

## MANDATORY CSR IN THE COMPANIES BILL, 2011: ARE WE THERE, YET?

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### ABSTRACT

*This essay examines the debate around clause 135 of the Companies Bill, 2011, which makes it compulsory for companies to spend 2% of their profits towards Corporate Social Responsibility ('CSR') initiatives. While it is a welcome change to turn CSR from a mere 'voluntary' initiative to a 'mandatory' one, this essay illustrates the large number of problems which have been left unaddressed by the legislators in framing this particular clause. It seems that in their eagerness to create a 'socialist' Companies Bill, the legislators have forgotten the main stakeholders for whom the Bill has been made – the companies themselves. Though the clause is mainly aimed at the lack of CSR initiatives being carried out by India Inc., it seems to be working 'against' them, rather than in 'cooperation' with them. Even from a legal viewpoint, there are some glaring loopholes in the clause.*

*The essay finally concludes that while the wording of the clause, even after so many deliberations amongst the various bodies of the Government, may seem to be a 'knee-jerk' reaction to the problem of CSR initiatives, the implementation of certain suggestions may curb the problems identified by a large extent.*

*It is to be noted that this essay proceeds on the assumption that Corporate Social Responsibility initiatives should be a legitimate concern of companies, and it does not indulge in the debate as to whether CSR activities should be carried out by companies in the first place itself.*

### I. INTRODUCTION

On December 18, 2012, the Lok Sabha passed the much-awaited and much-debated Companies Bill, 2011 ('the Bill').

<sup>1</sup>While the Bill makes a series of overhauls to the Companies Act, 1956, one of the most debated clauses of this Bill is the proposed clause 135, which will make

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it mandatory for certain companies to set aside 2% of their profits for Corporate Social Responsibility ('CSR'). The clause applies to three types of companies – a) those with a net worth of rupees five hundred crore or more, b) those with a turnover of rupees one thousand crore or more and c) those with a net profit of rupees five crore or more. These companies would be subject to the following obligations under the aforementioned clause –

- a. Mandatorily setting up a CSR Committee consisting of members from the Board of Directors, which will formulate a CSR policy.
- b. Ensuring that at least 2% of the average net profits of the company for the past three years are spent in accordance with the CSR Policy.
- c. Where the companies fail to spend the abovementioned amount, furnishing reasons for the same in the Directors' Report under clause 134 of the Bill.

In the deliberations which follow, this Article will examine the practical and legal implications of such a law coming into existence, and whether the same should be allowed or not.

## **II. THE PRESENT LEGAL POSITION ON CSR INITIATIVES**

Presently, there is no concrete legislation with respect to 'Corporate Social Responsibility' for companies in India. Official notifications by the Government have been released earlier in the form of 'guidelines' – some mandatory, some voluntary. The first indication of an official notification on CSR guidelines was issued by the Ministry of Petroleum and Natural Gas, whereby public sector oil-companies had agreed to spend at least 2% of their net profits on CSR initiatives.<sup>2</sup> This was followed by a notification titled 'Corporate Social Responsibility Voluntary Guidelines', which was issued in December 2009 by the Ministry of Corporate Affairs.<sup>3</sup> Further guidelines were issued for Central Public Sector Enterprises (CPSEs) in April 2010, whereby the creation of a 'CSR Budget' was

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1 *Lok Sabha passes Companies Bill*, Economic Times, Dec. 19, 2012 available at [http://articles.economictimes.indiatimes.com/2012-12-19/news/35912646\\_1\\_csr-activities-companies-bill-concept-of-class-action](http://articles.economictimes.indiatimes.com/2012-12-19/news/35912646_1_csr-activities-companies-bill-concept-of-class-action).

2 Press Information Bureau, Ministry of Petroleum and Natural Gas, Government of India, *Oil PSUs agree to spend two per cent of profits on Social Responsibilities*, Feb. 2, 2009 available at <http://pib.nic.in/newsite/erelease.aspx?relid=47172>.

3 Ministry of Corporate Affairs, *Corporate Social Responsibility Voluntary Guidelines, 2009*, available at [http://www.mca.gov.in/Ministry/latestnews/CSR\\_Voluntary\\_Guidelines\\_24dec2009.pdf](http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf).

made mandatory.<sup>4</sup> The latest notification is the ‘Guidelines on CSR and Sustainability for Central Public Sector Enterprises’, which came into effect from April 1, 2013.<sup>5</sup>

Thus, currently there is no statutory obligation on companies to contribute towards CSR initiatives, with the exception of Central Public Sector Enterprises.<sup>6</sup> Clause 135 of the Companies Bill, 2011, if passed, would be the first of its kind in India, and the second in the world after Indonesia, wherein a statutory obligation will be imposed on companies to compulsorily spend 2% of their average profits on CSR initiatives.

### **III. ‘MANDATORY’ CSR V. ‘VOLUNTARY’ CSR**

One of the principle contentions raised against this provision is that CSR is essentially a ‘voluntary’ exercise. CEOs of major Indian companies have stated that the process should be more ‘democratic’ and the decision regarding allocation of a public company’s profits towards CSR should be subject to the shareholders’ vote, not the government’s legislative powers.<sup>7</sup> The following points highlight the debate on this issue.

### **IV. ‘ASPIRATIONAL LAW’ – A THEORETICAL ARGUMENT**

Scholars argue that law cannot be ‘aspirational’ – it is not within the scope of law to statutorily mandate positive action; it can only enforce minimum standards.<sup>8</sup> Thus, whereas law can ban companies from using child labour, it cannot force companies to build excellent schools or be as environmentally

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4 Press Information Bureau, Ministry of Corporate Affairs, Government of India, *Corporate Social Responsibility*, 11 Aug. 2011 available at <http://pib.nic.in/newsite/erelease.aspx?relid=74428>.

5 Department of Public Enterprise, *Guidelines for CSR and Sustainability for Central Public Sector Enterprises*, available at [http://www.dpemou.nic.in/MOUFiles/Revised\\_CSR\\_Guidelines.pdf](http://www.dpemou.nic.in/MOUFiles/Revised_CSR_Guidelines.pdf).

6 *Supra* note 2 at 4.

7 *See Azim Premji against law on mandatory CSR spending by corporates*, The Economic Times, Mar. 24, 2011 available at [http://articles.economictimes.indiatimes.com/2011-03-24/news/29181451\\_1\\_csr-spending-corporate-affairs-murli-deora-azim-premji](http://articles.economictimes.indiatimes.com/2011-03-24/news/29181451_1_csr-spending-corporate-affairs-murli-deora-azim-premji); *Also see IT CEOs back Premji, against mandatory CSR*, Times of India, Mar. 26, 2011 available at [http://articles.timesofindia.indiatimes.com/2011-03-26/software-services/29191926\\_1\\_csr-azim-premji-corporate-social-responsibility](http://articles.timesofindia.indiatimes.com/2011-03-26/software-services/29191926_1_csr-azim-premji-corporate-social-responsibility).

8 Aneel Karnani, *Mandatory CSR in India: A Bad Proposal*, Stanford Social Innovation Review Blog (May 20, 2013) available at [http://www.ssireview.org/blog/entry/mandatory\\_csr\\_in\\_india\\_a\\_bad\\_proposal](http://www.ssireview.org/blog/entry/mandatory_csr_in_india_a_bad_proposal).

conscious as possible.<sup>9</sup> However, the above contention is ill-founded, both on technical legal grounds, as well as on practical considerations.

As far as the legal strength of this argument is concerned, the Constitution of India itself offers a prominent example of such ‘aspirational law’ being enforced, in the form of Article 21-A of the Constitution.

Technically speaking, the Directive Principles of State Policy are non-justiciable, as per Article 37 of the Constitution i.e. they cannot be enforced in a Court of Law, because these Principles impose positive obligations on the State. However, there have been instances where these principles have been realised in the form of a right. A major example and thereby proving an exception to this constitutional principle lies in the form of Article 21-A,<sup>10</sup> which was consequently given the shape of a legislation through the Right of Children to Free and Compulsory Education Act, 2009 (‘RTE Act’). The RTE Act, read with Article 21-A of the Constitution, guarantees to every child of the age of six to fourteen years a right to ‘full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.’<sup>11</sup> Thus, the ‘Grundnorm’ of our country itself has imposed positive obligations, and to state that the law cannot do the same is a fallacious argument.

Even from a practical viewpoint, there is a need for CSR to be mandatory. Though certain large companies such as Tata, Infosys and Mahindra & Mahindra are active participants when it comes to CSR activities, the performance of India Inc. has not been very impressive when it comes to taking up CSR initiatives. Even though Reliance India Limited is the largest CSR spender amongst Indian companies, even then its expenditure does not amount to 2% of the Profit After Taxes (PAT), as will be required under the Companies Bill, 2011. According to a survey carried out by Forbes India, only 6 out of the top 100 companies of India (ranked on the basis of net sales figures) contributed more than 2% of their profits

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9 Caroline Van Zile, *India’s Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market*, 13 Asian-Pacific L. & Pol. J. 280 (2011-2012).

10 Inserted by the Constitution (Eighty-Sixth) Amendment Act, 2002.

11 Ministry of Human Resource Development, Government of India, *Right to Education*, available at <http://mhrd.gov.in/rte>.

after taxes towards CSR initiatives.<sup>12</sup> Also, only 16 out of the top 100 companies published a separate Sustainability Report for the financial year 2011-2012.<sup>13</sup> Similarly, a study indicates that 60% of the participants of the Global Compact Society (GCS), India's counterpart of the United Nations Global Compact (UNGC), had not submitted a 'Communication on Progress' or COP Report, which is the UN's version of a Sustainability Report by the company, stating the various CSR initiatives taken by it for the benefit of its various stakeholders.<sup>14</sup>

The above facts clearly indicate that what India Inc. does is 'corporate compulsion responsibility', and not CSR. Companies take up minimal CSR initiatives in order to follow what has been termed as the 'check-box' approach – they just want to tick the box of fulfilling their CSR obligations. Hence, from a practical viewpoint, the Companies Bill, 2011 has actually taken a smart move by bringing in the '2% of PAT' provision. Companies will now be forced to not merely 'tick the box', but to explore such areas where they can effectively implement various CSR initiatives because they have to statutorily spend a minimum of 2% of their PAT, irrespective of whether they would prefer to do the same or not.

## **V. DIFFERENCES BETWEEN 'MANDATORY CSR' AND 'TAX'?**

Venu Srinivasan, Chairman of TVS Motors, has stated that this measure would be similar to imposing a tax; so have others.<sup>15</sup> However, this is a flawed argument, both from a legal and practical aspect.

*From a legal viewpoint*, the primary purpose of a 'tax' is the collection of revenue. When the Government imposes a tax, it need not identify a specific

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12 *CSR Report Card: Where Companies Stand*, Forbes India, Mar. 18, 2013 available at <http://forbesindia.com/article/real-issue/csr-report-card-where-companies-stand/34893/1>.

13 *India Inc. needs to wake up to its social responsibilities*, Forbes India, Mar. 18, 2013 available at <http://forbesindia.com/article/boardroom/india-inc-needs-to-wake-up-to-its-social-responsibilities/34891/1>.

14 Anil Kumar Sharma & Rupal Tyagi, *CSR and Global Compact: The Indian Perspective*, IX (3) IUP J. of Corporate Gov. 38-68 (July 2010) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1656196](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656196).

15 *India Inc. questions mandatory CSR*, The Indian Express, Dec. 20, 2012 available at <http://www.indianexpress.com/news/indian-inc-questions-mandatory-csr/1047785/>.

benefit accruing from the same.<sup>16</sup> However, that is not the purpose of clause 135 of the Companies Bill, 2011 – the money being used by the companies in CSR initiatives would not be filling the coffers of the Government. Also, the said money would be directed towards specifically earmarked activities.

*From a practical viewpoint*, money given as ‘tax’ goes to the State, and not directly to the community. For what purpose that money is used is left to the discretion of the Government. Also, in a country like India, where often the money does not percolate to the grassroot level due to various reasons such as corruption, bureaucracy, population etc, mere payment of taxes cannot be a means of ensuring that social good is being done. On the other hand, the measure under clause 135 is much more effective than a tax – companies have full freedom to give priority to social causes they want to support, and because the money is directly pumped into CSR initiatives, the impact is much higher. Clause 134 provides for mandatory disclosure of the implementation of the CSR Policy, and provides for penalty in case of failure to do the same. Hence, not only does the measure under clause 135 not amount to a ‘tax’, it is also more effective than a taxation scheme.

Thus, it is submitted that ‘voluntary CSR’ is no longer sufficient to ensure that companies realize their obligations towards various stakeholders (both at a micro and macro level) – it is only through ‘mandatory CSR’ that companies would take up CSR initiatives in a more streamlined manner. However, as has been examined below, there are certain problems with the way in which clause 135 has been drafted, resulting in various loopholes which would render this measure redundant.

## **VI. HINDRANCES CAUSED BY CLAUSE 135 OF THE COMPANIES BILL, 2011**

### *a) Constitutional Validity*

Clause 135 of the Companies Bill creates a classification amongst the existing companies in India. It divides companies into two categories –

- a. Companies having a net worth of five hundred crore rupees or more, OR a turnover of rupees one thousand crore rupees or more OR a net profit of rupees five crore or more.

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<sup>16</sup> Jindal Stainless Steel Ltd. and Anr. v. State of Haryana and Ors., AIR 2006 SC 2550.

b. Other remaining companies.

Now, clause 135 is applicable only to companies in category (a) as stated above. Since this clause creates a ‘classification’, it would attract the tests of being valid on the threshold of Article 14 of the Constitution of India i.e. equality before law.

The Supreme Court has laid down the following two tests for any classification to be held to be valid under Article 14:<sup>17</sup>

- a. The classification must be based on an intelligible differentia i.e. the groups created through the classification must be easily distinguishable from each other.
- b. The classification created must have a rational nexus to the object sought to be achieved by the Act.

While clause 135 easily satisfies the first test, it is the second test where it fails. As has been stated by the Minister for Corporate Affairs, the purpose of this clause is to ensure that ‘corporate entities contribute meaningfully’ towards the growth and prosperity of the nation.<sup>18</sup> A similar concern had been raised by the Standing Committee on Finance.<sup>19</sup> However, nowhere is there a mention as to how these figures have been arrived at, or why only these particular companies should be subjected to such an obligation. Such a categorization of companies seems ‘arbitrary’, so to speak – and there might be allegations that the Ministry of Corporate Affairs might be inclined towards bringing only ‘big’ companies in the ambit of this clause. However, is no definition, legal or otherwise of a ‘big’ company? Why cannot companies having a net worth of four hundred crores, or a turnover of rupees nine hundred crores, or a net profit of rupees four crores qualify as ‘big’ companies and have the same legal obligation as under clause 135?

Moreover, the factors on the basis of which the three classes of companies have been created under this clause are bound to create confusion.<sup>20</sup> On examining

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17 In Re: Special Courts Bill, 1978, AIR 1979 SC 478.

18 *Infra* note 23.

19 *Supra* note 8.

20 See *supra* “Introduction”.

the Economic Times' list of the top 500 companies of India for 2012,<sup>21</sup> there are certain companies which have revenues exceeding rupees one thousand crore, but have incurred a net loss. However, if we are to look at the language of clause 135, then even such a company, after incurring losses, would also be required to mandatorily undertake CSR obligations, as the word 'or' has been used i.e. if a company falls in either of the three categories, then clause 135 will apply to it. Though such a company may give the incurring of a net loss as a reason in its Directors' Report for not undertaking CSR obligations (as required in the proviso (5) to clause 135), whether the same would be accepted as a valid reason or not can only be decided by adjudication by the courts, as the clause or Bill is silent about the same.

Thus, the various discussions on the Bill have failed to show a nexus between the classification created by the clause and the object of clause 135 of the Companies Bill, as there is nothing to suggest that only these categories of companies can afford to undertake CSR obligations. Thus, this clause would be liable to be struck down as violative of Article 14 of the Constitution, if subject to judicial review.

*b) Absence of A Monitoring Body*

When one reads clause 135 of the Companies Bill, 2011, a question which strikes out is this – 'how does the Government expect to ensure compliance of the companies?'

Clause 135(5) states that when the company fails to spend 2% of its three years' average profits on CSR initiatives, the Board of Directors are required to state the reasons for the same in the report required to be produced under clause 134(3)(o). The latter clause states that the CSR policy and the initiatives taken thereby must be stated in the report under clause 134. Strangely, there is no mention of the report being submitted to the Government or to a monitoring body – the clause only talks about the report to be submitted by the Board of Directors in the general meeting. Also, because a large number of companies would fall within the ambit of this clause, it would be a monumental task for the said

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21 *ET 500 List – India's top companies 2012*, The Economic Times, available at <http://economictimes.indiatimes.com/et500list.cms>.



monitoring body to ensure that each company has complied with the said provisions.

Though only to some extent, the Companies Bill does provide for measures to ensure compliance. Clause 134 lists a number of details which the Board of Directors is mandatorily required to furnish in the Directors' Report. One of such details required to be furnished is that about the CSR policy developed and initiatives taken in accordance with the same, as mentioned in clause 134(3)(o). There is a provision for penalty in clause 134(8), which states that where a company fails to meet any of the provisions stated in clause 134, it would be subject to a minimum fine of fifty thousand rupees, which may extend up to twenty five lakh rupees, along with the imprisonment of the defaulting company officer for a maximum period of three years. Reading clause 134(8) with clause 135(5), it can be deduced that where a company fails to state the reasons for not contributing 2% of its average profits towards CSR initiatives, then the same would be subject to the penalty under clause 134(8) of the Companies Bill, 2011. This deduction can be inferred from the rule of statutory interpretation that a statute must be read as a whole, so as to be construed with reference to other clauses of the same.<sup>22</sup> While the Standing Committee on Finance has indicated that this 'self-disclosure' policy is sufficient to ensure compliance on behalf of the companies,<sup>23</sup> it is submitted that the same would not be sufficient and a monitoring body should be setup.

It is also noteworthy that in order to ensure compliance, clause 135(1) provides that at least one member of the CSR Committee must be an independent director i.e. a person who has no pecuniary relationship with the company, amongst other requirements.<sup>24</sup>

## **VII. TAX BENEFITS UNDER CSR – MAKING MANDATORY CSR 'PROFITABLE'**

Under the Income Tax Act, 1961, there are a number of sections which provide for deduction of certain CSR-related expenses –

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22 G. P. Singh, Principles of Statutory Interpretation 35 (12<sup>th</sup> edn., 2010).

23 *The Companies Bill 2009 – Twenty First Report*, Standing Committee on Finance (2009-2010), Ministry of Corporate Affairs available at [http://www.icsi.edu/webmodules/linksofweeks/21\\_Report\\_Companies\\_Bill.pdf](http://www.icsi.edu/webmodules/linksofweeks/21_Report_Companies_Bill.pdf).

24 See clause 149(5), Companies Bill, 2011.

- a. Payments which are made towards eligible projects or schemes approved by the National Committee for Promotion of Social and Economic Welfare, which functions under the Department of Revenue. (S.35AC)
- b. Payments made to associations or institutions for carrying out rural development programmes (S.35CCA)
- c. *Profits or gains earned from newly established industrial undertakings or hotel business in backward areas (S.80HH).*

Other sections include Sections 35CCB, 80G and 80GGA.

As can be seen, the Income Tax Act provides only for certain categories of CSR expenses to be treated as tax-deductible. As expected, India Inc. has been strongly demanding for making the 2% CSR expenditure a tax-deductible expense, as they are being 'forced' to fork out 2% of their profits by the Government.<sup>25</sup>

However, a major problem with this demand is the lack of the definition of a 'CSR initiative'. It is a commonly accepted fact among scholars that CSR is very difficult to define.<sup>26</sup> Taking an example from the Income Tax Act itself, one may argue that point (c) stated above should not qualify as a CSR expenditure as setting up an industrial undertaking or hotel business is a commercial activity, irrespective of the company's intention. At the same time, it can also be argued that because the said activity is taking place in a backward area, it will generate employment for the people of the said area, thereby qualifying as a CSR initiative. Thus, this would result in litigation, which neither the company nor the government desires.

Assuming that the above limitation can be tackled to some extent, it is the Government's duty to bring in such policy which fosters a healthy attitude amongst companies with respect to fulfilling their CSR obligations.<sup>27</sup> Because only a certain class of companies would be covered by clause 135 of the Companies Act, their competitive standing in comparison to the other companies who are not covered by

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25 *Mandatory CSR: India Inc. asks for tax breaks in return*, The Financial Express, Dec. 5, 2012 available at <http://www.financialexpress.com/news/mandatory-csr-india-inc-asks-for-tax-breaks-in-return/1040519>.

*India Inc. for tax sops on CSR*, Business Standard, Dec. 20, 2012 available at [http://www.business-standard.com/article/companies/india-inc-for-tax-sops-on-csr-112122000202\\_1.html](http://www.business-standard.com/article/companies/india-inc-for-tax-sops-on-csr-112122000202_1.html).

26 *Supra* note 9 at 275.

27 *Tax and Corporate Social Responsibility*, David F. Williams, KPMG, UK, Sep. 2007 available at [http://www.kpmg.co.uk/pubs/Tax\\_and\\_CSR\\_Final.pdf](http://www.kpmg.co.uk/pubs/Tax_and_CSR_Final.pdf).

this clause would be affected, as they are the ones who have to spend 2% of their profits. Thus, they must be compensated in some manner for this expenditure, in order to encourage companies to take up such CSR initiatives ‘wholeheartedly’, and not just for the sake of complying with the law.

It must be noted here that it is not within the jurisdiction of the Ministry of Corporate Affairs to decide the tax-deductibility of CSR expenditure under clause 135, and thus, outside the scope of the Companies Bill, 2011. The deductibility of such CSR-related expenditure, if any, can only be provided for by the Finance Bill, when it is introduced in the Budget i.e. it would fall within the jurisdiction of the Ministry of Finance. Considering that the Finance Act, 2013 has already been passed on May 10, 2013,<sup>28</sup> the benefit to the companies, if any, can only be provided in 2014, when the Finance Bill will be discussed in the Union Budget for 2014-15.

### **VIII. NO DEFINITION OF ‘CSR’**

Nowhere does the Companies Bill, 2011 provide a concrete definition of what amounts to ‘CSR’. This becomes a problem because the scope of the term ‘CSR’ is extremely wide – while certain issues such as environment, healthcare, education etc. are commonly accepted as part of CSR activities, there is much confusion with respect to the definition of Corporate Social Responsibility.<sup>29</sup> If the scope of the CSR activities is not clearly defined, then this would result in disastrous consequences with respect to the implementation of clause 135, as well as increased litigation for both the companies and the governing body. This can be seen from the illustration given above, with respect to provision of tax benefits.

This is only the first half of the problem – the second half of the problem is the creation of ‘Schedule VII’. Schedule VII, as laid down in the Companies Bill, gives a list of activities which ‘*may be included*’ by companies in their CSR Policy, as the language of the Schedule itself states i.e. the list of items given in the

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28 *Finance Act 2013*, Tax India Online.com available at [http://www.taxindiaonline.com/RC2/union\\_budget/finance\\_act/finance\\_act\\_13/index.htm](http://www.taxindiaonline.com/RC2/union_budget/finance_act/finance_act_13/index.htm).

29 *Corporate Accountability and Triple Bottom Line Reporting: Determining the Material Issues for Disclosure*, Justine Nolan, UNSW Law Research Paper No. 2007-15; See also *Enhancing Corporate Accountability: Prospects and Challenges Conference Proceedings 1* (March 20, 2007) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=975414](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975414)>.

Schedule should be indicative, and not exhaustive. However, clause 135 seems to state otherwise. Sub-clause 3(a) of clause 135 states that the CSR Committee shall indicate such activities ‘*as specified in Schedule VII*’. Which would mean that if a company does any activity beyond the scope of Schedule VII, it would not qualify as a CSR initiative.

This could have been a viable proposal, had it not been for the narrow scope of CSR activities that Schedule VII provides for – it lists only 9 activities in total, none of which cover any CSR activities carried out within the company i.e. micro-level activities. For example, the Schedule does not provide for any employee/worker welfare activities. One can also find a number of macro-level activities (carried outside the company) which have not been included. An example can be activities undertaken to promote awareness against drugs, liquor and other harmful substances. Thus, this would leave scope for litigation to arise, as there would be disputes regarding what amounts to CSR and what does not. Also, it robs companies of their due freedom to decide as to which area of CSR they would like to contribute to.

A possible answer to this question may lie in the previous CSR guidelines issued by the Government. For instance, SEBI had released a circular on ‘Business Sustainability Reports’, which made it mandatory for the top 100 listed entities on the BSE and NSE to disclose initiatives taken from the perspective of ‘Environmental, Social and Governance’ (ESG) norms. This circular contains an Annexure titled ‘Principles to assess compliance with ESG Norms’,<sup>30</sup> which gives a definite, yet broad scope as to what kind of activities can be considered to be ‘responsible business practices’. Similarly, a reference can be made to the Voluntary Guidelines issued in 2009.<sup>31</sup> All these sources, when read with Schedule VII, can give a somewhat defined scope as to what constitutes CSR activities, with enough freedom for companies to decide which area they would like to work upon.

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30 *Business Sustainability Reports*, Circular no. CIR/CFD/DIL/8/2012, Securities and Exchange Board of India (SEBI), Aug. 13 2012 available at [http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1344915990072.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1344915990072.pdf).

31 *Supra* note 3.

## **IX. CONCLUSION**

Though the aim which clause 135 of the Companies Bill, 2011 seeks to achieve is worthy of appreciation, even from a practical viewpoint, the manner in which the Bill has sought to achieve the same is fraught with errors. It seems like a ‘knee-jerk’ reaction to the problem of CSR not being followed with enough fervour by companies in India. The Government, it seems, has followed a ‘socialist’ approach in framing this clause, rather than making it ‘company friendly’ – this is the reason why it has been met with so much opposition from India Inc. The following solutions can be suggested in order to make this Bill more effective and more ‘company friendly’:

- *Amend Schedule VII to include a broad definition of CSR.* As has been suggested earlier, reference can be made to the earlier guidelines issued by the Central Government for this purpose. Because the Bill seeks to restrict the scope of CSR activities to those which have been enlisted in Schedule VII of the Companies Bill, 2011, it should provide a vast definition for CSR, in order to provide companies with the freedom to select from a large number of areas.
- *Tax sops must be provided for this expenditure.* As has been discussed in much detail earlier, this will provide a positive environment for the companies to function in, with respect to CSR activities.
- *Appoint a separate body for overlooking compliance with the obligations under clause 135.* This measure is bound to result in administrative difficulties, and the presence of a separate body which would monitor the CSR expenditure would ensure a higher and more effective degree of compliance. Leaving it only in the hands of the shareholders would not be sufficient.

This still leaves us with the problem of constitutional validity, which is something that cannot be solved so easily. Research, studies and a report will aid the Government in order to decide as to which class of companies should be covered by this clause. All in all, a lot of introspection is required before clause 135 can finally turn into Section 135 of the new Companies Act.