

Part I Corporate Governance and Corporate Law Reform in India: Note

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NOTES

¹ Fiscal Responsibility and Budget Management Bill, 2000 was introduced in Parliament in December 2002 to eliminate the government's revenue deficit and cut the fiscal deficit to 2% of GDP in five years.

² Two task forces were set up in September 2002, one each on Direct Taxes and Indirect Taxes, chaired by Dr. Vijay Kelkar. He gave the final Report on December, 2002.

³ The Act provides the first legal framework that recognizes securitization, asset recovery and reconstruction. The Act made it easier to recover bad loans from willful defaulters.

⁴ Chakrabarty Committee Report on Financial and Banking Reforms, Report submitted in 1985.

⁵ The Narasimham Committee, which first submitted its report in 1991 was again set-up as Narasimham and Andhyarujina Committee in 1998 to examine the banking sector reforms and changes in the legal system required to facilitate, *inter alia*, speedy recovery of bank loans. The Report was submitted on February 20, 2000.

⁶ Act No.12 of 2003. The Competition Act, 2002 provides for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of the consumers and to ensure freedom of trade carried on by other participants in markets in India.

⁷ SEBI (Disclosure and Investor Protection)(DIP), Guidelines 2000. This circular alongwith the Annexure is available at SEBI website at <http://www.SEBI.gov.in>.

⁸ There are two basic corporate finance and governance systems. One is the Anglo –Saxon “market – based” system. The other is represented by the Japanese and German “relationship – based” system. Given the increasing globalization, either of two or both system may exist. In India, both the systems continue to coexist. In ‘relationship-based’ system, companies raise most of their external finance from banks, and the banks have close, long-term relationship with their corporate customers.

⁹ “Market – based” system rely on markets for external finance. Markets also provide solutions to corporate governance. Both the systems have been discussed in Paper-B of this Report. See also, Paul J N Halpern, “Systemic Perspectives on Corporate Governance Systems”, in Stephen S.Cohen and Gavin Boyd (ed.) *Corporate Governance and Globalization*, published by Edward Elgar, Cheltenham, UK (2000). See also: Jonathan R. Macey, “Measuring the Effectiveness of Different Corporate Governance Systems”, in Joel M. Stern and Donald H. Chew (ed.) *The Revolution in Corporate Finance* (Blackwell 2003).

¹⁰ The Government of India in June, 2002 enacted a new Act, “The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002” for granting statutory powers to banks and financial institutions for possession and sale of security, to expedite recovery of loans and bring down their non-performing assets. The Act, enables the banks and financial institutions to hive off their non-performing loan portfolio by way of transfer to asset reconstruction or securitisation companies licensed by Reserve Bank of India. The Act confers enormous powers on such companies for taking all steps without intervention of courts. These companies can even take-over the business for realization of loans acquired. No reference can be made to Board of Industrial and Financial Reconstruction (BIFR) or under Sick Industrial Companies Act (SICA), when these companies acquire assets.

¹¹ The Securities and Exchange Board of India Act, 1992 (ACT NO. 15 of 1992) was enacted to provide for the establishment of a Board to protect the interests of the investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto.

¹² In 1996, the Confederation of Indian Industry (CII) set-up a committee to prepare a comprehensive voluntary code of corporate governance for listed companies. The final report was released in April 1998.

¹³ The earlier Companies Act were dated of 1882, 1913, 1936 and 1951.

¹⁴ The 2003 bill proposed to insert 16 new sections, substitute 34 existing sections, amend 123 existing sections and delete 21 existing sections, thus covering over 40 changes in its 174 clauses. The Bill included many reformatory provisions such as holding/subsidiary relations, sale, lease or disposal of the undertaking, officer who is in default, board size, independent directors, maximum term of 9 yrs for independent directors, reservation of board seats for women, retirement age for directors at 75, restriction on number of investment companies, consolidation of group accounts and qualification and disqualification of auditors.

¹⁵ Ministry of Finance and Company Affairs, Department of Company Affairs, Government of India on 21 August 2002 vide order No. 12/25/2202-IGC constituted a Committee to examine the Auditor – Company Relationship, Regulating Auditors etc, under the Chairmanship of Shri. Naresh Chandra.

¹⁶ R.D.Joshi Committee was appointed to examine the report of the Joint Parliamentary Committee on 1992 security scam.

¹⁷ Act No. 11 of 2003, assented to by the President on 13 January 2003, published in the Gazette of India, Extraordinary, Part ii, section 1, issued by Ministry of Law and Justice, Legislative Department, New Delhi on 14 January 2003.

¹⁸ The Depositories Act, 1996 has been enforced since September 20, 1995. The Government of India enacted the depository system to smoothen the registration of transfer of shares by the companies and eliminate refusal to such transfers. The Act has paved the way for smooth takeovers. The SEBI (Depositories and Participants) Regulations, 1996 provides for the rights and obligations of the depository and other constituents.

¹⁹ Tarapore Committee was constituted to inquire into the activities of Unit Trust of India. Report submitted on October 18, 2001.

²⁰ The Economic times, 23 January 2003.

²¹ Companies Act, 1956, section 560 deals with the Power of Registrar to strike defunct company off register.

²² Companies Act, 1956, section 63, deals with criminal liability for mis-statement in prospectus; section 68 for penalty for fraudulently inducing persons to invest money; and section 628 provides penalty for false statements.

²³ The Advisory Group on “Corporate Governance” was set up w.e.f. Feb. 8, 2000, under the Chairmanship of Dr. R.H.Patil. It submitted its report on March 24, 2001, see <http://www.rbi.org.in>

²⁴ Confederation of Indian Industry (CII), Desirable Corporate Governance: A Code (1998).

²⁵ Unit Trust of India (UTI), Code of Governance (1999).

²⁶ The Standing Committee was constituted by the RBI, in consultation with the Government of India, in December, 1999. The Committee submitted its Report in May, 2002. The Report indicated that its main objective was to essentially sensitize the authorities and markets to international practices and to bench-mark Indian market practices with international standards and codes.

²⁷ The Government of India, in August 2002, constituted a High Power Naresh Chandra Committee to examine the Auditor-company relationship, to examine the role of independent directors and how their independence and effectiveness can be ensured. The Committee submitted its report to the Finance Minister on 23rd December 2002. The Committee recommended that audit committee to be set-up

composed of independent auditors, companies to have at least 50 percent independent directors, certain professional assignments should not be undertaken by auditors, every five years audit partner should rotate but no need for audit firm's rotation.

²⁸ Rajas Kelkar, "FIIs Control 13.3% of Blue chip Market Capital", *The Economic Times*, 28 January, 2003

²⁹ In a December 13, 2003 judgement, Bombay High Court has virtually closed Section 100 of the Companies Act to firms that wish to eliminate minority equity holding, under its provisions merely to make them closely held. In his written order dismissing the petition of *Sandvik Asia Ltd.* that gave minority investors a Hobson's choice of exiting at Rs. 850 per share or nothing, Mr. Justice S.Radhakrishnan of the Bombay High Court said the company should have got its plan approved separately by promoters and non-promoters. In a mid-October oral order, the Court had disallowed Sandvik's scheme but has detailed now why the scheme was unjust and inequitable.

³⁰ Cadbury Committee Report on the Financial Aspects of Corporate Governance, 1992 (London: Gee); Greenbury Committee Report 1995. "Directors Remuneration," Report of a Study Group chaired by Sir Richard Greenbury (London: Gee); Hampel 1998 Final Report of the Committee on Corporate Governance (London: Gee).

³¹ Higgs 2003 Review of the Role and Effectiveness of non-executive directors (DTI, London).

³² Turnbull Report (1999), "Internal Control: Evidence for directors of listed companies incorporated in the United Kingdom," (London: ICAEW).

³³ Blue Ribbon Committee Report on Improving the Effectiveness of Corporate Audit Committees (1999) CLJ Vol.1, March 2003.

³⁴ The Sarbanes - Oxley Act, 2002, CLJ, Vol.1, March 2003.

³⁵ The disciplinary committee of the Institute of Chartered Accountant of India, between April'02 and March'03 found 37 CAs guilty under section 21 of the Chartered Accountant Act, out of which 17 were held guilty under the first schedule of section 21, another 17 under the second schedule and the 3 under both. The Council considered 173 cases for its *prima facie* opinion and referred 66 to disciplinary committee.

³⁶ Carroll, Archie B & Buchhaltz Anna K, "*Ethics and Stakeholder Management*" in *Business & Society* (2002).