awards function or charitable contribution or advertisement/ sponsorships of TV programmes etc. would it be now qualified as part of CSR expenditure?
 - (d) Broadly one can say that CSR activities are any activities other than four defined above in definition of CSR , which is for an universal call for ending poverty, protecting the planet and ensuring that all people enjoy peace and prosperity is considered as CSR
2. **CSR Policy definition** is revised with proper meaning of it as a Statement giving company’s Approach and Directions as per recommendation of CSR committee for selection, implementation and monitoring of activities to be undertaken in areas or subjects as CSR specified in Schedule VII of the Act.
 3. New **definition of International Organization** is added which means an organization notified by the Central Government as an international organization 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.”

Comment: Currently, International Organization are not eligible to undertake CSR activities unless they are a Section 8 company, a registered trust or a registered society in India. The International Crops Research Institute for the Semi-Arid Tropics (ICRISAT), The United

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States Agency for International Development (USAID) and United Nations International Children's Emergency Fund UNICEF, are few International Organizations. High Level Committee has recommended that this International Organizations have institutional memory, international foot print, best practices and a proven record of delivery. They may be engaged to partner with companies and eligible Implementing Agencies for capacity building and knowledge sharing.

4. New **definition of "Ongoing Projects"** is added which means a multi-year project undertaken by a Company **and having timelines not more than 3 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.

Comment: How the Act / Rule fix time line of three years for On Going Project. If the project requires five years or seven years can the CA 2013 force it to be of three years only. In this situation the purpose will be defeated.

5. New **definition of Public Authority** is added which authority as defined under section (2) (h) of Right to Information Act, 2005
6. **CSR :** Rule 3 mandates every company including **its holding or subsidiary** and a **foreign company or body corporate incorporated outside India** which has a place of business in India whether by itself or through an agent, physically or through electronic mode **and** which conducts any business activity in India in any other manner or having its branch office or project office in India, having Net Worth of Rs.500 Crore or more or Turnover of Rs.1000 crore or more or a Net Profit of Rs.5 crore or more during immediately preceding financial year is required to constitute a CSR Committee of the Board and need to comply with the provisions of section 135 of the Act and CSR rules:

Provided that Net worth, Turnover or Net Profit. of a Foreign Company shall be computed in accordance with Balance Sheet and Profit and Loss account of such foreign company of its **Indian Business Operations** prepared as per the CA 2013.

Net Profit of any Indian Company does not include any profit arising from any overseas branch or branches of the company, whether operated as .a separate company or otherwise and any

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dividend received from other companies in India, which are covered under and complying with the provisions of section 135 of the CA 2013 with respect to CSR .

Comment:

- (a)** For Foreign Company if any profit from overseas or the dividend received are not excluded in computation of Net Profit.
- (b)** Foreign Company is required to annex CSR Report while filing its Balance Sheet with Ministry of Corporate Affairs as per Section 381 (1) (b) of the CA 2013.
- (c)** If the Foreign Company is having the obligation of spending average CSR amount of Rs 5 Crore or more in the three immediately preceding financial years , does it require to undertake Impact Assessment for their CSR projects and require to disclose details of the same in its Annual Report on CSR.?
- (d)** Holding or Subsidiary company has no relevance to mention as CSR provisions will be applicable to every company on its standalone results. However the reference of holding and subsidiary may be relevant, in the event that if the subsidiary company declares dividend and its India holding company receives it, such dividend income is reduced out of the total Net Profit of holding company for calculation of threshold of net profit for applicability of CSR provisions.

7. **CSR Implementation** described under **Rule 4** is substituted with new Rule on CSR Implementation which states that (a) CSR activities can be undertaken by the Company either by itself or section 8 company or any entity established by an Act of Parliament or State Legislation and that too only when such entity shall **file e-Form CSR 1** with Registrar to register itself with Central Government for undertaking CSR activities. There is exception to any projects approved prior to these rules.(b) A Company may collaborate with other companies for undertaking CSR projects in such a way that the respective companies are in a position to report separately on such projects in accordance with the rules.(c) A company may engage International Organizations for designing, monitoring, evaluation of the CSR projects and also for capacity building as per its CSR policy and such International Organization can also implement CSR project subject to prior approval of the Central Government. (d) The Board to ensure the proper use of funds and CFO to certify to that effect and (e) In case of Ongoing Projects, the Board to monitor the implementation of the project with timelines.

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Comment:

(a) New e-form CSR-1 which is required to be filed by section 8 company or any entity established under the Act of Parliament or State Legislature which undertakes CSR implementation for a Company. If the Company implement CSR by itself , whether e-Form CSR-1 will allow the Company to file the form as required under Rule 4 of CSR Amendment Rules, 2020

(b) In this Rule 4 relating to implementation of CSR, the rules could have mention that the company is mandated to give preference to the local area and areas around it where it operates, for spending the amount earmarked for CSR activities. The question arise if the company is in service industry and having registered office, branch office, corporate offices across India, how CSR Committee will propose Action Plan with project of CSR in this areas. The company should not be limited to use CSR funds to local areas around it where it operates but shall select areas across the country which was suggested in the Companies (Amendment) Bill, 2016).

8. **CSR Committee** is mandated to formulate and recommend an **Annual Action Plan** to the Board as per CSR policy, which shall include (a) list of CSR projects to be undertaken in areas and activities as per Schedule VII of the Act (b) the manner of execution (c) the modalities of utilization of funds (d) monitoring and reporting and (e) details of need and impact assessment, if any , undertaken by the Company.

Comment: More responsibility is cast on CSR Committee and all Directors of CSR Committee including Independent Director, if any, will be required to formulate an Annual Action Plan, ensure proper accounting and robust internal audit process, build CSR framework, list out CSR project in compliance with mandatory requirements of prioritize the area and ensure it is part of schedule VII and lastly, to have proper management or outside agency to assess the Impact of such projects. Impact Assessment must have clear objective parameters to monitor, responsibility to be assigned , decide on frequency of such assessment and decision of what kind of methods to be used for Impact Assessment

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9. **CSR Expenditure** mentioned under **Rule 7** is revised which states that

(a) Board to ensure that the **administrative overheads for CSR activities should not exceed 5%** of total CSR expenditure of the company for the financial year and if the company is undertaking **impact assessment it may incur administrative overheads not exceeding 10%** of total CSR expenditure for that financial year.

Comment:

(a) Expenses for Brand building, Capacity building, Impact Assessment are considered as part of 10% admin expenses or not?.

(b) If the company is distributing goods or provide services in CSR program the same need to be accounted at Cost and not sale price.

(b) Further any **surplus arising out of the CSR** projects or programmes or 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 action plan of the company. (in line with Companies Amendment Bill, 2020)

(c) The Company may spent for **acquisition of assets** for its CSR activities but the same need to be held by a section 8 company established for charitable objects or a public authority. Provided that any asset created by a company prior to the commencement of Companies (CSR Policy) Amendment Rules, 2020, shall within a period of 180 days from such commencement comply with the requirement of this rule, which may be extended by a further period of not more than 90 days with the approval of the Board based on reasonable justification.

Comment: As per Rule 4, if the Company is allowed to undertake CSR activities by itself and if it creates or acquires any assets, the company need to ensure that the assets cannot be acquired in its name and it has to create a **Section 8 company or give it to public authority.** CSR spend can be both revenue and capital and in case the expenditure incurred by the company is of such nature which may give rise to an 'asset', the company cannot show in its balance sheet. The reason is that any asset appearing in the balance sheet means the company has control over the asset and any future economic benefits arise out of such asset is expected to flow to the company and hence now the rule specify that such asset to be held by section 8 company or public authority .The rationale of this provision is that the

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ownership shall rest with the public and the company may act as a custodian to operate it and make it self-sustaining.

(d) Unspent balance, if any, towards fulfilment of CSR obligation at the time of commencement of these Rules shall be transferred within a period of 30 days from the end of Financial Year 2020-21 to special account viz., '**Unspent Corporate Social Responsibility Account**' opened by the company and such amount shall be spent by the company in pursuance of its obligation towards the CSR Policy within a **period of 3 FY** 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

Comment: The language of the Section 135 (6) of the CA 2013 and Rule 7 (4) should be same. The Rule is silent about opening a **special account** by the company **in any scheduled bank** which is called as the "Unspent Corporate Social Responsibility Account".

10. In Rule 8 sub rule 3 is added specifying that the company having the obligation of spending average CSR amount of Rs 5 Crore or more in the 3 immediately preceding financial years is mandated to undertake **Impact Assessment** for its CSR projects and mandated to **disclose details** of the same in its Annual Report on CSR.

Comment: Whether the cost for Impact Assessment will be part of limit of 10% administrative expenses permitted to such company.

11. Rule 9 is substituted which is with respect to **Display of CSR activities as per Annexure A of the Rules** on the website of the company. The Board is mandated to disclose the composition of the CSR Committee, CSR Policy and Projects approved by the Board on the website of the company for public viewing.

(The same is required in Annual Report as part of Board Report).

Comment: The Annual Report with Board Report is already displayed on the website as required u/s 134 there is no point to repeat the disclosure again in Rule 9 of CSR Amendment Rules, 2020.

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12. Rule 10 is added which is **National Unspent Corporate Social Responsibility Fund.**
The Central **Government shall establish a fund called the “National Unspent Corporate Social Responsibility Fund” and** the Fund shall be utilized for the purposes of undertaking CSR projects in the in areas or subjects specified in Schedule VII of the Act. Provided that until such fund is created, the unspent CSR amount shall be transferred by the company to any fund as specified in Schedule VII of the Act (like Swatch Bharat Kosh, Clean Ganga Fund, Prime Minister National Relief Fund or Technology Incubator Fund) and the Central Government will have guidelines for the authority and manner of administration of the Fund.
13. **Annexure** is revised which is “format for the Annual Report on CSR activities to be included in the Board’s Report. The following are additional disclosures to be made :
- (a) Provide the web-link where Composition of CSR committee, CSR Policy and CSR projects approved by the board is disclosed on the website of the company
 - (b) Provide the details of Impact Assessment of CSR projects carried out in pursuance of Rule 8 (3) of the Companies (CSR Policy) Rules, 2014, if applicable and attach the report **(Impact assessment is mandated to companies who has the obligation of spending average amount of Rs 5 Crore or more as CSR in the three immediately preceding FY)**
 - (c) Surplus arising out of the CSR projects/ programmes or activities for the financial year to be added with 2% average obligation and give total CSR obligation for the financial year.
 - (d) Disclose total amount spent, total amount transferred to Unspent CSR Account as per Section 135(6) and amount transferred to National Unspent CSR Fund as per second proviso to Section 135(5) of the Act.
 - (e) Disclose details of CSR amount **spent against On Going Project** for the FY
 - (f) Disclose details of CSR amount **spent against other than On Going Project** for the FY
 - (g) Disclose amount spent in administrative overheads
 - (h) Details of CSR **amount/ spent/ unspent for preceding three FY** including amount spent to National Unspent CSR Fund as per 2nd proviso to section 135 (5) of the Act
 - (i) Details of CSR amount **spent for On Going Project** of the preceding FY(s)
 - (j) Amount transferred to **Unspent CSR Account pursuant to Rule 7 (4)** of the CSR Rules 2014 read with section 135 (6) for FY 2014-15 to 2019-20

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(The amount which has remained unspent from CSR obligation is required to be transferred in 30 days from the end of FY 2020-21 in any scheduled bank to be called as a special account “**Unspent CSR Account**”

- (k) Details of **creation and acquisition of assets** including date of creation/ acquisition of assets, amount of CSR spent for creation or acquisition, details of the entity under whose name such asset is registered and its address and details of property or assets created or acquired
- (l) **Reason for not spending** CSR spend as per its obligation
- (m) The Annexure is required to be **signed by CEO / MD / Director and Director/ CFO and in case of Foreign Company or branch, Representative** of such Foreign Company as defined u/s 380 (1) (d) of the Act.

C. Action required to be taken : All companies which are required to comply with the provisions of Section 135 with respect to CSR will be required to take following actions upon notification of the CSR Rules, 2020

1. Board and CSR Committee to revisit CSR Policy, which should contain the approach and directions for selection, implementation and monitoring CSR activities
2. Board to justify on On-Going Project as per Rule 2 (h)
3. E-Form CSR -1 to be filed by the Company itself or Section 8 company or by any entity established under the Act of Parliament or State Legislature which is going to undertake implementation of CSR activities of the Company
4. Company may consider to form a Section 8 company to hold assets created or acquired by the Company by capital expenditure in CSR expenses
5. Company may collaborate with other companies
6. CSR Committee to recommend CSR Policy and formulate Annual Action Plan
7. If Company's obligation of spending average CSR amount of Rs. 5 crores or more in three immediately preceding financial year it has to ensure that expenses on admin overheads should not exceed 10% of total CSR expenditure for that financial year and it need to undertake Impact Assessment for their CSR Program.

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8. Surplus arise from any CSR Project may be plough back into the same project or to be transferred to the Unspent CSR Account. Such amount then to be used as per CSR Policy and Action Plan
9. Transfer any assets if created by the Company prior to the new CSR Rules, 2020 within 180 days from the commencement of such Rules in any Section 8 Company or a public authority and maximum grace period of 90 days may be available with the approval of the Board based on reasonable justification.
10. Any unspent amount of prior period obligation of the Company from FY 2013-14 to FY 2019-20 is required to be transferred in 30 days from the end of FY 2020-21 that is by 30th April, 2021 in a special account namely “Unspent CSR Account” and the same to be used for fulfilling its obligation of CSR in three years that is by 2024-25. If the same remain still unspent, the Company to transfer it to Fund specified under Schedule VII within a period of 30 days from the end of third FY, that is by 30 April, 2025.
11. The Company need to update its website with revised CSR Policy, CSR Project and CSR Annual Report.

D. Certain recommendation of High Level Committee not yet in the statute

1. Provisions of CSR need to be applicable across all business entities and there should be a level playing field. Businesses are carried out inter alia as Partnerships, Limited Liability Partnerships (LLPs), Banks and CSR provisions to be mandated for these entities also.
2. Obligation under Section 135 to arise once the Company has been in existence for three years. This is also in keeping with the thrust of Ease of Doing Business by allowing adequate time for a newly incorporated company to stabilize itself before mandatory spending obligations are imposed on it.
3. The companies having obligation of CSR spent below Rs.50 Lac to be exempted from forming a separate CSR Committee of the Board. Instead the Board itself may carry out the functions of the CSR Committee.
4. The unspent CSR amount for a particular year be transferred to a separate designated account created for the purpose and need to be spent within a period of three to five years and not 3 years.
5. The emphasis on carrying out CSR activities in local area is only directory and not mandatory in nature however as per Section 135(5) the word used is “Shall” which is construed as mandatory

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and in the absence of any clarification advising companies to engage in CSR activities by balancing local area preference with national priorities, the message is not clear to Corporate.

6. CSR to be brought within the purview of statutory financial audit, by making details of CSR spending as part of the financial statement of a company and incorporated in Schedule III of the Act.
7. The Board of a Company to ascertain the credibility of an Implementing Agency (IA) and carry out necessary due diligence. IAs to be registered with MCA to carry out CSR activities.
8. CSR expenditure to be made deductible from the income earned for the purpose of taxation.
9. A CSR Exchange Portal be developed for creating an interactive platform for all stakeholders, including contributors, beneficiaries, IAs, etc. by leveraging the benefits of technology to maximize the potential and outcomes of CSR.
10. 'Social Impact Companies' be created as vehicles within the CSR framework, with the express object of pursuing social outcomes, while being permitted to achieve conditional profit which can be distributed. CSR contribution to social impact bonds raised by such Social Impact Companies or not-for-profit companies bringing upfront risk capital may be considered on a pilot basis.
11. The ambit of reporting on Business Responsibility Report (BRR) be expanded gradually and at this juncture, it be extended to top 1000 companies.
12. MCA & IICA established the National Foundation for Corporate Social Responsibility (NFCSR) on December 6, 2012 to provide a platform for corporates to collaborate with Government, Non-Governmental and Civil Society Organizations, and local communities on CSR projects. NFCSR to be strengthened to function as the think-tank for CSR. NFCSR undertake advocacy for Individual Social Responsibility.
13. MCA shall partner with the Department of Public Enterprise for comprehensive guidelines for Central Public Sector Undertakings (CPSUs).
14. CSR Survey may be prepared by the Ministry The Board of a company may engage a CSR professional, if it so desires, and the Government may prescribe eligibility criteria for such professionals.

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