

ASSURANCE

# Amendments to CSR activities for the year 2020-21



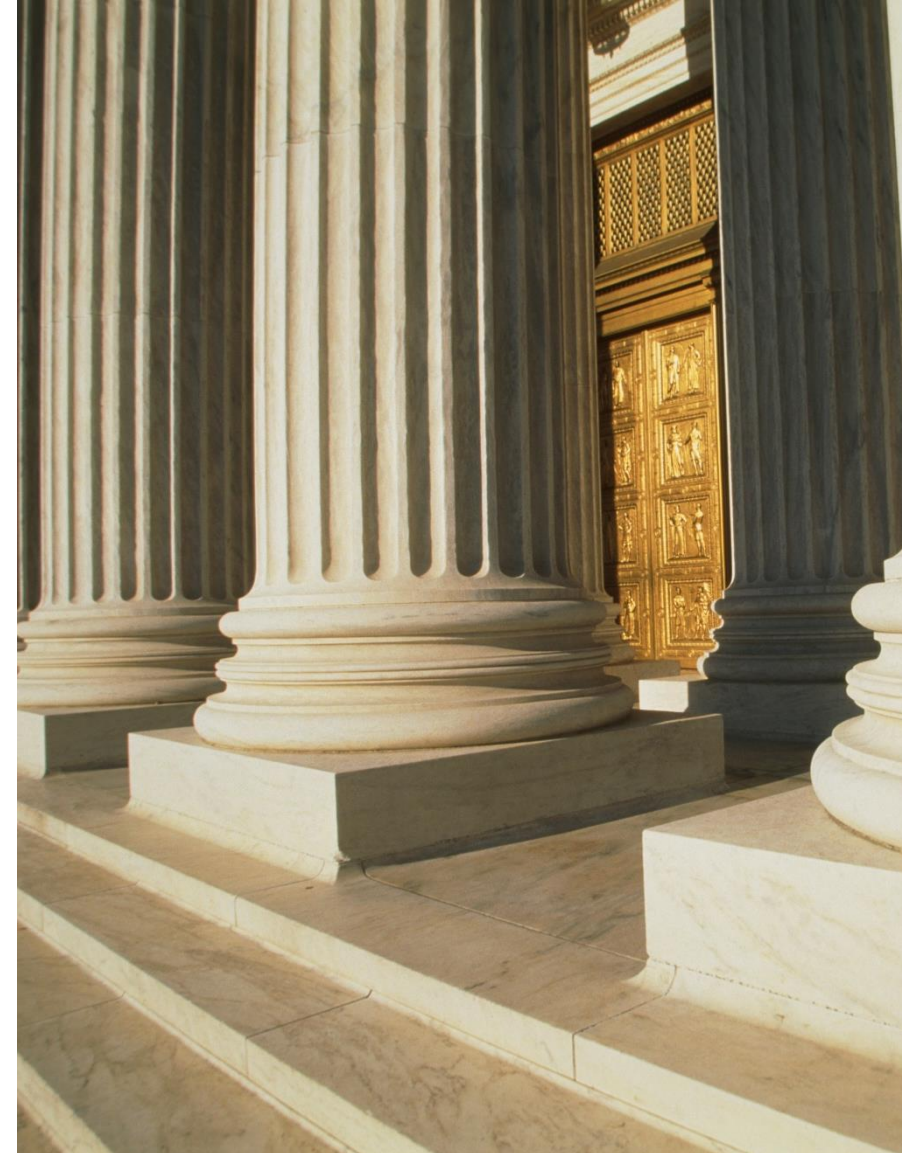
## Foreword

The ethos of philanthropy in India is age-old, spanning thousands of years, and the act of 'giving' is integral to this culture. As a nation defined by its diversity in language, food, culture, and religion – India has and continues to have a unified oneness when giving back to society. Each flavor of India's diverse culture has a synonymous spirit for benevolence.

Ergo, it was not surprising when India became the first country in the world to legally mandate its corporates to carry out corporate social responsibility (CSR) contributions. CSR is a part of corporate compliance, and it is inseparable from doing business in India. With effect from 1 April 2014, the Indian Companies Act, 2013 (the Act) in Section 135 mandates companies operating in India, including multinational companies to contribute to social causes. Corporate India has undisputedly upheld this charitable mandate. The Ministry of Corporate Affairs (MCA) has provided guidelines time and again on CSR matters. This guidance has come in the form of amendments communicated through circulars, orders, notifications and CSR Rules, the latest being the Corporate Social Responsibility Amendment Rules (CSR Amendment Rules), 2021.

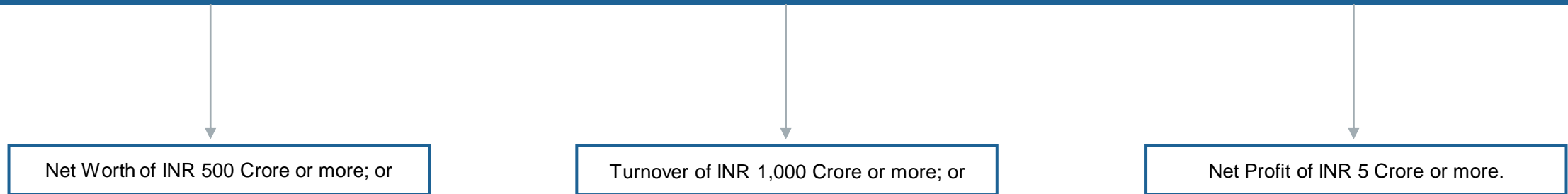
It is crucial to mention that the COVID-19 pandemic had a crippling impact on the world, impacting economies, but most importantly, it has altered the way we live our lives. Corporates have grappled with this disease for more than a year now and it has left a lasting impact on the CSR landscape in India. The Government of India has regularly issued clarificatory guidance about CSR contributions since the pandemic, enabling corporates to lend support in these trying times.

In the following pages, we shall take you across the latest pronouncements and legal framework that governs CSR in India.



## Applicability Criteria

Section 135 (1) of the Act requires companies meeting the following threshold criteria in the immediately preceding financial year to constitute a CSR committee of its Board



The constituted CSR committee is tasked with:

1. Formulating and recommending a CSR policy, comprising of activities specified in Schedule VII of the Act, to the Board Of Directors (BOD)
2. Recommending the amount of expenditure to be incurred on activities in the CSR policy
3. Monitoring the CSR policy from time to time

Schedule VII of the Act, which was pronounced in 2014, provides an exhaustive list of activities, projects, and social causes under Indian CSR. Contribution to the items listed in Schedule VII qualifies as CSR under the Act. The Ministry of Corporate Affairs of India (MCA) has recommended that the items of Schedule VII be broadly interpreted. The items listed in Schedule VII were largely in line with the United Nations Millennium Development Goals, 2000. Over time, this list has included areas and matters relevant to 'India's societal perspective. The latest addition to Schedule VII is COVID-19 related activities to help deal with the ongoing pandemic, which is discussed in later parts of the article.

<http://ebook.mca.gov.in/default.aspx>



## Quantum of Mandatory CSR Spending

Companies meeting the threshold requirements of Section 135 (1) are mandated to spend 2% of their average net profit of the immediately three preceding financial years in pursuance of their CSR policy.

The MCA also acknowledges that corporates may incur administrative costs for carrying out CSR projects, programs, and activities. CSR regulations allow administrative overheads upto 5% of the total CSR expenditure to be incurred.

Any surplus arising out of the CSR activities shall not form part of the business profit of a company. It shall be plowed back into the same project or shall be transferred to the unspent CSR account (discussed in later parts of this article).





## Transfer of unspent CSR amounts

CSR regulations were enacted with 'a comply or explain approach'. Failure to spend on CSR activities did not amount to a non-compliance if the reasons for such failure were disclosed in the Board's report. The Act did not prescribe any mode or format of disclosing the quantum of unspent amounts and the reasons of failure to spend. This resulted in diverse practices being followed.

The year 2018 saw a 9 per cent rise in the quantum of unspent money set aside by the NSE-listed [companies](#) towards the mandatory CSR spends. The unspent component of the mandatory [corporate social responsibility](#) (CSR) rose to INR 17.17 billion in the financial year 2018 as against INR 15.74 billion in 2017. This high quantum of unspent CSR sums and diversity in practice led to the MCA pronouncing regulations to ensure the application of such unspent funds. The Companies Amendment Act, 2019 which is applicable from 31 July 2019, specifically pronounced the procedure to be followed for managing unspent CSR funds.

CSR in India can be carried out in the following modes:

### a. In the form of an ongoing project or program

Under this mode, there is a defined objective that the contributing company strives to meet through its CSR contributions. The contributions made under this mode are not one-off donations but rather planned cash flow supplementation to an identified cause laid down in Schedule VII of the Act.

On-going projects are defined as '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.'

### b. Other than in the form of an on-going project or program

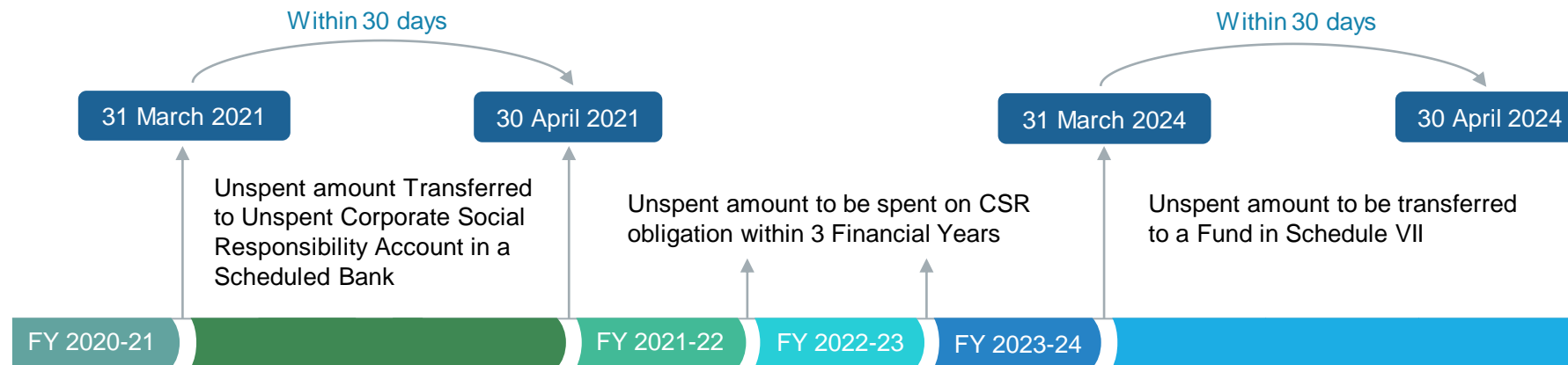
Under this mode, companies contribute their CSR liability to existing CSR funds that have been set up by the Government such as 'Swachh Bharat Kosh', 'Clean Ganga Fund', 'Prime Minister's National Relief Fund', etc.

Contributing companies can make these contributions on their own or through specified entities as discussed in CSR Amendment Rules 2021, ahead.

## Transfer of unspent CSR amounts

The Companies Amendment Act, 2019 mandates:

1. Companies spending on CSR in modes other than ongoing projects were required to transfer the **unspent amount** to a fund specified in Schedule VII **within six months** from the expiry of the financial year as per Section 135(5) and
2. Companies spending on CSR in a project or program mode, under Section 135(6) are required to:
  - Transfer the unspent amount to a special bank account **Unspent CSR Account** in a scheduled bank within **30 days** from the end of the financial year
  - This unspent amount is to be spent on CSR obligations within three financial year
  - On failure to spend this sum on CSR obligations, transfer the unspent amount to a fund specified in Schedule VII within **30 days** from the date of completion of the third financial year



## CSR under the Companies Amendment Act, 2020

The Central Government intended to provide greater ease of doing business to corporates that were compliantly upholding the law. The MCA translated this intent into the Companies Act, 2020. With revamped laws, clarifications and abolishment of criminal liabilities which were earlier applicable for non-compliance, the Amendment Act has been well received by Corporate India. The clarifications issued around the area of CSR will better enable corporates to carry out their CSR spends. Pronouncements made by the Amendment Act embody a clarificatory and enabling virtue. These pronouncements are as under:

### For newly incorporated companies

The Amendment Act clarifies that companies that have not completed three financial years since their incorporation shall spend at least 2% of their average profits of the number of years the company's existence. Accordingly, the MCA has prudently ensured that start-up companies and newly incorporated companies meeting thresholds of Section 135 conscientiously contribute towards CSR.

### Companies with CSR liability up to INR 50 lakh

The Amendment Act exempts companies that are required to spend up to INR 50 lakh in pursuance of their CSR policy from constituting a CSR committee. The BOD (Board of Directors) of such companies shall carry out the tasks and functions of the CSR committee. This shall help save administrative costs of companies with lower CSR liabilities enabling them to contribute more effectively to CSR.

### Set-off for excess CSR spending

Companies spending more than their mandatory CSR liability will be allowed to set-off this excess towards CSR obligations of subsequent periods. The period for which set-off can be claimed and the conditions to claim the set off have been clarified in the Companies (CSR) Amendment Rules, 2021 (discussed in later parts of this article).

### De-criminalization of CSR non-compliance

Prior to the announcement of the Amendment Act, officers in default of CSR provisions were punishable with either fine or imprisonment or both. Corporates were uneasy due to imprisonment provisions. The Company Law Committee in its report submitted to the MCA in November 2019 recommended deletion of imprisonment penalty for various corporate law non-compliances of which CSR was one. Accordingly, the MCA decriminalizes CSR non-compliance under the Amendment Act. Now, the non-compliant company and the officers in default shall be punishable with a fine only.

The fines are as under:

Fine for Non-compliant company	Fine for officers in default
Lower of:	Lower of:
a. Twice the amount required to be transferred either to the fund specified in Schedule VII of the Act or the Unspent CSR Account, as the case maybe; or	a. 1/10th the amount required to be transferred either to the fund specified in Schedule VII of the Act or the Unspent CSR Account, as the case maybe; or
b. INR 1 crore	b. INR 2 Lakh

## Contributions to COVID-19 related activities qualifying as CSR

The Government of India declared the novel coronavirus outbreak in the country a 'Notified Disaster' to enable state governments to mobilize resources from the State Disaster Response Funds (SDRF). Following the notification, the MCA clarified that spending of funds for COVID-19 relief would be a permissible activity under CSR. As a response, not only by companies of Indian origin but even foreign corporations mobilized support and initiated targeted campaigns to mitigate the impact of this unprecedented crisis. Keeping in mind the need for having a dedicated national fund with the primary objective of dealing with any kind of emergency or distress situation, the government set up the 'Prime Minister's Citizen Assistance and Relief in Emergency Situations 'Fund' (PM CARES) to respond to the COVID-19 crisis and provide relief to those affected. Further, Schedule VII was amended to include contributions to PM CARES as CSR along with the existing Prime Minister's National Relief Fund. the 'Government's PM-CARES Fund has witnessed monumental support from corporates, some companies have also contributed by individual programs and relief efforts. Some have also partnered with local authorities of respective state governments to donate medical/food supplies and scale other initiatives to cater to the needs of local communities.

Three circulars have been issued by the MCA providing clarificatory guidance on contributions to COVID-19 activities qualifying as CSR under the Companies Act, 2013. A summary of these three circulars is as under:

1. At the very outset of the pandemic, when Lockdown 1.0 was announced in March 2020, **General Circular 10/2020** specified that spends made towards COVID-19 activities would qualify as CSR activities covered by Schedule VII of the Companies Act, 2013. Contributions made towards COVID-19 would fall under the categories listed in item nos. (i) and (xii) Schedule VII of the Companies Act, 2013 relating to healthcare promotion, including preventive health care and sanitation, and disaster management.
2. **General Circular 15/2020** dated 13 April 2020, the second clarificatory circular on CSR spending for COVID-19 contained 7 FAQs on CSR. These FAQs specifically clarified that:
  - Contributions made to the "PM CARES Fund" would qualify as CSR expenditure whereas contributions made to "Chief Minister's Relief Funds" or "State Relief Fund for COVID-19" would not qualify as admissible CSR expenditure.
  - Payment of salary/wages to employees and workers during the lockdown period (including the imposition of other social distancing requirements) shall not qualify as permissible CSR expenditure.

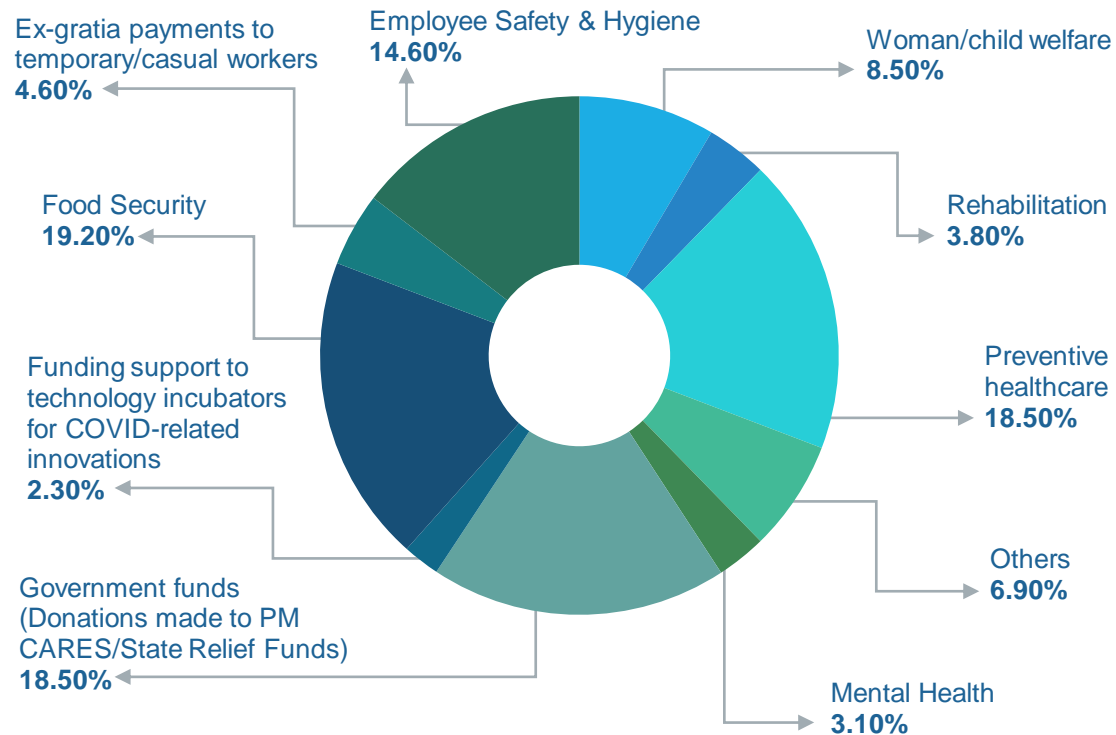
- Any ex-gratia payment made to temporary/casual workers/ daily wage workers over and above the disbursement of wages, specifically to fight COVID 19, would be admissible towards CSR expenditure as a onetime exception provided there is an explicit declaration to that effect by the Board of the company, which is duly certified by the statutory auditor.
3. General Circular 01/2021 was issued on 13 January 2021. This circular clarified that contributions to COVID-19 activities would qualify as CSR under item (ii) "Promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly and the differently-abled and livelihood enhancement projects".

The timing of the clarification coming from the MCA in January 2021 is expected to bode well with various CSR Committees and Boards of Directors who have to undertake the mandatory spending on CSR before 31 March 2021. The timeliness of this clarification shall ensure clarity for accounting and compliance teams of corporates to facilitate such contributions. Also, the Statutory Auditors of such corporations are granted time to integrate this MCA clarification in their compliance checklists.



## Contributions to COVID-19 related activities qualifying as CSR

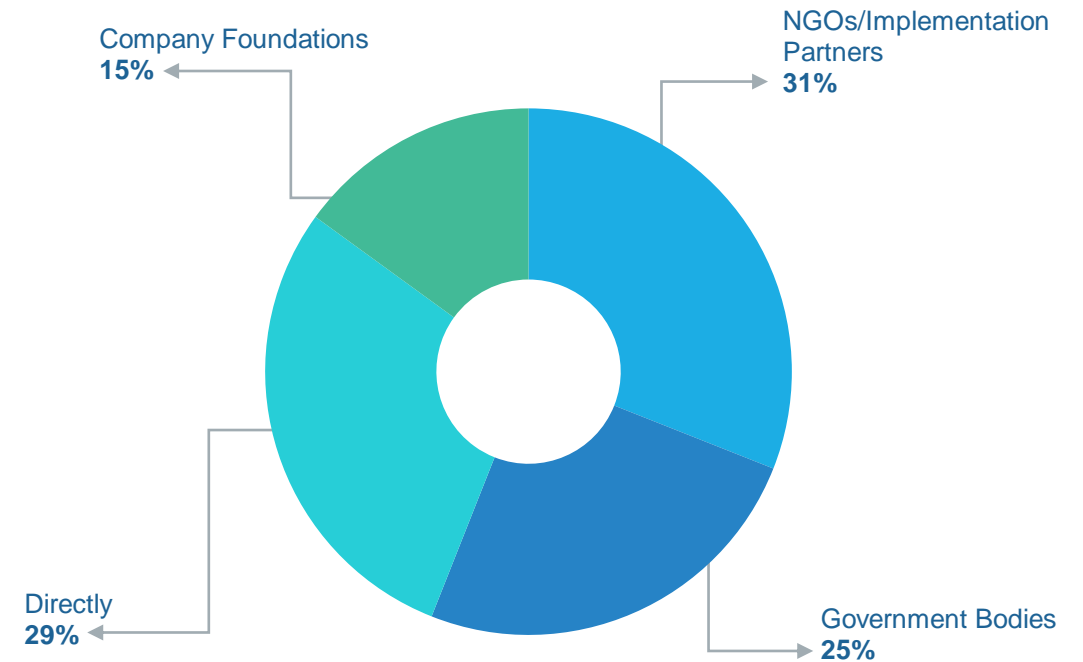
The National Investment Promotion and Facilitation Agency conducted an analysis of corporates who had made CSR contributions towards COVID-19 related activities. The key areas of contribution by these corporates is statistically presented as under:



Source:

<https://www.investindia.gov.in/siru/changing-landscape-csr-india-during-covid-19>

The corporates analyzed by The National Investment Promotion and Facilitation Agency undertook CSR contributions towards COVID-19 activities through the following channels:



The top strategy for companies for COVID-19 related projects has been to invest in projects and initiatives driven by social welfare by identifying direct beneficiaries. Geographical proximity is seen as a favorable option as organizations look to rebuild and provide assistance domestically and locally first.

# The Companies (CSR) Amendment Rules, 2021 (CSR Amendment Rules, 2021)

The MCA notified the CSR Amendment Rules, 2021 on 23 January 2021 to:

1. To enable corporates in supporting the Government's recovery efforts to counter the COVID-19 pandemic.
2. To bring about uniform a reporting process for disclosure of activities, projects and programs undertaken in a maturing Indian CSR landscape.
3. To clarify and best support CSR pronouncements in the Companies Amendment Act 2019 and Companies Amendment Act 2020.



The top five take-aways from the CSR Amendment Rules, 2021 for the Boards of Contributing corporates are:

1. Research and development activity of new vaccine, drugs and medical devices related to COVID-19 to qualify as CSR

Companies engaged in the research and development activity of new vaccine, drugs and medical devices in their normal course of business would see research and development activities of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22 and 2022-23 qualifying as CSR spends. Such companies will have to ensure that their research and development activities would have to be carried out in collaboration with institutes and organizations specified in item (ix) of Schedule VII<sup>#</sup> to the Companies Act, 2013.

Also, details of these activities will have to be disclosed separately in the Annual report on CSR included in the 'Board's Report.

## 2. Availability of set-off for excess amounts spent

Set-off for excess amounts spent on CSR expenditure is now permitted under the Amendment Act. The period for which this excess spends can be set-off is not specified in the Amendment Act. The same has been clarified by CSR Amendment Rules. Set-off for excess spending shall be available up to immediate succeeding three financial years.

This is subject to the following conditions:

1. The excess amount for set-off shall not include any surplus arising out of CSR activities.
2. The Board of the contributing company shall pass a resolution in favor of such set-off.

# The Companies (CSR) Amendment Rules, 2021 (CSR Amendment Rules, 2021)

## 3. Registration with Central Government

The implementation of CSR activities can be undertaken by the company itself or through:

- a. A company established under section 8 of the Act, or a registered public trust or a registered society, registered under section 12A and 80 G of the Income Tax Act, 1961 (43 of 1961), established by the company, either singly or along with any other company
- b. A company established under section 8 of the Act or a registered trust or a registered society, established by the Central Government or State Government
- c. Any entity established under an Act of Parliament or a State legislature
- d. A company established under section 8 of the Act, 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.

The entity undertaking the CSR activity will have to register itself with the Central Government by filing form CSR-1 electronically with the Registrar of Companies effective 1 April 2021. This pronouncement will not affect CSR projects or programs approved prior to 1 April 2021.

## 4. Independent Impact Assessment

Every company with an average CSR obligation of INR 10 crores or more in the three immediately preceding financial years shall undertake an impact assessment. This impact assessment shall be carried out through an independent agency. All CSR projects with outlays of INR 1 crore or more which have been completed not less than one year before undertaking the impact study shall be assessed. Impact assessment reports for each such project with an outlay of INR 1 crore or more shall be placed before the Board. These reports shall be annexed to the annual report on CSR. The cost of the impact assessment may be booked towards CSR expenditure for the financial year in question but the same shall not exceed the lower of:

- a. 5% of the total CSR expenditure for the financial year in question; or
- b. INR 50 lakh.

Both the Act and the CSR amendment rules are silent on the metrics of assessment as well as the format of such impact assessment reports.

## 5. Transfer of unspent CSR amounts

In accordance with the provisions of the Companies Amendment Act, 2019 unspent CSR amounts are to be transferred to a Fund specified in Schedule VII of the Act. The CSR Amendment Rules have clarified that unspent sums can be transferred to any Fund included in Schedule VII of the Act until such a Fund is specified.



# CSR contributions to COVID-19 related activities in the Second Wave of the pandemic in India

The resurgence of COVID-19 has resulted in pressure surmounting on an already burdened system of medical infrastructure in India. Cases started rising in February 2021 when India reported an average of about 10,000 infections a day. The situation progressively worsened in April with the World Health Organization stating that one in every three new coronavirus cases globally is being reported in India. The India COVID-19 variant known as B.1.617 and its multiple sub-lineages should the notoriety for this meteoric resurgence of the pandemic in India. The shortage of hospitals, medical infrastructure and oxygen has compounded the worry and scare caused by increasing COVID-19 cases.

In its bid to counter these adversities, the MCA undertook the following:

1. Made an appeal to MDs/CEO of the top 1,000 companies by market capitalization in India.
2. Issued two circulars facilitating the contribution to necessary activities in combating the second wave.

## Appeal made for contributions

Keeping in view the spread of COVID-19 in India, an appeal dated 30 March 2020 was made to MDs/CEOs of top 1,000 companies in terms of market capitalization, for generously contributing to "Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund" (PM CARES Fund).

In the appeal, it was mentioned that such contribution may, inter-alia, include the unspent CSR amount, if any, and an amount over and above the minimum prescribed CSR amount for FY 2019-20, which can later be offset against the CSR obligation arising in subsequent financial years. The said appeal was uploaded on the website of the Ministry and sent to e-mails of the aforementioned corporates on 31 March 2020.

In pursuance to the said appeal, many companies claimed to have contributed CSR funds to the 'PM CARES Fund' over and above their prescribed CSR amount for FY 2019-20.

## Request for Clarification by corporates

MCA received several representations for setting off the excess CSR amount spent by the companies in FY 2019-20 by way of contribution to 'PM CARES Fund' against the mandatory CSR obligation for FY 2020-21.

## Clarification by MCA

In the backdrop of the above scenario, MCA issued a clarification on 20 May which prescribes as under:

Where a company has contributed any amount to 'PM CARES Fund' on 31 March 2020, which is over and above the minimum amount as prescribed under section 135(5) of the

Companies Act, 2013 (The Act) for FY 2019-20, and such excess amount or part thereof is offset against the requirement to spend under section 135(5) for FY 2020-21 in terms of the aforementioned appeal.

The above is subject to all the following conditions:

1. The amount offset as such shall have factored the unspent CSR amount for previous financial years, if any.
  - a. The Chief Financial Officer shall certify that the contribution to "PM CARES Fund" was indeed made on 31 March 2020 in pursuance of the appeal, and the same shall also be so certified by the statutory auditor of the company.
  - b. The details of such contribution shall be disclosed separately in the Annual Report on CSR as well as in the 'Board's Report for FY 2020-21 in terms of section 134 (3) (o) of the Act.

Link to the clarification:

[http://www.mca.gov.in/Ministry/pdf/Circular\\_20052021.pdf](http://www.mca.gov.in/Ministry/pdf/Circular_20052021.pdf)

# CSR contributions to COVID-19 related activities in the Second Wave of the pandemic in India

## Circulars issued by MCA

Prior to the announcement of the Amendment Act, officers in default of CSR provisions were punishable with either fine or imprisonment, or both. Now, the non-compliant company and the officers in default shall be punishable with a fine only.

The MCA has issued the following circulars:

- General Circular No. 05/2021 dated 22 April 2021
- General Circular No. 09/2021 on 5 May 2021.

These circulars provide clarification on spending of Corporate Social Responsibility (CSR) funds for creating makeshift hospitals, temporary COVID care facilities, health infrastructure for COVID care, establishment of medical oxygen generation and storage 'plants' etc.

### Overview of General Circular No. 05/2021

The MCA via [General Circular No. 10/2020](http://www.mca.gov.in/Ministry/pdf/GeneralCircularNo10_2020) dated 23 March 2020, clarified that spending of CSR funds for COVID-19 is an eligible CSR activity. In continuation to this clarification, the MCA has pronounced that the spending of CSR funds setting up makeshift hospitals and temporary COVID Care Facilities would qualify as eligible CSR activities under item nos. (i) and (xii) of Schedule VII of the Companies Act, 2013.

Reference to Circular No. 05/2021 dated 22 April 2021

[http://www.mca.gov.in/Ministry/pdf/GeneralCircularNo5\\_22042021.pdf](http://www.mca.gov.in/Ministry/pdf/GeneralCircularNo5_22042021.pdf)

### Overview of General Circular No. 09/2021

The MCA via [General Circular No. 10/2020](http://www.mca.gov.in/Ministry/pdf/GeneralCircularNo10_2020) dated 23 March 2020, clarified that spending of CSR funds for COVID-19 is an eligible CSR activity. In continuation to this, the MCA has pronounced that the spending of CSR funds on the following would qualify as eligible CSR activities under item nos. (i) and (xii) of Schedule VII of the Companies Act, 2013:

- Creating health infrastructure for COVID care
- Establishment of medical oxygen generation and storage plants
- Manufacturing and supply of oxygen concentrators, ventilators, cylinders, and other medical equipment for countering COVID-19
- Activities similar to the ones mentioned in (a) to (c) above
  - *Item (i) of Schedule VII covers activities for promoting health care, including preventive health care*
  - *Item (xii) of Schedule VII covers disaster management, including relief, rehabilitation, and reconstruction activities.*

This circular also draws reference to item (ix) of Schedule VII of the Companies Act, 2013, which permits contribution to specified research and development projects as well as contribution to public-funded; universities and certain organizations engaged in researching science, technology, engineering, and medicine as eligible CSR activities.

Reference to General Circular No. 09/2021

[http://www.mca.gov.in/Ministry/pdf/GeneralCircularNo9\\_05052021.pdf](http://www.mca.gov.in/Ministry/pdf/GeneralCircularNo9_05052021.pdf)

## Conclusion



The circulars issued regarding the CSR activities in the past few months ensure that enough support is provided to those impacted by COVID. It further enables corporates to adhere to CSR compliance by doing their bit and be a part of the larger cause. The pandemic has left many of us in shambles, and MCA is taking every possible effort to keep the corporate's best interest at heart as they attempt to contribute to society.

While the country is still recovering from the second hit and likely to experience a third wave of the pandemic, we can expect further additions to what may qualify as CSR activities.

By amending Schedule VII, MCA has been sensitive to ensure that society's immediate needs are met through CSR contributions by the corporates. These amendments are a game-changer as it lays down specific procedures to guide corporates concerning certain situations.



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