
**AN ENHANCED CORPORATE SOCIAL RESPONSIBILITY MODEL IN TIMES OF
COVID-19: THE NEED OF THE HOUR**

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ABSTRACT

The COVID 19 pandemic has altered the socio-cultural reality and the world we had inhabited so far. The effects of this “*crowd disease*” are too farfetched to be tackled by the welfare state alone. This crisis has inevitably put businesses under test for their commitment to ethical business conduct and CSR. The short-term and long-term financial strains caused by the outbreak may significantly push firms to pursue short-term gains, sometimes even through fraud and misconduct, and reduce long-term CSR investment, likely due to lack of slack resources and rising survival pressures. However, at the same time, the COVID-19 pandemic offers companies a great opportunity to step towards more real and credible CSR and help resolve pressing economic, financial, and environmental challenges. The authors have attempted to trace the growth of CSR as a concept, from its origin in the principle of voluntariness which dominated the CSR jurisprudence in the 1980s to the recent mandatory requirement for the Companies meeting the threshold in Companies Act 2013. The researchers have analyzed the adequacy of the 2% criteria for CSR activities and suggested a model to remove the bottlenecks restricting CSR activities. We suggest a departure from the narrow notion of Corporate Social Responsibility which advocated donating the required amount to designated funds mentioned in Schedule VII of the Companies Act, 2013, which now also includes the PM CARES fund and instead suggest a more active involvement of Corporations to take advantages of the unique strengths inherent in their model. We argue for giving COVID19 a wartime footing to increase CSR activities. We have also analyzed how this will be good for the businesses as Consumer Ethics and business environment have changed drastically due to the emergence of this pandemic.

KEYWORDS: *COVID-19, Corporate social responsibility, Consumer ethical decision making, Business ethics*

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INTRODUCTION

The Corona Virus pandemic has exposed the shortcomings and vulnerabilities of our healthcare system like never before. The rapidly exploding number of cases has overstretched the capacities of our healthcare system. According to a WHO report, India has been ranked 112 out of 191 countries in terms of access and quality of healthcare.³ In terms of the number of cases, India is ranked at 4, with the numbers pushing more than 5 lakh as on 30 June 2020.⁴ This indicates a disproportionate burden on our healthcare system.

Consequently, bot central and state machinery are overstrained. In this situation, utilizing the Corporate Social Responsibility Mechanism to complement the Central and State Governments is of particular importance. This paper attempts to trace the development of the CSR mechanism in India and advocates for an enhanced CSR Model, urging the companies to perform their legal obligations in the spirit with which CSR was introduced in India.

The idea of CSR is rooted in the understanding that Companies are Social Organizations and they cannot exist in a vacuum. If the society they function in is suffering, they cannot earn a profit. Moreover, as these organizations exist in the society and derive benefit from it, they owe a responsibility to it. This idea is in tune with the stakeholder theory of Corporate Organization which argues that profit is not the sole motive for a company to exist. Stakeholder Theory instead argues that a company’s motives should include protection of interests of the employees, shareholders, society and the environment.

This notion is reflected in Section 166 of the Companies Act, 2013 which casts a fiduciary duty on the Director to promote the object of the Company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, and the community and for the protection of environment.⁵ The framework for CSR is contained in Section 135, Schedule VII of the Companies Act, 2013 and Corporate Social Responsibility Rules of 2014.

Section 135(1) lays down the Companies who are required to conduct CSR activities- net worth of rupees 500 crore or more, or turnover of rupees 100 crore or more or a net profit of

³ Ajay Tandon, Christopher Murray, Jeremy Lauer, David B Evans, *measuring overall health system performance for 191 countries*, GPE Discussion Paper Series: No. 30 EIP/GPE/EQC World Health Organization, accessed at <https://www.who.int/healthinfo/paper30.pdf?ua=1>.

⁴WHO, Coronavirus Daily Situation Report of June 28, 2020, accessed at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200629-covid-19-sitrep-161.pdf?sfvrsn=74fde64e_2.

⁵The Companies Act, 2013, §166.

rupees 5 crore or more during previous financial year. These companies are required by law to form a CSR committee composed of three or more directors, one independent if required to appoint one. If the company is not required to appoint Independent Directors, the committee shall comprise of two or more directors.⁶

Board’s report under Section 134 must disclose composition of this committee⁷. The CSR committee has a responsibility to formulate a CSR Policy and recommend it to the Board, recommend the amount of expenditure to be incurred on the activities and to monitor the activities.⁸ The responsibilities of the Board of Directors for CSR include approving the CSR Policy as recommended by the committee and display it on website and ensure that they are undertaken by the company.⁹

Further, the Board must spend at least 2% of the average net profits of the company made during the three immediately preceding financial years or since incorporation if company has not finished 3 years on eligible CSR activities provided in Schedule VII.¹⁰ The Board also must give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities.¹¹ The Board must also specify the reasons for not spending the amount and transfer it to a designated fund under Schedule VII.

If however, the funds are of an ongoing project and not spent in a financial year, the company needs to transfer the funds in a special account called the Unspent CSR Fund and utilize it in 3 financial years, failing which it must be transferred to a designated fund under Schedule VII. The provision of transferring the unutilized funds to designated funds under Schedule VII was introduced by the 2019 amendment.¹²

The amendment further introduced penal consequences for a company’s inability to actively spend or contribute, by imposing a fine not less than Rs. 50,000 but which may extend to Rs. 25, 00,000; and imprisoning every defaulting officer of the company for a maximum term of three years, who may alternatively be fined or both.

⁶ The Companies Act 2013, §135 (1) proviso.

⁷The Companies Act 2013, §135 (2).

⁸The Companies Act 2013, §135 (3).

⁹The Companies Act 2013, §135 (4).

¹⁰The Companies Act 2013, §135 (5).

¹¹The Companies Act 2013, §135 (5).

¹²The Companies (Amendment) Act, 2019.

Since the amendment, many stakeholders have vehemently resisted it due to the stringent penalties that have been imposed and the manner of effecting corporate social awareness.¹³

AMENDMENTS IN CSR RULES

The Ministry of Corporate Affairs (MCA) recently published a draft of new CSR rules for public consultation in its ongoing effort to encourage, track and regulate CSR activities in India. Stakeholders were asked to submit their feedback by April 10, 2020 after that the Ministry would consider the feedback and make amendments to the proposed Regulations. Though there are several changes outlined in the draft Rules, here are certain amendments that affects or improve operations and plans of foreign non-profits and companies operating in India. These include the following:

- The definition of CSR has been expressly amended to exclude activities that are conducted outside India, donations to a political party, activities that are performed as part of a Company's regular business or those that support employees significantly. Activities where workers are less than 25 per cent of the beneficiaries must be required.
- Recognition has been given to designated international organizations under the draft Rules by which such organizations may contribute to the design, monitoring and evaluation of CSR projects or programs as per company CSR Policy and capacity building of their own CSR staff. Furthermore, they would also be authorized to explicitly enforce these organizations. CSR ventures by corporate funding subject to Government approval.¹⁴
- The current Rules require businesses to conduct CSR activities (a) by themselves; (b) by non-profit entities; (c) by non-profits founded by the Central Government or the State Government or by any agency constituted under the Parliament Act or the State Legislature, or (d) by non-profits with a three-year track record of undertaking similar projects or programmes.

Non-profits belong to Company, Registered Trust or Registered Society Section 8. The draft rules propose that companies will be permitted to undertake CSR activity either a) itself; b) through a Section 8 company or c) anybody set up by an Act of Parliament or a

¹³ Roshni Menon, Continued Uncertainties in the CSR Regime, accessed at, <https://indiacorplaw.in/2020/01/continued-uncertainties-csr-regime.html>.

¹⁴ International Organization” means an organization notified by the Central Government as an international organization under section 3 of the United Nations (Privileges and immunities) Act, 1947 (46 of 1947), to which the provisions of the Schedule to the said Act apply.”

legislature of a State. The draft rules also added that by filing the e-form CSR-1 with the Registrar along with the prescribed fee, such a company / entity will be required to register itself with the Central Government to undertake any CSR operation.

The proviso that included the provision that independent non-profits to have a record that three years of pursuing similar ventures or services that were also dropped. Although a number of professional bodies consider that Trusts and Societies are protected by 'entities set up under a Parliament Act or a State legislature,' the Ministry will need to explain the same in the final draft of the regulations.

Adjustments have also been made in the concept of CSR policy, ongoing projects and project lengths which will impact the way projects and funds are organized and disbursed. Some of the other changes in compliance requirements that have been proposed are:

1. The Chief Financial Officer (CFO) or person in charge of financial management must certify that the funds distributed for CSR activities were used in the manner authorized by the Board;
2. The companies with an average CSR expenditure of INR 50 million or more shall conduct an impact assessment for their CSR projects or programs and disclose information of the same in their annual report;
3. The Board must ensure that the operating overhead incurred for the financial year will not exceed 5 per cent of the overall CSR expenditure. The company may incur administrative overheads not exceeding 10 per cent of total CSR expenditure for that financial year for impact assessment;
4. The Board shall mandatorily report on its website in the specified format the composition of the CSR Committee, CSR Strategy, and Projects as approved by the Board.
5. Unused balances in respect of the fulfilment of the CSR responsibility at the time of implementation of these Rules shall be transferred to a special account opened by the company named 'Unspent Corporate Social Responsibility Account' within 30 days from the end of the financial year 2020-21.

The unspent balance would need to be used within 3 years from the date of transition, in compliance with CSR Policy. It is also proposed to set up a fund in the form of 'Global Unspent Corporate Social Responsibility Fund' where the unspent sum in

connection with ongoing projects would have to be transferred if 3 years have elapsed from the transfer date in “Unspent Corporate Social Responsibility Account.”

6. A business that invest the CSR sum to create or acquire assets that are held solely by a company formed pursuant to section 8 of the Act having charitable objects, or by a public authority. Any businesses that have acquired assets prior to the beginning of the Rules shall take action to comply with this new regulation within 180 days of such implementation (with a further extension of no more than 90 days with the approval of the board).

CORPORATE SOCIAL RESPONSIBILITY IN THE TIMES OF COVID-19

Companies (Amendment) Act, 2019 inter-alia requiring the provisions to change from “*comply or explain*” to “*comply or suffer*” There is a tectonic shift from matter of voluntary practice to a subject of legal pressure and enforcement. However, the amendments have not been notified yet by the Central Government. The MCA had issued a deadline of 20 April 2020 for the public to send their comments on the draft rules. Until the MCA notifies the amendment rules, the model remains “*comply or explain*” and it is in this framework that companies have carried out their CSR obligations in the times of COVID.

Many corporate organizations have already taken various measures to help in COVID19 relief work. In the financial year 2018-19, as per MCA data portal, nearly 17% of total CSR spending was on healthcare. This figure is expected to rise this year.¹⁵ The Ministry of Corporate Affairs has further clarified¹⁶ that spending on COVID19 is eligible CSR activity.

On 28th March, 2020, MCA clarified that contribution made to ‘PM CARES fund’ shall qualify as CSR expenditure under item no (viii) of schedule VII of the companies act, 2013.¹⁷ Pursuant to this, multiple corporate have undertaken various activities for fighting against COVID-19. Some organizations have been promoting social awareness for social distancing by McDonald’s, Audi, Coca-Cola, Volkswagen all have done this by tweaking their logos, RIL provides the first 100 bed COVID-19 hospital, 50 lakh free meals, 1 lakh masks, daily wise 1000 PPE for health care workers.¹⁸

¹⁵Development Sector Wise CSR Data, accessed at <https://www.csr.gov.in/developmentlist.php>

¹⁶Ministry of Corporate Affairs, Clarification on spending of CSR Funds for Covid19, General Circular 10/2020 DT. 23 MARCH 2020.

¹⁷Ministry of Corporate Affairs, Clarification on contribution to PM CARES Fund as eligible CSR activity under item no. (viii) of the Schedule VII of Companies Act, 2013, eF. No. CSR-05/1/2020-CSR-MCA.

¹⁸ ET Government, Corporate Social Responsibility in times of Covid19, accessed at <https://government.economictimes.indiatimes.com/news/economy/corporate-social-responsibility-in-times-of-covid-19-pandemic/75771467>.

However, there is an inherent flaw in the approach that corporate houses have towards CSR. CSR spending right now is perceived as a legal obligation which has to be discharged. The usual route that companies follow is contributing the 2% legal requirement to designated funds under Schedule VII.¹⁹ Due to this, the original vision of introducing CSR to increase their social responsibility, benefit from the corporate method of doing things, encourage innovation and take advantage of their presence in the grassroots level to tackle socio-economic problems has been diluted.

The primary aim for introduction of CSR was to enhance the Social responsibility of business, and CSR was never intended as another method for the state to earn revenue or mobilize more revenue.²⁰ The idea was to complement the state machinery and not become a cog in it.

COVID-19 has presented the Corporations to unlock the true potential of CSR both as a tool to increase their Brand's Goodwill, and showcase their commitment to ethical Business Conduct. This is in harmony with the Stakeholder model of Business Organization as opposed to the Wealth Maximization Model. Consumers are likely to shift towards prosaically consumption to satisfy their self-actualization and altruistic interests.²¹

Companies must first strive to professionalize their CSR teams, forge new partnerships with NGOs and work with the district administrations to deploy their CSR funds in the most effective manner. This situation must be treated at a war time footing. The idea is that the eligible companies are usually one with deep pockets and good organizational structure. Therefore, they should rise above and beyond the 2% model and follow a hybrid model.

They can restrict part of their funds to donate to designated funds, but they must reserve the other for doing the social work themselves. They should identify the areas which require immediate attention for which twin factors of the designation of the area as a Containment Zone and intersection with the Aspiration Districts Programme²² should be explored. Companies can contribute by donating PPE, getting testing kits, immediate on the spot help camps for Migrant and vulnerable people, fund and support relief work by various NGOs and coordinate with them.

¹⁹ Vishal Tripathy, Leveraging CSR To Complement India's Covid-19 Mitigation Strategy, <https://niti.gov.in/leveraging-csr-complement-indias-covid-19-mitigation-strategy>.

²⁰ Ministry of Corporate Affairs, Report of the High Level Committee on Corporate Social Responsibility 2018, at ¶21.

²¹ HongwieHei, Lloyd Harris, The Impact of Covid-19 Pandemic on corporate social responsibility and marketing philosophy, accessed at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7241379/>.

²² Supra note 17.

PM CARES fund does not reach the needy as quickly as CSR. Accounts of people in government institutional quarantine suggest that the governmental facilities are lacking in quality. The government can further direct Corporate for Mandatory utilization of previous financial years' unspent CSR allocation for COVID-19, and further allow the Carrying forward the funds spent in CSR contribution towards COVID-19, in excess of the minimum threshold, for set off against the obligations under subsequent FYs.²³

CONCLUSION

In this article we gave some initial thoughts about how CSR, consumer ethics, and marketing theory are affected by the ongoing COVID-19 pandemic. This pandemic offers companies great opportunities to actively engage in various CSR initiatives during the crisis, and potentially catalyzes a new era of long-term CSR growth. Ethical aspect of consumer decision during the pandemic has become popular for consumers, which is also likely to move consumers towards more responsible and pro social consumption. These developments are likely to be replicated by businesses and organizations.

Fundamental changes in our lives will affect our beliefs, attitudes, and opinions so astute marketers can adapt to reflect their policies and strategies. Does the idea of social media and more ethical company orientations have a longstanding resurgence? We are hoping. Such changes seem extremely likely that the ways in which marketing has functioned in the past would need to adapt and meet the new reality.

We conclude this report asking our academic communities to participate in comprehensive work on the following research issues. While the immediate effects of the COVID-19 pandemic are fairly obvious, the question of what could be the long-term effects on CSR and Healthcare system needs to be answered. There is an immediate need to investigate how people, clients, and consumers react (both positive and negative) to varying lockdown restrictions in terms of customer behavior, and the impact of this behavior on Corporate orientations.

²³AyushVijayvargiya, Is the Indian CSR Legal Framework COVID Ready ?<https://indiacorplaw.in/2020/05/is-the-indian-csr-legal-framework-covid-ready.html>