



Bombay Chamber of Commerce & Industry

**Recommendations on draft Companies (Corporate Social Responsibility Policy)
Amendment Rules, 2020.**

1. **CSR Implementation: Rule 4(1): Clarification on the Implementing Partners:** Current Draft Rules suggest following three Implementing Partners through which CSR program should be implemented:
 - a. Companies established under Section 8; or
 - b. International organizations subject to prior approval of the central government; or
 - c. any entity established under an Act of Parliament or a State legislature.

It may be a setback for many companies that have already established systems and processes working with either a registered Trust or Society Foundation for CSR program execution. It is ideal to have an existing practice of including Foundations, Trusts and Societies along with suggested new practice. Any amendment should be progressive, and any iota of regression makes it challenging for companies to take a detour and accommodates abrupt change in the direction.

2. **Engaging International Organization as an Implementing Partner: Rule 4(3):** The Companies should engage International Organisations only if there are no strings attached i.e. Companies should be restrained from leveraging any brand value or other advantages for directly or indirectly benefitting their businesses by associating themselves with International Organisations. This may otherwise go against the basic principles of Corporate Social Responsibility and also give International Organisations an unfair advantage in accessing CSR funds thereby limiting a wider coverage of activities and geographical communities.

International Organisations should also be restricted from using the funds for augmenting their own capacities and it should be clarified that the limits for administrative spend and impact assessment will apply to International Organizations.

3. **Eligible CSR activity: Rule 2(i)(c)(iv): Clarification on whether the threshold of 25% is for value or for number:**

While the Draft Rules state that CSR activity benefiting less than 25% of employees shall be deemed to be CSR activity, it does not specify the percentage of CSR amount to be spent on less than 25% employees. The current draft rules might give an opportunity to the industry to exploit the law by disproportionately favouring a company's employees. Therefore, it is advised to cover both numbers and value so that the spirit of the law is maintained.

4. **CSR Implementation: Rule 4(1): Prior experience for the implementing agencies not required as per current draft Rules:** It is essential for an implementing agency to

have working experience in the development space. Therefore, limit of minimum 3 years of prior experience should be made essential to take up any CSR project. The registration route in a way enables this to be opened up for scrutiny as the Section 8 company details can be verified; and companies could exercise diligence at their level while selecting an implementing agency for their CSR project(s).

It is further suggested to clarify if the Government proposes to prescribe any qualifying criteria for registering the implementing agencies.

5. **CSR Implementation: Rule 4(1): Implementing Partners to file CSR – 1 for undertaking any CSR activity:** Given the shift from requiring a 3 year track record in similar projects / programs to a mere registration, it is suggested to clarify: (a) whether the Government intends to formally 'approve' an entity's involvement as an implementation agency; or (b) whether a registration is a pre-condition before any implementing agency has access to CSR funds or Implementing Agencies can commence the CSR activities once an application for registration is filed with the Ministry of Corporate Affairs.
6. **CSR Expenditure: Rule 7(3):** As per the current Draft Rules, Trusts and Societies have been excluded from being Implementing Agencies. However, if the proposal to include Trusts and Societies as Implementing Agencies is accepted, the Rules should be amended to allow asset creation/acquisition by Trusts and Societies as well.
7. **Impact Assessment: Rule 8(3):** The Draft Rules do not clarify as to who is eligible/qualified to undertake the impact assessment. Therefore, there is a need to set the eligibility criteria/qualification/conditions for the entities who will undertake impact assessment.
8. **Impact Assessment: Rule 8(3):** It is suggested that the Impact assessment should be done for projects with a minimum prescribed size and not based on prior 3 years average spend,
9. **On-going projects: Rule 2(iv)(h): The word 'Board' can be replaced with CSR Committee:** It is the CSR committee which monitors CSR activities, hence it should be empowered to extend the duration of non-multi-year projects beyond a year; monitor /implement the ongoing projects and make modifications. Since this may be a significant commitment, it can be approved by the Committee and formally acknowledged by the Board at its next meeting as a good governance practice.
10. **CSR Implementation: Rule 4(1): While the proposed rules allow CSR activities through Section 8 companies, it is silent on CSR activities to be taken through Trust and Society:** It is suggested to frame a mechanism to capture details of continuing projects and the implementing agencies. Further, It is suggested to clarify if the companies can continue with the existing implementing agencies for approved projects without the registration and is there any time limit for them to get themselves registered / companies to work with them. Since there is no clarity on this, some companies may continue to execute projects for several years under pre-approved programs.
11. **CSR Implementation: Rule 4(2): The requirement of CSR committees of respective companies to report separately on the collaborated projects or programmes in accordance with these rules is ambiguous:** In case of bigger projects, the CSR resources are pooled by the group and utilized and it is difficult to segregate the projects. While each collaborating company can report separately on the funds contributed and the role played by it, it is suggested to permit a consolidated report on fund utilisation by the Implementing Agency, with respect to the joint project.

12. **Engaging International Organisations: Rule 4(3):** Engagement of International Organisations and related payment should be regulated by the other regulations e.g. FEMA regulation. While the rules have specified that companies 'may' engage International Organizations as notified by the Central Government for Impact Assessment, they are silent on engaging other international/domestic organisation. Therefore, it is suggested to clarify that engaging other International/Domestic organisations is also allowed.
13. **CSR Implementation: Rule 4(4): a) Certification by the management of NGO / Implementing Agency:** The CFO of a company may not be in a position to certify utilization of funds independently where an implementing agency is being used and may be expected to place reliance on certification by some senior person from the Implementing Agency or third party. Therefore, it is suggested to allow certification on the utilization of CSR funds by (a) senior management of the Implementing Agency (b) Independent Chartered Accountant, (c) person from senior management as explained under section 178 being responsible for CSR activity or any director of the Company.
14. **CSR Implementation: Rule 4(5):** Responsibility should rest with the CSR Committee and if CSR Committee feels appropriate, it may refer the Board of Directors for review and alignment for modification of timelines.
15. **Annual Action Plan by CSR Committee: Rule 5(2):** The CSR committee is a special body of the Board. Therefore, all the responsibilities listed in proposed rule 2 should rest with CSR committee, so long as these are within the framework of the CSR policy. The board should only review the CSR compliance once in a year. Currently the roles of Board and CSR Committee seem to overlap to some extent. It can be streamlined to better carve out specific roles for each.
16. **CSR Expenditure: Rule 7:** The proposed rule does not define what constitutes CSR Expenditure (while the heading of the Rule is CSR Expenditure). We suggest that the present definition under Rule 7 reproduced below is retained and the new provisions shall be added to the Rule:
- "CSR expenditure shall include all expenditure including contribution to corpus, or on projects or programs relating to CSR activities approved by the Board on the recommendation of its CSR Committee, but does not include any expenditure on an item not in conformity or not in line with activities which fall within the areas or subjects, specified in Schedule VII of the Act."
17. **CSR Expenditure: Rule 7(3):** If the proposal for trusts and societies being permitted to continue as implementation agencies is approved, the Rule should clarify that in addition to section 8 companies and public authorities, registered trusts and societies should also be allowed to hold assets. This will also help the companies to keep the assets in their existing structures of trusts or societies.
- It is further suggested to clarify that the assets are not used for the business or no tax benefits are claimed by the company. There needs to be a certification or enabling mechanism for verification in such cases.
18. **CSR Expenditure: Rule 7(3): The effect should not be retrospective, if trusts and societies are not allowed to hold assets:** Since the companies would have already transferred the assets in name of NGOs (like dialysis machines), they will have no control over such assets. Therefore, it should not have retrospective effect. Therefore,

transfer of assets (already transferred to NGOs) to Sec 8 companies or public authority should not be made mandatory.

19. **CSR Expenditure: Rule 7(4):** Given the current business environment, where the Companies are facing challenges from working capital and cash flow perspectives, Government may consider a longer moratorium for payment of accumulated unspent CSR from prior years.
20. **Impact Assessment: Rule 8(3):** Within the overall budget, the organisations may take some small community programs across geographies where it works and due to the size of the project / programs involved, going for impact assessment for each and every CSR program is undesired and will not serve any useful purpose.
21. **Impact Assessment: Rule 8(3):** Limit of Rs. 5 crore for impact assessment by company is insignificant. Therefore, considering the expenses involved in impact assessment, those projects where companies spend significantly should only be mandated for impact assessment.

Some additional Recommendations by EY LLP

22. **Eligible CSR activity: Rule 2(i)(c):** Rule 2(i)(c)(iv) covers “the employees of the company and their families”, however, the proviso only covers “employees”. Therefore, proviso should also cover the employees of the company and their families.
23. **CSR Policy: Rule 2(ii)(e):** It appears that the intent behind this change is to make the CSR Policy a guiding/framework document and leave out the specifics of the activities to be decided by the CSR Committee. This allows companies greater operational flexibility. However, Section 135(3)(a) states:

*“(3) The Corporate Social Responsibility Committee shall,—
(a) 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;”*

Given that the Act retains the language as was originally prescribed, it may limit the intended objective of the alteration in the Rules. The Rules may therefore clarify the extent to which activities in the CSR Policy need to be covered.

24. **On-going projects: Rule 2(iv)(h):**
 - a. The definition may be redrafted for consistency and removing the ambiguity, as the current definition makes a reference to both “years” and “financial years” (illustratively, it could be defined to cover multi-year projects that extend over 3 financial years excluding the financial year in which the project was commenced.
 - b. It is suggested to allow projects that have a longer duration than the 3-year timeline but to fund them through CSR expenditure of subsequent year(s). From the current definition it appears that the ongoing projects cannot have a timeline beyond 3 years. This might discourage/limit companies in taking up projects/programmes with greater value proposition to society (particularly asset creation projects) but having a life cycle of more than 3 years. Boards of companies that do undertake such projects can satisfy themselves of the longevity of the projects and monitor delivery.

25. **CSR Implementation: Rule 4(1):** The language of the Rule 4(1)(b) is “any entity established under an Act of Parliament or a State legislature.” If the intent is to include the entities established through the act of Parliament or a State legislature word “under” should be replaced with “by” for greater clarity.

26. **CSR Expenditure: Rule 7(4):**

- a. It is suggested to reconfirm/clarify that for subsequent FYs commencing with the FY ending March 31, 2021 and onwards, it is intended that the treatment of unspent CSR obligations for each FY will need to follow the approach stipulated in Sections 135(5) and 135(6) of the Companies Act, 2013 depending on whether the projects are ‘ongoing projects’ or not (provisions yet to be notified).
- b. It is also not clear whether companies that qualified to comply with the CSR provisions during a certain year or period but have completed the cooling off period of 3 years post exiting the qualifying conditions are also required to transfer any moneys outstanding during such period that they were so covered.
- c. If a holding company of an Indian company (which is required to comply with CSR provisions) is contributing towards the permissible CSR activities in India directly, then such contribution could be considered as part of the Indian company’s obligation and off-set against the same.

27. **Impact Assessment: Rule 8(3):** Minimum set of areas to be considered while undertaking an impact assessment may also be added in the rules to make them more effective. (illustratively, whether the specific programs were designed in line with the needs of the community and organization’s mission/vision, whether the right mechanism was adopted for implementing the projects/programs, whether the goals and objectives decided at the beginning of the projects/programs were achieved, whether there are any unexpected changes or negative effects for the target community (due to gaps/lapses, if any in the CSR project/programme

28. **In the Companies Amendment Bill, 2020, It is proposed to add following proviso after the second proviso of section 135(5):**

"Provided also that 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."

However, the manner in which the excess amount has to be set off has not been prescribed in the proposed rules. Therefore, the same should be added in the Rules.