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Fast Tracking Companies Bill, 2011



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To quote Gloria Borger, *“for most folks, no news is good news;”* This however might not be conceded by those who were eagerly waiting for the Companies Bill, 2011 (“Bill”) to get some direction. It has taken the Union Cabinet nearly two decades to replace the extant Companies Act, 1956 (“Act”) with such a legislation that would have one basic premise – *transparency*. Procedural technicalities and political tensions ensured the delay in getting a Cabinet approval for the Bill.

Prime Minister Manmohan Singh at an event in April, 2012 said that *“The Companies Bill presently under consideration of Parliament seeks to provide a further fillip to the cause of Corporate Social Responsibility (CSR) and Corporate Governance and Investor Protection.”* In keeping with the same, the Union Cabinet which has initiated a fast track reforms attitude finally gave its nod to the Bill on October 04, 2012 breathing life into the long awaited Bill. The Union Cabinet has finally shown some resolute to this lagging Bill. Hopefully, the Bill will be placed in the winter session of the Parliament for final approval. The Union Cabinet’s nod to the Bill came on a day when it also approved other reforms, a move which was rejoiced by the markets with Sensex registering a 118 points gain.

So, why this sudden drive or to be more optimistic, interest in the Bill?

The Bill gained momentum after the Satyam fiasco, *Indian Enron* scandal to some. This particular fiasco had put India Inc. on international platform for all the wrong reasons. For a company, which had received corporate governance awards, to manage a scandal on such a large scale, showed the glaring loopholes in the applicable legislation. In fact, the Bill among the industry insiders is even being termed as the *“anti- Satyam”* bill. The Prime Minister had in the month of September 2012 had said *“We will soon bring before Parliament the new Companies Bill that has been in the making for quite some time now....”* giving a signal that yes we are no more wanting to drag it further, but give the green signal as soon as possible. As commented by the Prime Minister, the industry also hopes that the Bill will serve the purposes it is meant for.

Here, we have put together a comparison between the Bill (Bill No. 121 of 2011) and the Bill as approved by the Union Cabinet, juxtaposing the same with the recommendations of the Standing Committee submitted in its Report presented to the Hon’ble Speaker on June 26, 2012:

Bill as per Bill No. 121 of 2011	Bill as approved by Union Cabinet
Inclusion of Whole Time Director (“WTD”) in definition of Key Managerial Personnel (“KMP”) (Clause 2 (51))	
KMP originally included Chief Executive Officer (“CEO”) or Managing Director (“MD”) or manager, Company Secretary, CFO.	Now this would also include WTD.
This is in line with the recommendation of the Standing Committee to streamline the liability of all the officers of the Company. Whether or not the Company has a MD, WTDs are now included within the meaning of KMPs	

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Corporate Delinquency (Clause 36)	
This clause related to fraudulently inducing a person to invest in the company.	Now, Clause 36(c) added to include punishment for falsely inducing a person to enter into any agreement with bank or financial institution, with a view to obtaining credit facilities.
The scope for taking action for punishment for fraud has been further widened to include cases where there is inducement by any person to enter into an agreement for obtaining credit facilities. The punishment shall be imprisonment and fine, i.e. fraud related offences have been made severe and stringent. Therefore any gain/loss made/caused on account of entering into such agreements with banks and financial institutions are further liable to action under Clause 447.	
Private Placement (Clause 42)	
Subject to the provisions of Clause 25 of the Bill, which related to offer or sale of shares to public, companies could also make an offer of invitation of securities by <i>private placement</i> .	The term has been defined.
Defining the term is in line with the suggestion of the Standing Committee. This was suggested to prevent misuse of existing provisions on the matter (a recent case in question being the Sahara matter), to protect interest of investors and to synchronize the provisions with SEBI regulations / norms.	
The exact definition is still not known; however, with the number of members in a private company being increased to 200, something on similar lines is expected.	
Approval of the Tribunal shall be required for consolidation and division of share capital (Clause 61)	
Consolidation and division of share to be done after making application to the Tribunal and obtaining consent.	Now, approval of the Tribunal to be sought only if the voting percentage of shareholders changes consequent on such consolidation.
The Standing Committee had suggested that the approval of Tribunal required may be done away with as share consolidation and division is an internal affair of a Company but the Ministry aims to protect the interest of the minority shareholders as such consolidation and division in many cases are made to oust the minority shareholders.	
Corporate Social Responsibility (Clause 135)	
Clause 135 wanted every applicable company to 'make every endeavour' to ensure to spend 2% of its average net profits to of preceding three financial years towards CSR.	The phrase 'make every endeavour' has been deleted and replaced with 'shall ensure'. Further, local areas where the company operates are to be given preference in the CSR policy.
This is in tune with the suggestion of the Standing Committee. Since, corporates are expected to be socially responsible, they will have to ensure to have concrete CSR plans in	

place.	
Limit to act as auditor (Clause 141(3)(g))	
The limit in respect of maximum number of companies in which a person may be appointed as auditor has been proposed as twenty companies.	
Initially the Clause did not specify the maximum number of companies in which an auditor could be employed, but now it is proposed that the maximum number of companies should be twenty. Standing committee had recommended that as in the existing Act, exemption given to private limited companies should be restored and that the Clause should be in sync with the Chartered Accountants Act, 1949. Not completely, but partially it seems that the recommendation has been given heed to.	
Audit of Government Companies (Clause 143(5) and (6))	
Powers relating to audit of Government Companies by Comptroller and Auditor General (“CAG”) of India modified to perform such audit effectively. This is in line with the suggestion of Standing Committee whereby, the CAG has been mandated to issue directions in the way the accounts of Government companies should be done in general and not just keeping Accounting Standards in view.	
Scope of audit (Clause 144)	
This Clause prescribes certain services to be not rendered by the statutory auditor of the company. This also extends to the subsidiary / holding/associate company.	Provisions modified such that restriction will not apply to associate company. Transition period for complying with the provisions to be also provided.
Punishment for contravention of provisions by auditors (Clause 147 and Clause 245)	
Clause 139 to 146 relates to audit and auditors. Clause 147 relates to punishment of auditor for contravention of these clauses.	Under Clause 245, Central Government has been empowered to specify any specific authority/ body to ensure that in case of such a contravention, the amount paid as penalty be given to the affected parties including tax authorities.
Independent Directors (IDs) not liable to retire by rotation (Clause 149 and 152)	
Clause 149(12) kept IDs out of the purview of retiring by rotation. Clause 152(6) (c) relating to retiring by rotation did not specifically exclude IDs from calculation of one third of retiring directors.	Clarification to provide that IDs will not be considered for calculation of directors retiring by rotation.
Minimum rate of interest for loans and investment by the company (Clause 186)	
Loan to be not provided at a rate of interest lower than what is prescribed and made public u/s 49 of the RBI Act, 1934.	Interest rate shall be the prevailing rate of interest on dated Government securities.
The amendment is in line with the suggestion of the Standing Committee. The market for the dated Government securities is now developed with enhanced liquidity unlike	



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previously when the bank rate was the only major benchmark and market related benchmarks had not stabilized.	
Appointment of individual as Chairperson and Managing Director (“MD”)/ Chief Executive Officer (“CEO”) (Clause 203)	
Prohibition of the captioned, subject to provisions of the Articles of Association of the company.	Prohibition has been relaxed such that in case of companies, which have arrayed lines of businesses and separate divisional MDs, the same person be appointed as Chairman and MD.
Power to remove difficulties (Clause 470)	
Power to Central Government to remove any impediments in the implementation of provisions, by publication in Official Gazette, within a period of <i>three years</i> from the enactment of the legislation.	The time limit has been revised to <i>five years</i> .
This has been done to remove any hardships in transiting from existing arrangements. Some such clauses are: Clause 149, Clause 186	

Our Analysis

What started off as a means to streamline the Company Law legislation has started to see the light of the tunnel. In fact, the Bill is unique in its own way as it is the first legislation to include CSR in its legislation for companies. The Act has always been open to various interpretations and has through the years seen landmark judgments. Once the Bill is finally passed, it will start another process of discussions and interpretations, making for an interesting scenario for all company law enthusiasts and the corporate world surely!!

For our other write-ups of Companies Bill, 2011 and related study you may visit the following links:
Highlights of Companies Bill, 2011: <http://www.india-financing.com/Companies%20Bill%202011-highlights.pdf>

Companies Bill, 2011 at a glance: http://www.india-financing.com/Companies_Bill_2011.pdf

Highlights of Standing Committee Report on Companies Bill, 2011: <http://www.india-financing.com/Companies%20Bill%202011-highlights.pdf>

Role of a Company Secretary under the Companies Bill, 2011: <http://www.india-financing.com/Role%20of%20CS%20under%20Companies%20Bill,%202011.pdf>