

Date: October 22, 2013

To
Dr. Aman Deep Singh
PS to Minister of Corporate Affairs,
Ministry of Corporate Affairs,
New Delhi.

Subject: Giving recommendations and seeking clarifications in CSR rules of the new Companies Act, 2013

Dear Sir,

It is my pleasure to write to you on behalf of the Retailers Association of India (RAI)!

Retailers Association of India (RAI) is the unified voice of Indian retailers. RAI works with all the stakeholders for creating the right environment for the growth of the modern retail industry in India. It encourages, develops and supports retailers to become modern and adopt best practices that will delight customers.

RAI is the representative body of Retailers in India having over 900 member establishments including large and small retailers in the country and represents over 98000 stores in India. RAI has a three charter aim of Retail Development, Facilitation and Propagation.

The Corporate Social Responsibility (CSR) rules given in the new Companies Act, 2013 are a welcome move as it not only diverts funds for the betterment of the society but also provides for a road map to Corporates to structure their CSR spending. However, we seek the following clarifications in the rules:

The key pointers and probable solutions are stated herein below:

1. Applicability of CSR provisions on Private limited companies:

- a. Requirement of independent director: Section 135(1) of the Act states that '*every company*' which satisfies the thresholds set forth in this sub-section is required to constitute a Corporate Social Responsibility Committee. The said Corporate Social Responsibility Committee is required to consist of three or more directors, out of which at least one director is required to be an independent director.

Section 149(1) of the Companies Act, 2013 prescribes the number of directors that a company is required to have and Section 149(4) of the Act prescribes that every listed company shall have at least one-third of the total number of directors as independent directors. Section 149 of the Act does not stipulate any requirement for a private limited company to have independent directors.

Thus, since Section 135(1) of the Act does not differentiate between a private company and a public company there seems to be an implicit requirement that a private limited company which meets the thresholds for constituting a Corporate Social Responsibility Committee) is required to have an independent director in its Corporate Social Responsibility Committee and therefore on its Board, which is not in line with the provisions of Section 149(1) of the Act. **Hence, In view of the above, the requirement to have an Independent Director for the Corporate Social Responsibility Committee for a Private Limited company need to be removed in line with the Companies Act provisions for a Private Limited company**

- b. Minimum number of directors: The CSR provisions under the Companies Act, 2013 require a minimum of 3 directors for the constitution of the CSR committee. Clarification is needed as to whether qualifying private companies would be required to appoint a third director to comply with the CSR provisions.

2. Clarification on CSR requirement:

- a. We would like clarity on Part II, Clause 1 (d) and (e) of the CSR rules where “surplus arising out of CSR activities” and “any income arising there from CSR activities” have been spelt out. We would like to understand the context under which these “surpluses” and “incomes” might arise considering that the company is required to earmark a certain percentage of the average net profits every year towards CSR Activities.
- b. While the reporting framework under CSR rules suggest that the unspent amount of the specified CSR spend to be rolled over to the succeeding financial years, it does not clarify whether the excess spend of over and above 2 percent mandatory CSR spend in any particular financial year can be carried forward in succeeding financial year or not.

- c. For driving greater efficiencies in the delivery systems, the CSR Committee constituted under sec. 135(1), shall prepare the CSR Policy of the company for 5-10 years and to accomplish this, every year they should prepare a list of CSR projects/programmes which a company plans to undertake during the implementation year, specifying modalities of execution in the areas/sectors chosen and implementation schedules for the same.
- d. The methodology of computation of Net Profit, in addition, clarified that any exceptional or unprecedented income should be exempted. Further, the requirement of 2% of net profit before tax is discriminatory and the requirement should instead be 2% of net profit after tax.

3. **Utilisation of CSR fund:**

While the CSR rules specify that CSR activities shall not be exclusively for the benefit of employees / their families, it does not provide any objective criteria of certain benefits (not exclusive) given to employees / their families that could be regarded as CSR activities. Costs related to employ volunteerism should be considered as CSR and the rules should suggest it to be monetized on the basis of salaries. Any expenditure made on evaluation and monitoring should also be considered as CSR.

Moreover, companies should be allowed to provide proprietary assets to focused group of beneficiaries as an enablement/empowerment project as per the CSR Policy of the company and it can be monetized for accounting and reporting 2% CSR spend.

However, any political activity/ event or any political party or an entity which is in any manner directly or indirectly related to a political party or engaging in any political activity or being directly or indirectly managed or controlled by a person engaged in political activity spends which are targeted to or discriminates based on caste, religion, faith, sexual orientation should not be included in the CSR list.

Please refer to the annexure attached below for the recommended list of items which should be included in CSR activities.

4. **CSR and tax provisions:**

Questions may arise with regard to tax deductibility of expenditure incurred on CSR activities. One argument is that it is in the nature of allocation of profit, hence will not be allowed as deduction for tax purposes. However, the counter argument is that there is a legal obligation on the company to incur such expenses and non spending these costs may have legal/ other regulatory implications on the company.

Deductibility of expenditure incurred on CSR activities should be allowed as deduction for computation of taxable income. In certain past cases also, voluntary CSR expenses have been treated as tax deductible. To avoid legal complications, the CBDT may clarify that CSR expense will be treated as allowable expenditure under section 37 of the Income-tax Act

5. **Non compliances of CSR norms:**

We would request you to kindly clarify the penalty provisions that would be applicable if there is a contravention of Section 135 of the Act or of the CSR Rules. In addition to the clarification, a suitable insertion of the penalty that would be applicable for contravention or violation of the CSR rules will bring clarity for the below reasons:

- a. Non-disclosure of reasons for spends towards CSR in Boards' Report: In case the Company fails to spend the required amount as per the Section 135, the Board of Directors have to state reasons for not spending such amount in the Board Report. Failure to disclose in the Board's Report will entail the company and its officers in default being visited with penalty as per Section 134 (8) of the Act.
- b. Punishment where no specific punishment or penalty is provided: If the company or any officer of the company contravenes any of the provisions of the Act or the rules made thereunder for which no penalty or punishment is provided elsewhere in the Act, penalty as per Section 450 of the Act shall be levied on the company and its officers.

Since the draft rules do not contain a specific provision regarding the penalty that would be applicable for contravention, one would infer that contravention of Section 135 and the CSR Rules would be visited with penalty under Section 450 of the Act and not penalty contained in Section 469(3) of the Act.



We hope and believe that you will receive our representation favorably and look forward to your kind action in this regard.

Looking forward to an early reply,

Yours sincerely,

For Retailers Association of India

Gautam Jain
Head – Advocacy & Finance

Annexure

The following are the items which should be added to the list of items in which Corporates can spend for CSR:

CSR activity	Description
R&D	Research and development of new technology or products which can be for community use
Disaster relief	Cost borne by the company for immediate disaster relief. Value of products must be measured on the basis of MRP/unit as it includes costs such as R&D etc
Innovation	Funding innovation and incubation of projects
Salary of Employees	The salaries of the employees that are directly working on CSR Projects as per the Company CSR Policy
Donations	Donation of any products/ hardware/ software/ solutions/ services of the Company to any organization/ school/ trust/ society or any other person(s) which will be utilized for the benefit of the community or section of community
Proprietary Assets	Provide proprietary assets like software to focused group of beneficiaries as a enablement/empowerment project
Persons with disability	Work done for persons with disabilities (PWDs), Disaster Management, in-house green initiatives and rural development.
Safety Infrastructure	Building safety infrastructure in the local area in which the company operates (e.g. footbridges, road safety initiative)