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The CSR Framework in India: A Study of Indian Corporate Sector for Implementation of Regulatory Framework

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Abstract

The concept of corporate social responsibility, which recognizes the noble obligation of businesses to contribute to communities and environment, has evolved tremendously over time, globally as well as in India. In India, starting from the Gandhian philosophy of trusteeship, the concept eventually took shape of a legal mandate in 2013, when the Companies Act, 2013 made an express provision for larger companies to contribute to CSR out of their profit. The model was based on the philosophy that companies must be held accountable through their boards to quantifiable targets of social spending. Inability to spend did not attract punitive action, but an explanation of non-compliance was sought. The experiment did yield some result as the CSR spending spiked. However, it fell short of the expected outcomes. Many companies chose not to spend and simply offered an explanation, sometimes flimsy. The obdurate conduct of some of the corporates, coupled with the demands of changing times led the government to review the legal framework of CSR. Most recommendations made by a committee constituted in 2018 found favour with the lawmakers, resulting in amendments in the Act in 2019 and 2020, and in the CSR Rules in 2021. The changes, which took effect from 22 January 2021, brought about substantial change in CSR regime. The new CSR framework is far more nuanced and result oriented. It also provides clear penal consequences for non-compliance. This new framework will require companies in India to define a clear strategy for CSR, not just to be compliant on paper, but also to be aligned with the national priorities and Sustainable Development Goals. Government, companies and the civil society would be required to combine their efforts to help India Inc. improve its preparedness for this new CSR framework of India. The objective of this research is to study the CSR framework in the Indian corporate sector for implementation of the regulatory framework and to critically evaluate the framework and lay down suggestions for its betterment. The research methodology adopted for this research work is doctrinal study from secondary sources and certain journals and research papers.

Keywords: Corporate social responsibility, sustainable development goals

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INTRODUCTION

The concept of corporate social responsibility ("**CSR**") recognizes the responsibility of businesses to contribute to bringing about positive change in communities and environment. Its meaning and scope have evolved tremendously over time. From being a mere moral responsibility of businesses to becoming integral, and somewhat central, to running sustainable businesses, CSR is now a much more mature concept than it was few decades ago.

It is intrinsically linked to sustainability, even as philanthropy does continue to be a driver in many cases even today.

Corporate Social Responsibility has been interpreted in different parlance in various parts of the world. In today's world, what is commonly understood and accepted is that businesses have a certain role beyond the core activities performed by them, which will define their corporate citizenship. This role is getting increasingly defined and measurable. Businesses are expected to give back to the community which ultimately supports their very existence. Even as there may not be a direct correlation between the CSR activities of a corporate and its business goal of profit maximization, CSR undeniably plays a salutary role in furthering those business goals too. "From the eco-social perspective, corporate social responsibility is both a value and a strategy to ensure sustainability of business [1].

In India, CSR has historically been associated with charity. Some large businesses have been associated with CSR for a fairly long period. However, it remained rather limited in its scope and reach. Government did make attempts to make CSR popular by leading by example in terms of CSR by government undertakings or central public sector enterprises ("**CPSEs**"). It also nudged listed companies towards CSR but stopped short of forcing them. Finally, perhaps frustrated by the limited success in its efforts to persuade India Inc to increase its CSR spending, Government of India made CSR mandatory. In 2013, India became the first country in the world to introduce a legal mandate in its corporate law to drive large and profitable businesses towards CSR. This move also generated a good amount of debate on the desirability of CSR being mandatory, instead of voluntary. While businesses grudgingly complied with the new regime of mandatory CSR, they also found loopholes in it to escape spending on CSR. Moreover, the new regime could still not convince India Inc to move towards sustainability in CSR. The limited success led to several rounds of rethink and relook at the law.

Eventually, by a series of amendments through 2019, 2020 and 2021 in the provisions related to CSR in the Companies Act, 2013 ("Act") and in the associated delegated legislation, namely, the Companies (Corporate Social Responsibility Policy) Rules, 2014 ("CSR Rules"), all of which were brought into force on 22 January 2021, the CSR regime in India has been further strengthened, adding more enforceability, accountability and durability. Newly introduced provisions such as impact assessment of projects, recognition of multiyear projects, carving out role of Chief Financial Officer ("**CFO**") in CSR function, penalty for non-compliance should go a long way in strengthening the CSR regime in India.

EVOLUTION OF THE CONCEPT OF CSR GLOBALLY

Concept of charity in business is fairly old. However, scholars trace the history of modern day CSR from the early 1920s up to the present time. By the 1920s and early 1930s, corporates started to balance profit generation with demands of their clients, workers and society [2]. As a result, the business managers came to be recognized as trustees, with corporation adopting socio-economic responsibilities. During the Second World War, wider dialogues on their social responsibilities had already begun [3].

In this section, the evolution of the concept of CSR has been divided into the following different phases beginning from the post-World War II era to systematically examine the evolution (Table 1):

Table 1. Phases of CSR evolution globally.

Phase I	CSR in the 1950s Stewardship and Philanthropy
Phase II	CSR in the 1960s and 1970s Response to social demands
Phase III	1980s Stakeholder theory and business ethics
Phase IV	Impetus of Globalization and changing perspectives of CSR in the 1990s
Phase V	21st century – Sustainability, strategy, shared value

Impetus of Globalization and Changing Perspectives of CSR in the 1990s

The 1990s saw the rise of globalization wherein multinational corporations expanded their operations world over and faced new challenges and opportunities. Policies related to environmental issues, labour, social welfare programs, communication and transport needed to be revisited. In this changed global scenario, the concept of citizenship acquired new meanings to reflect a much broader and more comprehensive view of business's social role. Cross-cultural, cross-national, cross-governmental, cross-regional, and cross-continental in scope, the spirit and deep meaning of this new dimension of social responsibility are best captured in the phrase "Corporate Global Citizenship" [4].

In the 1990s, a trend of institutionalization of CSR could also be seen. In 1992, The association - Business for Social Responsibility [5] ("**BSR**") was founded having 51 companies with the vision of a becoming a *"force for positive social change - a force that would preserve and restore natural resources, ensure human dignity and fairness, and operate transparently"*. BSR established four core program areas: environment, human rights, community economic development, and governance and accountability.

21st Century: Sustainability, Strategy, Shared Value

In the 2000s the concept and understanding of CSR expanded and number of steps were taken at the global level for implementation of CSR. The then Secretary General of the United Nations ("**UN**"), Kofi Annan, at the World Economic Forum said:

> *"I propose that you, the business leaders gathered in Davos, and we, the United Nations, initiate a global compact of shared values and principles, which will give a human face to the global market".*

Answering to his call, several corporations, business associations, labour and civil society groups joined hands to launch the UN Global Compact ("**UNGC**") with a vision to create an instrument bridging the governance gaps in terms of human rights and social and environmental concerns and integrate universal values in the markets. UNGC calls on business to *"embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption"* [6]. Thus, UNGC aims to help businesses align their operations and strategies with ten universally accepted principles of human rights, labour, environment and anticorruption.

Another relevant example in this context is the OECD Guidelines for Multinational Enterprises ("OECD Guidelines") issued by the Organization for Economic Cooperation and Development ("OECD"). The OECD Guidelines are recommendations addressed by governments to multinational enterprises operating in or from the territories of the 44 countries that adhere to the Guidelines. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards. The Guidelines seeks to harmonize business operations with government policies, to boost trust between enterprises and communities, to help improve the climate for foreign investment and to enhance the contribution of MNCs to sustainable development [7].

In year 2000, Millennium Development Goals (MDGs) has been adopted by United Nations and set the agenda for next 15 years. Among other things, the agenda calls upon all private businesses to help solve sustainable development challenges.

These events may not be directly linked to CSR; however, they drew the world's attention towards sustainability and social responsibility of businesses.

EVOLUTION OF THE CONCEPT OF CSR IN INDIA

In the previous section, we have discussed the evolution of the concept of CSR globally. The emergence of CSR was in far back hinted during the Vedic period; during that, Kings had an obligation for society and merchants displayed their own business responsibility by building places of worship, education, inns and wells. Now we shall discuss the evolution of the concept of CSR in India. With the philosophy of "*Sarva loka hitam*" the core activity of business of kingdom was to increase wealth of society but the wellbeing of stakeholders was also taken care of [8].

Discussion in the following paragraphs regarding the different phases of CSR will demonstrate systematically the evolution of CSR in India (Table 2):

Table 2. Phases of CSR Evolution in India.

Phase I	CSR motivated by charity and philanthropy (Till 1914)
Phase II	Trusteeship approach (1914–1960)
Phase III	CSR under paradigm of mixed economy (1960–1980)
Phase IV	Transition from philanthropic approach to stakeholder approach (1980s onwards)
Phase V	Voluntary CSR initiatives by government (2000–2013)
Phase VI	Mandatory CSR under Companies Act, 2013, comply or explain (2013–2021)
Phase VII	Mandatory CSR under Companies Act, 2013 comply or pay penalty (2021 onwards)

REGULATORY FRAMEWORK IN INDIA

The Act brought in mandatory provisions of CSR, which were enforced with effect from 01 April 2014. This is a landmark piece of legislation as it makes India among the First Nations in the world to make social welfare spending a part of statute by law. Section 135 of the Act is the formal provision that brought CSR from the 'backroom to the boardroom'. The delegated legislation associated with the section is contained in CSR Rules, which have been amended from time to time.

In this section we would examine the genesis of the mandatory CSR in India, the key features of the regulatory regime of CSR under section 135, followed by a critical analysis of this regime.

GENESIS OF THE MANDATORY CSR REGULATION IN INDIA

With the Gandhi's 'Trusteeship model' leads CSR to becoming a mandatory obligation for certain companies through a statute. As discussed in the above section, to promote CSR activities in India, the MCA launched the CSR Guidelines in 2009, which was later refined and launched as the NVG Guidelines in 2011. However, these guidelines were voluntary in nature. However, a watershed moment came in the evolution of the CSR mandate in India when the Government with the mandatory provision under section 135 of the Act provided structure and a clear vision to CSR practice in India.

Dr. Bhaskar Chatterjee led the initiative to add section 135 into the Act which made CSR mandatory for certain stable companies having a net worth of Indian Rupees ("**INR**") 500 Crore or more, or a turnover of INR 1000 Crore or more, or a net profit of INR 5 Crore or more during any financial year.

The key elements of the Chatterjee Model are [9]:

- Focus on large, stable Corporations,
- Guaranteed spending of certain percentage of profit on CSR,
- Beyond core business and legislative duties,
- In areas of National priorities,
- Clear outcome-orientation,
- Assigning financial and human resources,
- Clarity in implementation, measurement, reporting, audit,
- Harnessing the strength of the Corporations.

The Table below explains the main elements of the mandate in brief [10]:

KEY ELEMENTS OF MANDATE UNDER SECTION 135

This CSR mandate was built upon the following broad principles which are explained below [11]:

Applicable to Profitable Companies

The CSR mandate was based on the vision that companies should be able to engage in strategic corporate responsibility. The emphasis was on the fact that once a company has become profitable, successful and stable then it would be able to focus on CSR. A struggling company may want to do CSR but in such a case it may not be able to engage in strategic corporate responsibility. Hence, the mandatory CSR was made applicable only on certain companies and the determination was based on net worth, turnover or profitability in immediately preceding financial year.

Quantifying CSR spent

The companies breaching any of the three *de minimis* thresholds above are mandated to spend in a financial year, 2% of three preceding years' average net profit. Several companies would claim that they have done significant work. But the actual amount spent was not clearly recorded. Hence, a need was felt that the CSR spending should be quantifiable in Rupee terms in the same manner as the financial or human resource or marketing results are quantifiable.

Assigning CSR Accountability

An endeavour was to bring CSR from the backroom to the boardroom and the need was to answer the question that who in the Company would be accountable for a CSR project. CSR Committee of at least two directors needs to be constituted and board is required to approve, publish and execute a CSR Policy of the company, which shall indicate the activities to be undertaken by the company in areas or subject specified in Schedule VII of the Act. The CSR spending must be line with the CSR Policy.

CRITICAL ASSESSMENT OF THE MANDATORY FRAMEWORK

Several scholars have echoed the view that the absence of regulation and voluntarism has hampered the growth of CSR to its full potential. Others have highlighted that making this a discretionary on the part of companies is not suffice and it needs to be forwarded through regulation. Further, it was also believed that India being a developing country had several socio-economic challenges and it needed a unique model of CSR tailor-made to suit its needs. These views on CSR regulation in a way encouraged the government to formally legislate CSR obligations, and which was also welcomed by several stakeholders. The mandatory nature of CSR spending was faced with mixed reactions. Certain stakeholders lauded the new regime as a milestone in corporate India's journey for sustainability while others criticised the law.

The famous scholar John Elkington who had propounded 'the triple bottom approach' said the following, in an interview, in the context of the introduction of the mandatory CSR framework in India:

> *"I see the Companies Act as an interesting political initiative, but wide open to misinterpretation and, unfortunately, corruption. Some companies are already using consultants and legal people to see how they work around the requirements. And the best corporate responsibility programmes have always been voluntary, rather than forced by governments; an approach which often encourages a defensive, minimalist response from most business leaders.*
> *But now the Act exists, business should use the stimulus to jump their thinking to new levels. I think India Inc. has an extraordinary opportunity here to leapfrog other countries."*

COMMITTEES TO REVIEW THE CSR FRAMEWORK

India is the first country in the world which has mandated CSR for certain categories of companies. The framework of this legislation in unique. Since it is a new law, it is important that the government carries out a regular review of its implementation so that areas of improvements can be identified. Government has done that from time to time so far and has been able to revisit the law based on the recommendations made by experts. The reports mentioned implementation, loopholes and scope of improvement in the mandatory CSR regime are listed below:

MCA established a High-Level Committee ("HLC 2015") that recommended policies for tracking the advancement of CSR implementation. This committee believed that the current rules, which are based on the broad idea of "comply or explain", were sufficient to ensure legal compliance for the time being. Additionally, corporations may receive a pass if they do not comply in the first 2 or 3 years because everyone involved will use those years as a "time of learning". The HLC 2015 proposed that section 8 companies not be subject to the CSR regulations. It was also advised that another Committee be formed after roughly 3 years of experience in the execution of this policy in order to conduct an in-depth analysis of the full range of difficulties connected to the required application of CSR regulations.

Pursuant to this, a Steering Committee on CSR as well as Legal Sub-Committee and Technical sub-committee was constituted on 04 April 2018 to review the existing framework of CSR provisions. In its report [12], the Legal Sub-Committee noted that from a study of the disclosures made by the companies, it appears that some of the companies did not comply with the provisions of CSR and there is a need for initiating stricter compliance towards monitoring the provisions of CSR. Non-compliant companies give various reasons for non-compliance or non-spending the CSR amount which are basically in the nature of excuse. According to the Legal Sub-Committee, "CSR qualifying companies must spend the necessary amount and failure to do so shall invite punitive action as provided for in the Act, unless the regulatory body accepts the reason(s) offered in the report". A much stronger CSR regulatory and policy framework will be developed as a result of the suggestions made by the High-Level Committee on Corporate Social Responsibility (HLC 2018), which was established to assess the current CSR framework. The HLC 2018 carried out a comprehensive review of law and recommended significant changes in the legislative framework for CSR which laid the foundation for the momentous changes brought into effect at the start of 2021.

THE NEW REGIME: RECENT AMENDMENTS IN THE CSR REGIME IN INDIA

In the previous section we examined in detail the genesis of the mandatory CSR in India, the key features of the regulatory regime of CSR under section 135, followed by a critical analysis of this regime. 22 January 2021 was a watershed moment for CSR governance in India. MCA, *vide* three separate notifications. The details of the change in law are as follows:

- Companies (Amendment) Act, 2019 (No. 22 of 2019):
  - s. 21 amended CSR provisions;
  - Came into force *vide* S.O. 324(E) dated 22 January 2021.
- Companies (Amendment) Act, 2020 (No. 29 of 2020):
  - s. 27 amended CSR provisions.
- Came into force *vide* S.O. 325(E) dated 22 January 2021:
  - Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021;
  - Notified *vide* G.S.R. 40(E) dated 22 January 2021.

Thus, several amendments were brought in section 135 of the Act in 2019 and 2020 and the CSR Rules in 2021, all brought into force on 22 January 2021. In this section, we will discuss the amendments in the Act in 2019 and 2020 and the CSR Rules in 2021. We will examine the complete framework of CSR in India as amended till date. It is noteworthy that with the latest amendments, the debate on the mandatory nature of CSR in India is now settled. It is not a mere moral obligation but a concrete legal one, with consequences for non-compliance.

The new CSR framework of India as contained in section 135 of the Act, read with the CSR Rules (both as amended till date) is as follows:

Class of Companies to Which Applicable

The determination is based on net worth, turnover or profitability in immediately preceding financial year. The provision applies to every company (including its holding and subsidiary) and foreign company having branch or project office in India, having minimum net worth of INR 500 Crore, or turnover of INR 1000 Crore, or net profit (excluding the profit from any overseas branch and dividend from other companies covered by CSR provisions) of INR 5 Crore. In this context, the Company Law Committee highlighted in its report that it is important to prevent static financial thresholds from impeding corporate-driven socioeconomic development and environmental preservation. The Committee suggested adding adequate measures to Section 135(1) so that the Central Government could increase such restrictions by rules in order to keep the review process on schedule.

CSR Committee of the Board

The companies breaching any of the three *de minimis* thresholds stated above are required to have a CSR Committee of at least two directors. Companies mandated to have independent directors will have at least one additional independent director in the CSR Committee, raising it to minimum three members. A new sub-category has now been introduced in the Act by the Companies (Amendment) Act, 2020. In companies where spending requirement is less than INR 50 Lakhs in a financial year, CSR Committee need not be constituted separately and Board itself shall discharge the functions of CSR Committee [13].

Minimum Spending Requirement

The companies breaching any of the three *de minimis* thresholds listed in point:

i. above are mandated to spend in a financial year 2% of three preceding years' average net profit. It may be noted here that, as per an amendment [14] brought about in sub-section (5) of section 135 *vide* the Companies (Amendment) Act, 2019, in case a company has not completed 3 years since its incorporation, the said amount will be calculated based on immediately preceding year's net profit. The recommendation of the amount to be spent in a financial year shall be made by the CSR Committee. But it is the Board which is responsible to ensure that the amount is spent.

Permitted Activities

The activities to be undertaken by the company should be in areas or subject specified in Schedule VII of the Act, as revised from time to time. The wide-ranging list ranges from certain sustainable development goals to promotion of sports and measures for benefits of veterans of armed forces. In addition, it contains provisions for contributions to a number of funds, including the PM CARES Fund, Clean Ganga Fund, Prime Minister's National Relief Fund, and Swach Bharat Kosh Fund. Due to the COVID-19 pandemic, businesses that regularly conduct research and development ("R&D") on new vaccines, medications, and medical devices are now permitted to do so in conjunction with one of the institutions or organisations listed in item (ix) of Schedule VII of the Act for three fiscal years beginning in 2020–21.

Geographical Scope

CSR projects or programs undertaken only in India shall qualify as CSR activity. Company is expected to carry out CSR activities in local areas and areas around it where it operates.

Mode of Implementation

The amended rule 4 provides that a company may undertake CSR activities on its own or through a CSR vehicle, singly or in collaboration with other companies. When collaborating, each company must be in a position to report separately on such projects in accordance with the CSR Rules.

The following types of CSR vehicles are allowed:

- A registered trust, registered society or not-for-profit section 8 company registered under sections 12A and 80G of the Income Tax Act, 1961 set up by a company or collaborating companies, or

- Such trust, society or not-for-profit company established by the Central Government or State Government, or
- Any entity established under an Act of Parliament or a State legislature, or
- A company established under section 8 of the Act, or a registered public trust or a registered society, registered under sections 12A and 80G of the Income Tax Act, 1961, and having a proven history of at least 3 years in carrying out similar activities.

Moreover, every entity, such as, a CSR vehicle of a company, NGO partners, government agencies, intending to undertake any CSR activity, must register with the government by filing Form CSR-1 with the Registrar of Companies ("ROC") which will automatically issue a CSR Registration Number. This registration requirements came into force from 01 April 2021, and projects approved prior to that are not required to register.

CSR Policy and Display on Website

The CSR Committee is required to:

- formulate and recommend to the Board, a CSR Policy indicating, *inter alia*, the activities identified by the company in line with Schedule VII;
- recommend the amount of expenditure to be incurred on the activities; and
- monitor the CSR Policy of the company from time to time.

Section 2(1)(e) now defines CSR Policy to refer to:

- a statement,
- containing the approach and direction given by the Board,
- considering the recommendations of CSR Committee,
- includes guiding principles for:
  - selection,
  - implementation, and
  - monitoring of activities.
- formulation of annual action plan (a new concept introduced in the CSR Rules).

So, while the CSR Committee is required to formulate, the Board is required to approve, publicise and implement, a CSR Policy of the company.

Contents of the CSR Policy will be disclosed in Board Report. The CSR Policy is also required to be placed on the Company's website, along with composition of CSR Committee and list of approved CSR projects. The CSR spending must be line with the CSR Policy.

Penalty for Breach

A company shall be liable for penalty if it fails.

Disclose unspent amount in Annual Report on CSR, or

- Transfer unspent amount relating to other than ongoing project in Fund specified in Schedule VII within the specified time, or
- Transfer unspent amount relating to ongoing project into unspent CSR account within specified time, or
- Transfer the amount remaining in unspent CSR account after 3 years into fund specified in Schedule VII within specified time.

Thus, the non-compliance by a company regarding unspent CSR amount and its transfer/treatment thereof would make it liable to pay a penalty of twice the unspent amount (otherwise required to be transferred to a specified fund or Unspent Corporate Social Responsibility Account) or INR 1 Crore, whichever is less. Every officer in default is liable to pay a penalty of one-tenth of such unspent amount or INR 2 Lakhs, whichever is less.

In the preceding paragraphs, an attempt has been made to comprehensively study and discuss the new and updated CSR regime. This thorough study and analysis of provisions will assist compliance officers, experts and corporates to ensure complete compliance with the CSR framework which assumes more importance due to the introduction of penal provisions for non-compliance.

SUGGESTIONS AND RECOMMENDATIONS

The new CSR framework calls for a sincere and urgent relook at the way the companies conduct CSR actions. Therefore strives to identify certain clear actions for procedural and systemic changes which will not only ensure better compliance but will also help chart a direction towards sustainability.

Recommendations for Government

Defining a Range for CSR Spending for Board, instead of Only Minimum Amount

Presently, the Act and the CSR Rules do not provide any maximum threshold for the CSR spending which a company may do. As a result, a company can theoretically spend the entire profit or even more on CSR. Similarly, a loss-making enterprise may spend on CSR. Indeed, there are instances of companies spending more that the statutory minimum on CSR. Furthermore, the 2% *di minimis* threshold has practically meant that some companies have treated it akin to a rate of taxation and have strictly limited their spending to 2%. Both scenarios, overspending and strictly 2% spending, have their demerits. In the context that the CSR spending decisions are made by the Board and not the shareholders, overspending what essentially ought to be shareholders' wealth is inherently problematic. In doing so, one can argue that the Board will fail to perform the fiduciary duty towards the shareholders in the same manner.

It is, therefore, recommended that in addition to the *di minimis* threshold, the Act should provide a maximum limit (say, 7%) of spending on CSR beyond which the Board would require a prior approval of the shareholders in a general meeting.

Similarly, for companies making losses for three years or more, any CSR spending must be mandated by the shareholders.

This will provide the Board a reasonable range to make CSR spending and would potentially encourage companies presently sticking to the mandatory 2% to spend more and move towards the median between minimum and maximum spending requirement. It will also help address the unintended consequence of the 2013 mandate whereby some companies, which were spending more than 2% earlier, reduced their spending to 2% after the 2013 enactment [15]. One can argue that it also will bring back a sense of voluntarism within the framework of mandatory CSR. Most importantly, it will help generate a shareholder engagement in CSR beyond the routine annual reporting.

Deploying a Compliance Toolkit

The new CSR framework has many 'checkpoints'. They include checks for mandatory spending requirement, exemption from having a CSR Committee, calculation of amount of spending for a company older as well as newer than three financial years, carrying forward overspent amount, parking underspent amount, limit on administrative overheads spending and requirement to conduct impact assessment. The multiplicity of the checkpoints can be a veritable nightmare for compliance teams of companies. Such complicated compliance checklist soon become a talking point and are then inevitably and invariably linked to ease of doing business. While one can understand the need for having the multiple checkpoints, it is equally important to make the implementation of the same easy, certain and seamless.

To further the goal of ease of implementing the new CSR framework, it is recommended that MCA may deploy a toolkit on its portal for companies to check their respective compliance requirements. Such toolkits are indeed not new. For instance, the MCA portal provides a tool for calculating fee for various forms filed on its portal [16]. Similarly, the Competition Commission of India provides a Do-It-Yourself ("**DIY**") tool on its portal as a notifiability check for mergers and acquisitions under the Competition Act, 2002 [17]. Deploying a similar tool for CSR compliance check will reduce compliance burden, bring exactness in compliance and reduce disputes between companies and regulators on applicability of the CSR provisions. It is understood that MCA is in the process of releasing Frequently Asked Questions ("**FAQs**") for the new CSR framework. The toolkit may be integrated with the FAQs.

Creating a Database of Best Practices

While one should not be looking always at the government for handholding the industry, in order to broaden the base of companies engaged in CSR and to inculcate a culture of sustainable CSR, government may consider creating an open access database of best practices culled out from the filings done by various companies on its portal. A library of well-catalogued CSR policies, sector-wise programmes, impact assessment reports and list of registered CSR partners will help companies navigate through CSR compliances with ease. To recognize and promote CSR compliance, MCA has also instituted National CSR Awards [18]. The first set of best practices can be derived from the shortlisted entries for the awards. Notably, National Corporate Social Responsibility Data Portal has already been established by MCA to disseminate CSR related data and information filed by companies [19]. This portal itself can be further augmented by adding a best-practices section.

In addition to the best practices from India, an effort should be made to create a pool of resources from all over the world to democratize the availability of information on CSR. This will not only help companies keep pace with the global trends in CSR but will also help other stakeholders understand the potential benefits of CSR, which will in turn help create a 'demand' for CSR.

Suspension of Enforcement for at Least one Financial Year

The new framework is undoubtedly more complex than the old one. It would, therefore, not be surprising that companies will falter in complying with the requirements in its letter and spirit in the initial phase. However, the stringent penal provisions have come into force at the same time with the new framework. This will potentially end up instilling an unnecessary fear of the regulator among the companies if they are penalized for inadvertent non-compliance in this initial phase. While companies must strive to be compliant, but they must also be afforded a reasonable timeframe to adapt to and adopt new rules.

It is, therefore, recommended that the penal provision, namely sub-section (7) of section 135 should be placed under a temporary suspension for a period of at least one financial year. During this period, companies found to be in breach of the CSR mandate should be let off with a warning. This will not only offer companies enough time to deploy a robust compliance framework but will also provide MCA some empirical dataset to analyse the teething issues with the new framework and, if felt necessary, to tweak it.

Qualification in Public Procurements

Government is one of largest buyers of goods and services in the economy. Government agencies such as the Indian Railways, National Highways Authority of India, public works departments, public health engineering departments, municipal bodies, public sector undertakings in the oil and gas sector, etc. are some of the largest procurers. Their procurement process is governed by various laws, rules, regulations, guidelines, policies governing public procurement in India and is carried out mostly through a tendering process wherein certain minimum qualifying requirements are set. It is recommended that one of the minimum qualifying requirements should be compliance with CSR regulations. Therefore, a company which is subject to CSR compliance, but has remained non-compliant, should be disqualified from participating in public procurement. It will help create ownership and business interest in CSR spending and compliance, especially in companies which depend on public procurement.

Recommendations for Corporates

Compliance Readiness Assessment and Implementation Plan

Companies must immediately carry out an assessment of their compliance readiness and identify the gaps in their compliance programme. This is all the more important for the companies to avoid the heavy penal consequences for the defaulting companies and their officers.

The board of directors, CSR committee, finance and compliance teams, and internal auditors must take notice of the changes in law, analyse its impact on the company, inform the shareholders in upcoming annual general meeting and deploy a plan of action for due observance of the letter of law. In not doing so, each one of them will be failing in their respective fiduciary and professional duties. The Technical Handbook on Accounting for Corporate Social Responsibility Activities, published by the Institute of Chartered Accountants of India (ICAI), offers instructions on the accounting facets of CSR expenses. In order to provide comprehensive guidance on the auditing elements of CSR expenditures and the roles and responsibilities of ICAI members, it has also made available a Handbook on Audit of CSR Activities. Companies may refer to the technical guide and the handbook for carrying out CSR compliance.

Drafting CSR Policy and Annual Action Plan

A key new change in the law is the bifurcation of CSR Policy and Annual Action Plan. In the new framework, the former is more of a charter document and the latter an implementation framework for the year. As discussed in the preceding chapter, there are specific requirements in the CSR Rules for the contents of the two documents as they intend to serve their respective unique purpose. Though no specific timeline is prescribed in the Act or the CSR Rules for adoption of the said documents, it is recommended that Companies should formulate and adopt the two in the very first Board and CSR Committee meetings for the fiscal year 2021-22.

Centre for E2E in CSR at the Indian Institute of Corporate Affairs, Government of India is one of the agencies assisting companies in CSR policy making, designing of projects, etc. [20]. Companies may seek professional guidance from such expert agencies too for formulating their CSR Policy and Annual Action Plan.

Registering CSR Vehicles with MCA and for Income Tax Exemption

Two more immediate steps that companies must take are related to the registration requirements. The first registration requirement is under the Act itself. An e-Form CSR-1 is to be filed with MCA for registration of entities for undertaking CSR activities. ICAI has deployed a Handbook on Certification of Form CSR-1 to provide guidance to its members on certification of this form [21]. For the procedural part, companies may refer to this handbook for carrying out this compliance. Secondly, all CSR vehicles must be registered in accordance with sections 12A and 80G of the Income Tax Act of 1961, per the CSR Rules. Notably, the Finance Bill, 2020 has proposed to renew the registrations and approvals currently issued under sections 12A, 10(23C), 35, and 80G of the Income Tax Act. The said proposal stated that every existing registration under the said sections would need to be re-validated. Companies should immediately take steps to comply with the procedural requirements of registration, failing which, a CSR expenditure made after 01 April 2021 without due registration is at risk of being disallowed as such.

Compliance and Capacity Assessment of CSR Partners

Notably, the requirement of registration under rule 4 applies not only to own CSR vehicles of companies, but also to external agencies (such as, trusts, societies, not-for-profit companies and government entities) undertaking CSR on behalf of companies. It is, therefore, an obligation of the company relying on the support of such external agencies to ensure their due compliance with the registration requirement, failing which the CSR spending routed through unregistered external agencies will be under a risk of being disallowed.

Also, the intent of the law is that the company should be fully engaged with CSR implementation and, to that end, it mandates monitoring and reporting. CFO has the duty to certify the utilization of CSR funds. The CSR Rules also allow for collaborative CSR spending so long as companies are able to report separately on their share. In view of these specific requirements, it is extremely important for companies depending on external CSR partners to carry out their capacity assessment, including the accounting controls and tools deployed by them and level of expertise of their compliance and accounting teams. Notably, it was recently reported that the licences granted under the Foreign Contribution Regulation Act, 2010 (“**FCRA**”) to over 20,600 NGOs were cancelled in the last 10 years, mostly on account of non-filing of annual returns [22]. This further underscores the need to do a due diligence of CSR partners and to nudge them towards paying attention to their governance and compliances. In this context, the Code for Charity Governance published by the Institute of Company Secretaries of India may serve as a good guidance for NGOs to help establish a culture of sound governance [23]. The ICAI's Technical Guidance on Accounting of CSR Funds by Third Parties offers helpful advice for businesses on how to account for CSR monies in the financial records of external CSR partners.

Capacity Building

If the 2013 mandate took CSR to the boardroom, new CSR framework envisages to take it onward to the corner room of the CFO. Companies will be well advised to take note of this intent of law. It is recommended that the companies should train their CFOs and other senior financial control, accounting and reporting professionals on CSR. Such training should encompass not just the compliance aspect but also the philosophy and rationale of CSR, and the business case for it. Trainings may be conducted by internal compliance and CSR teams, or by external experts on CSR.

Indian Institute of Corporate Affairs (“**IICA**”), Government of India offers various courses and certifications [24], such as IICA Two Days’ Program on “Integrating Governance with Environmental & Societal Responsibilities”, 3-months’ Certificate Programme in Implementing CSR II Projects, 9-months’ Certificate Programme in CSR, Customized Programme in CSR (1-5 days), 2-weeks’ International Programme on CSR/Responsible Business, and 3-months’ Certificate Course on Responsible Business Conduct with UNICEF.

Promoting CSR through Purchase and Supply Chain Management

Companies may consider promoting CSR through their purchase and supply chain management function. As a starting point, companies should require their vendors and suppliers to ensure that they are CSR compliant just the way many companies, especially multinational corporations, require their vendors and suppliers to commit to an ethics compliance programme. In fact, a self-declaration may be sought from the vendors and suppliers about the applicability of CSR mandate on them and their due compliance wherever applicable. Moreover, larger companies should take initiative to issue guidelines on CSR compliance and organize briefing sessions for suppliers which may help smaller companies save cost of capacity building, inculcate a culture of compliance and also potentially initiate the hitherto untapped segment of micro, small and medium enterprises into the CSR domain.

Recommendations for Civil Society

Augmenting Popular Support for CSR as an Idea

Global experience shows that companies have increased their CSR engagement when they have realized its potential to generate goodwill for their business, eventually translating into better business performance. A study of Indian companies has also established positive correlation between CSR communication, variable CSR and intangible or non-financial firm performance such as reputation and image through the eyes of one of its key stakeholders (employees) with respect to its competitors [25].

Civil society organizations can play an important role in creating awareness about CSR in society which will help generate 'demand' for CSR. It will, in turn, lead to stronger positive correlation between CSR and firm performance, both tangible and intangible because companies with an image of being responsible corporate citizens will be able to attract more customers as well as better talent as their employees.

The outreach of the civil society organizations and NGOs is far and wide. In 2020, Government of India had mobilized over 92,000 such organizations to help provide succour to the poor and the vulnerable to ameliorate their suffering due to the COVID-19 outbreak [26]. This group of social workers can help generate greater awareness for CSR at the grassroot level. Moreover, a dialogue of sorts may be started with the local communities through the social workers for need and impact assessments.

There is ample evidence of impact of civil society organizations on changing corporate behaviour, especially in the face of corporate social irresponsibility. One such example is the case of Hindustan Unilever Limited ("**HUL**") which faced significant backlash after civil society groups brought to the fore the case of environmental hazards caused by their former thermometer factory at Kodaikanal, India [27]. Not only did HUL accept its faults but committed to remedying the situation in right earnest.

Identifying and Adopting Impact Assessment Good Practices

The concept of impact assessment in certainly not new in India. CPSEs have been under the obligation to carry it out for several years now. As per the guidelines issued by Department of Public Enterprises, Government of India, an impact assessment study by external agencies is mandatory for mega projects and desirable for all CSR activities or projects undertaken by CPSEs [28]. Moreover, some companies in the private sector which were not mandated by law to nonetheless been commissioning impact assessments as a good practice. As a consequence, several agencies in India, such as, some of the institutions of higher learning, non-profit organizations and consulting organizations in social sector have been working in this field. It is now an opportunity for the businesses on one side and such third-party agencies on the other to bring together their ideas, expertise and templates for a large-scale deployment.

CONCLUDING REMARKS

This regime change has been hailed as a natural progression towards next level of CSR and compliance, giving more discipline and direction to the CSR and, in the process mainstreaming CSR. It also brings planning and delivery in focus. Some commentators have called it comply or transfer regime while others have called it comply or pay penalty regime. Some stakeholders have expressed their reservations on the caps such as 5% on administrative overheads and INR 50 lakhs on impact assessment, calling them very low and unrealistic. Concerns have also been expressed on the deletion of corpus contribution from CSR expenditure. A legitimate concern has also been raised on the local area limitation which continues to be unanswered in the current round of amendments and continues to widen the geographical disparity. A demand of FAQs has also been raised by the industry to have better clarity on the scope of the new provisions.

While commenting on the changes in CSR framework at a webinar organized by the Associated Chambers of Commerce and Industry of India ("**ASSOCHAM**") on February 19, 2021, Mr. Gyaneshwar Kumar Singh, Joint Secretary, Ministry of Corporate Affairs, Government of India noted that the intention of the Government was to get the expertise and efficiency of the private sector for development of nation [29]. He asserted that it was a law in progress and government was open to inputs from society. Government intended to keep its intervention at the minimum, limiting it to cases of fraud.

He called upon companies to care for the society even as they carried out their business. He emphasized that business ought to function in sustainable and inclusive manner. Mr. Singh also emphasized on the role of demand mapping and informed that a CSR exchange portal was ready for testing. Participation in CSR exchange will be voluntary. It will be a meeting place of experts, corporates and implementing agencies. There would be a mechanism by which district and state authorities would be able to upload their needs and industry could respond to them. Mr. Singh commented that Government was open to getting more inputs to align Indian CSR to the UN Sustainable Development Goals.

The pragmatic and pro-active approach of the government in establishing CSR as a sustainable practice has set the stage for the India Inc to step up its efforts and help create a template for CSR which can be emulated by other countries. During the COVID-19 pandemic, many private enterprises have shown their ability and willingness to serve the society. It was exhibited in 2020 during the first wave of the pandemic and has again been on display in 2021 when the devastating second wave struck India, catching all by surprise. Several corporate houses stepped forward to improve the production, supply and transport of the life-saving oxygen, sometimes even at the cost of their own business. At the same time, the pandemic also brought to the fore the immense possibility of continued engagement of the corporate India in social sector. It is hoped that the new CSR framework will be a harbinger of sustainability in CSR in India and will fuel India’s commitment to the overarching Sustainable Development Goals.

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