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Newsflash:

CORPORATE SOCIAL RESPONSIBILITY (CSR) : THE REVISED REGIME

5 February 2021

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For Client Circulation

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1.0 PREFACE

- 1.1 One of the most hotly contested, debated, acclaimed as well as criticized section of the Companies Act, 2013, the sacrosanct section 135, the Corporate Social Responsibility or CSR is something that needs no introduction now to any Indian entrepreneur. It is a concept that is fairly edged in every business's mind and most of the businesses are reasonably aware about what is expected out of them in this arena.
- 1.2 While the concept of CSR is more than 6 years old, the law makers still feel the need to keep making amends to it so that CSR is not just left to become one of the many passive compliances that Corporates must keep doing. It is certainly one of the concepts that has kept evolving over the past six years with as many as 16 amendments being made time and again to keep pace with the changing business, social and economic environment in India and the world over.
- 1.3 While a few of the amendments to CSR, proposed in the Companies Amendment Act, 2019, like making CSR non-spending a criminal offence, did not see the light of the day and eventually rolled back, the Ministry of Corporate Affairs, to ensure that Corporates do CSR, both in letter and in spirit, completely overhauled the CSR Policy Rules 2014 with a new set of Rules, the CSR Policy Amendment Rules, 2021, which have come into effect from 22 January, 2021. As such, the amendments in CSR that were brought about by the Companies Amendment Act, 2020, also stands notified w.e.f. 22 January, 2021.
- 1.4 It is thus imperative for businesses to understand the new CSR Regime, which now requires them to re-visit their CSR Programs, plans, policies, etc, to be in accordance with the revised regulations, since from the FY 2021-22 onwards, the CSR obligations would have to be imparted in accordance with the new Rules.
- 1.5 Gone are the days when Corporates could simply give some reasons or explain the non-spending on CSR in their BOD Report. The COREX (Comply or Explain) Rule is now only a history as far as CSR is concerned. Corporates would in addition to COREX, must transfer the unspent CSR Amount to a dedicated Fund, will have to get their CFOs to certify the CSR spends, will have to cut ties with Private Trusts which were their trusted vehicles for doing CSR and much more.
- 1.6 With the above backdrop and with an honest intent that it helps, we have tried to put together the relevant and important pieces of the new CSR Rules in this write-up, which, to our mind, would help you get a flavor of the new regime.

2.0 THE PRE-AMENDMENT CSR LANDSCAPE

2.1 Section 135: Trigger

The provisions of Section 135 shall apply to **every** company having:

- Net worth of rupees five hundred crore or more; or
- Turnover of rupees one thousand crore or more; or
- Net profit of rupees five crore or more during the **immediately preceding financial year**.

For the purpose of determining whether a company triggers the threshold criteria prescribed above, it shall review its latest audited standalone financial statement.

2.2 Entities to which applicable:

Applicable to all public, private and OPCs registered under the Companies Act, 1956/2013 or any other previous law. Although, the provisions of Section 135, do not contemplate its application to foreign companies, the Rules have expanded the application to foreign companies having a branch office or project office in India which fulfills the criteria stated above. The computation in the balance sheet and profit and loss account of such company prepared as per the provisions of the Act shall determine whether a foreign company fulfills the applicability criteria.

2.3 Entities eligible for undertaking CSR:

- a Section 8 Company or a registered trust or a registered society, established by the company, either singly or along with any other company, or
- b Section 8 Company or a registered trust or a registered society, established by the Central Government or State Government or any entity established under an Act of Parliament or a State legislature.
- c Provided that- if, the Board of a company decides to undertake its CSR activities through a company established under section 8 of the Act or a registered trust or a registered society, other than those specified in this sub-rule, such company or trust or society shall have an **established track record of three years in undertaking similar programs or projects**; and the company has specified the projects or programs to be undertaken, the modalities of utilization of funds of such projects and programs and the monitoring and reporting mechanism to such section 8 Company/ Trust/ Society”.
- d A company may also collaborate with other companies for undertaking projects or programs or CSR activities in such a manner that the CSR Committees of respective companies are in a position to report separately on such projects or programs in accordance with these rules.

2.4 CSR Committee:

- a Any company fulfilling the applicability criteria set out above must constitute a CORPORATE SOCIAL RESPONSIBILITY COMMITTEE (CSRC).
- b CSRC of a company shall consist of
 - Minimum three directors
 - Out of the which, at least one should be an independent director.
- c CSRC of an unlisted company, not required to appoint an independent director, shall constitute a CSRC without such director.
- d CSRC of a private company having only two directors on its Board, shall constitute a CSRC with only two a such directors.
- e CSRC of a foreign company shall consist of at least two persons, of which
 - one person shall be nominated by the foreign company and

- one person shall be the authorized representative of the company who is a person resident in India and whose particulars have been submitted to the Registrar of Companies as per the provisions of the Act.

2.5 Functions of the CSR Committee:

The CSR Committees shall:

- formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company in areas or subject, specified in Schedule VII;
- recommend the amount of expenditure to be incurred on the activities referred to in clause (a);
- monitor the Corporate Social Responsibility Policy of the company from time to time and
- frame a transparent mechanism for implementation of the CSR projects of the company.

2.6 CSR Spend:

The Board shall ensure that the company spends, in every financial year, at least two per-cent of the average net profits of the company made during the three immediately preceding financial years in pursuance of the CSR Policy.

2.7 Implications of not spending:

If the company fails to spend such amount, the Board shall specify the reasons for not spending the amount in its Report.

3.0 AMENDMENTS TO THE CURRENT REGIME EFFECTIVES FROM 22ND JANUARY 2021:

3.1 New Definition of CSR provided which excluded certain activities:

Corporate Social Responsibility (CSR)" means the activities undertaken by a Company in pursuance of its **STATUTORY OBLIGATION** laid down in section 135 of the Act in accordance with the provisions contained in these rules, but shall **not include** the following, namely: -

- activities undertaken in pursuance of normal course of business of the company:

Provided that any company engaged in research and development activity of new vaccine, drugs and medical devices in their normal course of business may undertake research and development activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22, 2022-23 subject to the conditions that:

- such research and development activities shall be carried out in collaboration with any of the institutes or organizations mentioned in item (ix) of Schedule VII to the Act;
- details of such activity shall be disclosed separately in the Annual report on CSR included in the Board's Report;
 - any activity undertaken by the company outside India except for training of Indian sports personnel representing any State or Union territory at national level or India at international level
 - contribution of any amount directly or indirectly to any political party under section 182 of the Act;

- (iii). activities benefitting employees of the company as defined in clause (k) of section 2 of the Code on Wages, 2019 (29 of 2019);
- (iv). activities supported by the companies on sponsorship basis for deriving marketing benefits for its products or services;
- (v). activities carried out for fulfilment of any other statutory obligations under any law in force in India.

3.2 Dismantle the CSR Committee

Section 27 of the Companies (Amendment) Act, 2020 as notified on 28th September 2020 and effective from 22nd January 2021 provides that the companies which have CSR spending obligation up to Rs. 50 lakh shall not be required to constitute the CSR Committee and the functions of such Committee as provided under section 135 shall, in such cases, be discharged by the Board of Directors of such company.

3.3 Entities eligible to do CSR Activities: The company can undertake CSR activities itself or through -

- a) Section 8 Company or a registered public trust or a registered society, **registered under section 12A and 80 G of the Income Tax Act, 1961**, established by the company, either singly or along with any other company, or
- b) Section 8 Company or a registered trust or a registered society, established by the Central Government or State Government; or
- c) any entity established under an Act of Parliament or a State legislature; or
- d) Section 8 Company or a registered public trust or a registered society, registered under section 12A and 80G of the Income Tax Act, 1961, and having an established track record of at least three years in undertaking similar activities

3.4 Registration of the above entities w.e.f. 1 April, 2021:

Every entity who intends to undertake any CSR activity, shall register itself with the Central Government by filing the form CSR-1 electronically with the Registrar for the CSR projects or programmes approved on or after 01st April, 2021.

3.5 CSR Policy to include annual plan on CSR:

The CSR Committee shall formulate and recommend to the Board, an annual action plan in pursuance of its CSR policy, which shall include the following, namely:

- a. the list of CSR projects or programmes that are approved to be undertaken in areas or subjects specified in Schedule VII of the Act;
- b. the manner of execution of such projects or programmes as specified in sub-rule (1) of rule 4;
- c. the modalities of utilization of funds and implementation schedules for the projects or programmes;
- d. monitoring and reporting mechanism for the projects or programmes; and
- e. details of need and impact assessment, if any, for the projects undertaken by the company.

3.6 Impact Assessment of significant CSR Outlays:

Every company having average CSR obligation of Rs. 10 crore or more in pursuance of section 135 (5), in the 3 immediately preceding financial years, shall undertake:

- a impact assessment, through an independent agency, of their CSR projects having outlays of one crore rupees or more, and which have been completed not less than one year before undertaking the impact study.
- b The impact assessment reports shall be placed before the Board and shall be annexed to the annual report on CSR.
- c A Company undertaking impact assessment may book the expenditure towards CSR for that financial year, which shall not exceed five percent of the total CSR expenditure for that financial year or fifty lakh rupees, whichever is less.

3.7 Set off and Carry forward of excess CSR Spend:

Section 27 of the Companies (Amendment) Act, 2020 as notified on 28th September 2020 and effective from 22nd January 2021 read along with Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021 allows eligible companies under section 135 to set off any amount spent in excess of their CSR spending obligation in a particular financial year towards such obligation in subsequent three financial years by passing a Board Resolution.

3.8 Transfer of Capital Assets:

The capital assets created or acquired due to CSR amount shall be held by section 8 company or Registered Public Trust or Registered Society, having charitable objects and CSR Registration Number or by beneficiaries of the said CSR project, in the form of self-help groups, collectives, entities; or by a public authority.

Any capital asset created by a company prior to the commencement of the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021, shall be transferred to the aforesaid entities / authority within a period of 180 days from such commencement 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.

3.9 On-going projects and other than on-going projects:

As per Rule 2(i) an on-going projects means “a multi-year project undertaken by a Company in fulfilment of its CSR obligation having timelines not exceeding three years excluding the financial year in which it was commenced, and shall include such project that was initially not approved as a multi-year project but whose duration has been extended beyond one year by the board based on reasonable justification”

3.10 Certification from the CFO of the Company on the CSR Spends

The Chief Financial Officer or the person responsible for financial management shall certify that the funds so disbursed have been utilized for the purposes and in the manner as approved by the Board.

3.11 Implications of not spending on CSR:

Section 21 of the Companies (Amendment) Act, 2019 as notified on 31st July, 2019 and effective from 22nd January 2021 now requires the company to transfer the unspent amounts to Unspent Corporate Social Responsibility Account (UCSR Account) or the Fund specified under Schedule VII of the Act e.g. Contribution to the prime minister's national relief fund, PM CARES Fund, etc. as below:

- i. If the unspent CSR amount DOES NOT RELATE TO ONGOING PROJECTS, then the Company is required to transfer the unspent amount to UCSR Account or the Fund specified under Schedule VII of the Act within 6 months of the expiry of the Financial Year.

So the unspent CSR amount (not relating to ongoing project) for the FY 2020-21 should be transferred by 30th September 2021 (within 6 months) to the Fund specified under Schedule VI, i.e. Prime Minister's National Relief Fund, PM CARES Fund, etc.

- ii. If the unspent CSR amount relates to ongoing projects, then the unspent CSR amount is required to be transferred within a period of 30 days from the end of the financial year to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called the UCSR Account, and such amount shall be spent by the company in pursuance of its obligation towards the Corporate Social Responsibility Policy within a period of 3 financial years 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 third financial year.

- The unspent CSR amount on ongoing projects to be transferred by 30th April 2021 (within 30 days) to UCSR Account as opened by the company with any scheduled bank
- To utilize the unspent CSR Funds, for the ongoing projects by 31st March 2024 and
- Transfer the unspent CSR amount, if any to the Fund specified under Schedule VII by 30th April 2024.

Further, Section 27 of the Companies (Amendment) Act, 2020 as notified on 28th September 2020 and effective from 22nd January 2021 has introduced the penal provisions for violation of section 135, which makes the company liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII Or the Unspent Corporate Social Responsibility Account, as the case may be, or Rs. 1 crore, whichever is less, AND every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or Rs. 2 lakh, whichever is less.

Thus, by making this section of Companies (Amendment) Act, 2020 effective, non-compliance of CSR activity shall now attract penalty on Company as well as officers of the company who are in default.

4.0 WAY FORWARD FOR CSR

✓ DOs	✗ DONTs
✓ Do check the trigger for CSR for the last three FYs. Once applicable would continue to remain applicable for 3 successive FYs.	✗ Do not undertake any CSR Activities through private trusts
✓ Do form CSR Committee if not already formed	✗ Do not undertake any one off projects as CSR;
✓ If CSR obligation is less than 50 lakh, dismantle the CSR Committee	✗ Do not spend on CSR in any of the areas which is not covered under Schedule VII of the Act;
✓ Do Include Annual plan for CSR in your CSR Policy	✗ Do not includes vaccine related research and development in your CSR

	<p>Expenditure unless you comply with the following:</p> <ul style="list-style-type: none"> a The company engaged in research and development activity of new vaccine, drugs and medical devices in their normal course of business related to COVID-19 b research and development activities shall be carried out in collaboration with any of the institutes or organizations mentioned in item (ix) of Schedule VII to the Act c details of such activity shall be disclosed separately in the Annual report on CSR included in the Board's Report;
✓ Do include the areas given in Schedule VII for your CSR plans/programmes	* Do not spend on any sponsorship programme for any CSR activity, which might be considered as marketing for your products as it would not amount to doing CSR;
✓ Do take a liberal interpretation of the areas specified in Schedule VII to include more activities that can be treated as CSR	* Do not do any CSR Activity exclusively to benefit your employees and their families as it would not be considered as CSR;
✓ Do carry forward the excess CSR spend in one year to the next FYs up to 3 FYs	* Do not undertake any CSR activity which might be treated as only in furtherance to promote your own business or products;
✓ Decide the entities through which you intend to undertake CSR	* Do not carry any CSR activity outside India
✓ If a Trust is chosen to do so, ensure that it is a Public Trust and not a private Trust	* Do not forget to carry on the excessive CSR Spend of one FY to the next FYs (up to 3)
✓ Do register the section 8 Company/Society/Trust chosen for your CSR, on the MCA portal	* Do not forget to include your foreign company's branch/liaison/project office in India for undertaking CSR in India:
✓ Ensure that you take a certificate from your CFO before every AGM for the CSR undertaken	* Do not forget to include Annual Plan on CSR in your CSR Policy;
✓ Do include vaccine related research expenditure as CSR for the FY 2021-22/23/24 as CSR if: <ul style="list-style-type: none"> a The company engaged in research and development activity of new vaccine, drugs and medical devices in their normal course of business related to COVID-19 b research and development activities shall be carried out in collaboration with any of the institutes or organizations mentioned in item (ix) of Schedule VII to the Act 	* Do not take more than 5% of administrative expenses pertaining to CSR as your CSR Expenditure;

c details of such activity shall be disclosed separately in the Annual report on CSR included in the Board's Report;	
✓ If your CSR spend is more than Rs.10 crore, undertake CSR Impact Assessment for outlays of more than 1 cr in the previous FY	* Do not just mention reasons for non-spending on CSR in your BOD report since now it would mean transfer of unspent amount on CSR to a Fund as mentioned in Schedule VII.
✓ Do count Impact assessment cost of Rs. 50 lakh or 5%, whichever is less, as CSR expenditure	* Do not discontinue your CSR spends if in this year after triggering CSR, next year you are not in the thresholds provided; since CSR once applicable continues to apply for 3 FYs.
✓ If not able to do the given CSR in the FY, beginning from 2020-21: a. In case of on-going projects, do the following: <ul style="list-style-type: none"> • Transfer the unspent CSR Amount by 30th April 2021 to UCSR Account as opened by the company with any scheduled bank; • To utilize for the ongoing projects within 3 years from date of such transfer and • Transfer the unspent CSR amount, if any to the Fund specified under Schedule VII within 30 days by end of third FY. b. In case of other than on-going projects, do the following: <ul style="list-style-type: none"> • Transfer the unspent CSR Amount by 30th September 2021 to the Fund specified under Schedule VII e.g. Contribution to the Prime Minister's National Relief Fund, PM CARES Fund, etc. 	
✓ Do collaborate with certain International Monitoring organizations, if required, for doing CSR:	
✓ Do put up your CSR Policy on your Company's website, if you have one;	
✓ Do put the revised annexures on CSR in your Board Report from the FY 2020-21 onwards	
✓ Keep you CSR team, if you have one, informed about all the above.	

5.0 SCOPE & LIMITATIONS:

The purpose of this write-up is to provide a brief overview along with Ministry of Corporate Affairs' clarifications for facilitating effective implementation of CSR. No part of this Paper shall be reproduced without our prior written consent. The Paper is prepared for general use and our views as stated above would be required to be revalidated vis-à-vis the facts of each case. The Government or judicial authorities may or may not subscribe to the views expressed herein. Under no circumstances, the above should be used as any tax avoidance scheme. It may be noted that nothing contained in this write-up should be regarded as our opinion and facts of each case will need to be analyzed to ascertain applicability or otherwise of the said notification and appropriate professional advice should be sought for applicability of legal provisions based on specific facts. We are not responsible for any liability arising from any statements or errors contained in this write-up.

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