

Discussion Paper on “Rationalisation of the Regulatory Framework for Enhancing the Effectiveness of Insolvency Professional Entities in Insolvency Resolution Process”

This paper seeks to implement measures to enhance the effectiveness of Insolvency Professional Entities (the entities or IPE) by rationalising the regulatory framework to meet the emerging requirements arising due to evolving role of the entities in conducting the insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (IBC or the Code).

Need for enhancing the effectiveness of Insolvency Professional Entities

2. The concept of IPEs was laid down in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (IP Regulations) first notified in November 2016. In March 2018, the Board amended the IP Regulations for defining the role and additional eligibility requirements for IPEs i.e., to provide support services to individual Insolvency Professionals (IPs) who are its partner or director, ensure majority shareholding and management with IPs and prohibiting multiple partnership or directorship with IPEs. Lately, in September 2022, the Board had allowed the entities to carry on the activities of IP to leverage the paraphernalia of resources and experience of entities to enhance the efficiency of insolvency resolution process. Till 30th September 2023, there were 113 active recognised entities (a company, limited liability partnership, registered partnership firms). Of these, 64 entities have also been registered as IPs.

3. Though the role of IPE is expanded to carry on the activities of an IP, the basic regulatory framework of the IPE was retained without modification. Based on consultations with IPEs and insolvency professional agencies (IPAs), the Board has received feedback on the constraints being faced by the IPEs to carry out the role of IP and areas requiring further consultation and amendments. Thus, to facilitate IPEs to undertake the expanded role as IP in accordance with the amendments notified in September 2022 and October 2022, the existing framework needs to be rationalised commensurately to achieve the expected outcomes. This paper addresses these impediments.

4. The proposals are envisaged to facilitate better implementation of the regulatory framework of IPEs. It will provide clarity and flexibility to the IPEs to perform their functions within the purview of regulatory framework.

Issues Covered in the Paper

5. This paper covers the following issues: -

- 1) Monitoring of IPE acting as IP
- 2) Related Party Definition for an IPE acting as IP
- 3) Restriction on Number of Assignments by an IP
- 4) Minimum Fee Structure of an IPE acting as IP

Issue 1: Monitoring of IPE acting as IP

Existing framework

6. IBBI being a principal regulator of the insolvency profession closely monitors the performance and conduct of IPs in accordance with the mandate under the Code read with the Code of Conduct as provided in the IBBI (Insolvency Professionals) Regulations, 2016, IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017 and IBBI (Inspection and Investigation) Regulations, 2017.

7. Sections 217 to 220 of Chapter VI of the Code deals with the provisions of inspection and investigation against the IPs. In terms of section 219 of the Code, the Board may, upon completion of an inspection or investigation under section 218 of the Code, issue a show cause notice to such IP, and carry out its inspection as specified by regulations i.e., IBBI (Inspection and Investigation) Regulations, 2017 (I & I Regulations). As per regulation 11 of IP Regulations, the disciplinary proceedings shall be conducted in accordance with the I & I Regulations. Under section 220(3) of the Code, if the Disciplinary Committee is satisfied that sufficient case exists, it may impose penalty or suspend or cancel the registration of the IP, after following the due procedure.

8. Similarly, there are provisions under the IP Regulations for liability of the IPE and its derecognition. Regulation 13(3) of IP Regulation provides that an IPE shall be jointly or severally liable for all acts or omissions of its partners or directors as IPs committed during such partnership or directorship. Further, in terms of Regulation 14 of IP Regulations, the Board may also derecognise an IPE by a reasoned order if sufficient cause exists for its derecognition.

9. For an IPE acting as IP, regulation 7(2)(ha) of IP Regulations stipulates that such IPE shall allow only a partner or director, as the case may be, who is an IP and holds a valid authorisation for assignment (AFA) to sign and act on behalf of it.

Domestic Scenario

The Comparative Provisions in Other Laws in India

A. Chartered Accountants, Company Secretaries, Cost Accountants and Advocates

10. As per the extant provisions of the Chartered Accountants Act, 1949 (CA, 1949), section 21A of CA, 1949 empowers the Board of Discipline to take stipulated actions against the member, if in its opinion the member is guilty of a professional or other misconduct mentioned in the First Schedule of CA, 1949, after following the due process. The actions may include reprimanding, removing name from the Register up to a period of three months, imposing penalty upto rupees one lakh, closing the matter or in case of disagreement, advising the Director (Discipline) to investigate further. Further, under section 21B, the Disciplinary Committee is empowered to take action against the member, if in its opinion the member is guilty of a professional or other misconduct mentioned in the Second Schedule or both the First Schedule and the Second Schedule of CA, 1949. It may reprimand the member, remove name of member from the Register for any period including permanently or impose fine upto rupees five lakhs.

11. Similar provisions exist in Chapter – V (Misconduct) of the Company Secretaries Act, 1980 and the Cost and Works Accountants Act, 1959.

12. Further, Chapter – V (Conduct of Advocates) of the Advocates Act, 1961 (AA, 1961) deals with the provisions related to misconduct by the advocate whose name is entered as such in any roll under the provisions of AA, 1961. Section 35 of AA, 1961 provides that the State Bar Council through its Disciplinary Committee is empowered to take action against the advocate on its roll if it has reason to believe that such advocate has been guilty of professional or other misconduct. It may dismiss the matter, reprimand the advocate, suspend the advocate from practice or may remove the name of the advocate from the State rolls of advocates. Furthermore, in terms of section 36 of AA, 1961, the Bar Council of India through its Disciplinary Committee is empowered to take action against any advocate whose name is not entered on any State rolls if it has reason to believe that such advocate has been guilty of professional or other misconduct.

B. Companies Act, 2013 [Registered Valuers]

13. Chapter- IV (Cancellation or Suspension of Certificate of Registration or Recognition) of the Companies (Registered Valuers and Valuation) Rules, 2017 issued under the Companies Act, 2013 (CA, 2013) *inter alia* deals with the provisions for taking action against the registered valuers (RVs) including handling of complaints against the RVs. These rules provide for registration of individuals as well as partnership entity or companies as valuer. These entities registered as valuer are called as registered valuer entities (RVEs). Rule 15 provides that the Authority (IBBI is designated as Authority under these rules) may cancel or suspend the registration of a valuer violation of the provisions of the Act, any other law allowing him to perform valuation, these rules or any condition of registration or recognition, as the case may be in the manner specified in rule 17. Further, rule 17 provides the procedure to be followed for cancellation or suspension of registration certificate. The action that may be taken against the valuer includes warning, suspension or cancellation of the registration or no action. Thus, as per these rules, action can be taken against the registered valuer which includes both individual as well as entities.

C. Companies Act, 2013 [Accounting and Auditing Professionals]

14. Section 132 of the CA, 2013 entrusts overriding powers upon the National Financial Reporting Authority (NFRA) in matters relating to accounting and auditing standards under the CA, 2013. It is also entrusted to oversee the quality of service of the professions associated with ensuring compliance with accounting and auditing standards, and suggest measures required for improvement in quality of service and such other related matters as may be prescribed. NFRA also has overriding powers of taking actions like imposing penalty or debarring the member or the firm, if professional or other misconduct as defined under the CA, 1949 is proved.

Analysis

15. It is pertinent to note that the CA, 2013 has laid down provisions for taking action against the firm of these professionals, limited to the activities covered under the said Act. The valuer profession has not made any distinction between the individual or the entity for the purposes of taking any action. However, it is noteworthy to mention that the specific statues of the profession of Chartered Accountants, Company Secretaries, Cost Accountants and Advocates, which primarily forms the eligibility criteria for registration as IP do not provide for any provisions for taking any action against the firm of these professionals.

Statement of Problem

16. Now, with the dual role framework, an IPE may choose to render only support services or carry on the activities of an IP or undertake both the services. As per the existing regulatory framework, the IPE is jointly or severally liable for all acts or omissions of its partners or directors as IPs committed during such partnership or directorship. However, with the introduction of new framework, an IPE may have different partner or director as authorised signatory for multiple assignments. Furthermore, there may be repeated instances of contravention or disciplinary proceeding against one or more partners or directors of the IPE acting as IP who are/have been its authorised signatory indicating systemic risk. In such cases, the implication of the contravention by the IPE acting as IP or its partner or director and its consequent impact on the IPE, authorised signatory or its other partner or director needs to be addressed.

Proposal

17. In view of the above, following course of action may be clarified: -

- a) In case of contravention by the IPE acting as IP, the disciplinary proceeding shall be initiated against the IP who is/has been its authorised signatory for respective assignment(s). Upon initiation of disciplinary proceeding against such IP, the IPE shall not allow him/her to act as authorised signatory in any new assignment. Such action would not impact the ongoing assignment or status of AFA of the IPE acting as IP or its other partners or directors, as they are separate legal entity from the authorised signatory.**
- b) If there are repeated instances of contravention or disciplinary proceeding against one or more partners or directors of the IPE acting as IP, the disciplinary proceeding may also be initiated against the IPE acting as IP on a case-to-case basis. However, such action would not impact the status of AFA of other partners or directors of the IPE.**

Issue 2: Related Party Definition for an IPE acting as IP

Existing framework

18. To ensure independence and avoid conflict of interest, the Code of Conduct specified in IP Regulations has put in certain restrictions on the IP. Clause 23B of Code of Conduct prohibits an IP from engaging or appointing any of the relatives or related party for or in connection with any work relating to any of his assignment. Similarly, clause 23C of Code of Conduct prohibits an IP from providing any service for or in connection with the assignment being undertaken by the relative or related party.

19. However, the institutional framework of the IPEs is designed to provide support services to an individual IP in relation to any assignment. To facilitate such engagement, the IPE of which the individual IP is a partner or director has been excluded from the definition of related party.

Statement of Problem

20. For an IPE acting as IP, its partner or director would be its related party. In such case, without the specific exclusion, such IPE would not be able to use its inhouse resources for engagement or appointment of its partner or director. Similarly, such IPE will also not be able

to provide any service for or in connection with the assignment being undertaken by its partner or related party.

21. Such restriction prohibits an IPE acting as IP from using its own resources or providing its services to its partner or director which is not commensurate with its extended role. Furthermore, these restrictions undermine the very purpose of establishing a multi-disciplinary entity i.e., to enhance the efficiency of various processes. While it is imperative that the fundamental principles outlined in the code of conduct are adhered to both in letter and in spirit, it is equally essential to provide sufficient flexibility to professionals and entities. This flexibility enables them to fulfil their functions and render optimal services. To ensure this, the restriction related to valuation and auditing services may be continued.

22. Thus, IPE acting as IP should be able to engage or appoint its partner or director or it may also be able to provide any service to its partner or director.

Proposal

23. To meet the intended objective of making use of potential institutional and multi-disciplinary structure of IPEs, the partner or director of the IPE acting as IP may be excluded from the definition of related party for the purposes of clauses 23B and 23C of Code of Conduct specified in IP Regulations, except for the services related to valuation and auditing.

Issue 3: Restriction on Number of Assignments of an IP

Existing framework

24. The role of an IP under the Code is very extensive and demands unfettered time and efforts. The time-bound nature of the processes under the Code makes the role of IP even more indispensable. To ensure efficient conduct of the processes, clause 22 of Code of Conduct specified in First Schedule to IP Regulations imposes restrictions of ten assignments as resolution professional in corporate insolvency resolution process (CIRP), of which not more than three shall have admitted claims exceeding one thousand crore rupees each.

Statement of Problem

25. With the introduction of provisions allowing IPE to act as IP, as per interpretation, such limits will also apply to these IPEs. However, an IPE has more than one individual working as its partner or director. The application of exiting limit on the assignments for an IPE acting as IP would not be commensurate with its services offered.

26. Further, it is pertinent to note that IPs have been undertaking assignments in multiple roles as IRP, RP in a CIRP, liquidator in liquidation process, RP in personal guarantor matters, etc. Taking note of the responsibility entrusted upon an IP for each of the roles, it is considered expedient that the restriction to be extended to more assignments so that IP is able to devote time and resources efficiently.

Proposal

27. It is proposed that clarification under clause 22 of Code of Conduct specified in IP Regulations may be modified to include following: -

- (a) For IP who is an individual - Overall limit of 10 assignments at any point of time, out of which not more than three shall have admitted claims exceeding one**

thousand crore rupees each. The overall limit includes all the assignments of an IP.

- (b) For IP which is an entity - Overall limit of 5 assignments per partner or director who are IPs holding AFA, at any point of time (excluding the assignments taken by an IP in his individual capacity). However, number of assignments for an IPE acting as IP at any point of time shall not be more than 15 assignments having admitted claims exceeding one thousand crore rupees each. The overall limit includes all the assignments of an IPE acting as IP.**

Issue 4: Minimum Fee Structure of an IPE registered as IP

Existing framework

28. Regulation 34B of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) as amended in September 2022, stipulates the minimum fixed fee structure and a performance-linked incentive fee for the IPs in a CIRP, subject to approval of applicant or the committee of creditors (CoC), as the case may be.

Statement of Problem

29. The minimum fixed fee structure and performance-linked incentive fee was introduced to address issues related to fixation of fee of IP, connected litigation, direction from Adjudicating Authority/ National Company law Appellate Tribunal and incentivising IPs for time-bound resolutions. With the introduction of provisions allowing IPE to act as IP, as per interpretation, these regulations shall also apply to such IPEs. However, because of their institutional framework, IPE are better placed to negotiate fee commensurate with the services offered by them as compared to an individual IP. Further, the scope of services of IPE acting as IP may be different due to inclusion of support services at the discretion of creditor.

Proposal

30. It is proposed to clarify that the existing fee structure is applicable for individual IP only and shall not be applicable in case of IPE acting as IP.

Economic Analysis

31. The proposals are aimed at rationalising the framework of IPEs commensurate to achieve the expected outcomes of their expanded role. These proposals are envisaged to facilitate better implementation of the regulatory framework of IPEs. It will provide clarity and flexibility to the IPEs to perform their functions within the purview of regulatory framework.

Public comments

32. The Board accordingly solicits comments on the proposals discussed above and draft amendments to Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017, placed as **Annexure-I, Annexure-II and Annexure-III**, respectively.

33. This is issued in pursuance to regulation 4 of the Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018. After considering the comments, the

Board proposes to make regulations under section 196, 207, 208, 217, 218, 219, 220 read with section 240 of the Code.

Submission of comments

34. Comments may be submitted electronically by 11th November 2023. For providing comments, please follow the process as under:

- i. Visit IBBI website, www.ibbi.gov.in;
- ii. Select 'Public Comments'.
- iii. Select '**Discussion paper –Regulatory Framework of IPEs**'.
- iv. Provide your Name, and Email ID;
- v. Select the stakeholder category, namely, -
 - a) Corporate Debtor;
 - b) Personal Guarantor to a Corporate Debtor;
 - c) Proprietorship firms;
 - d) Partnership firms;
 - e) Creditor to a Corporate Debtor;
 - f) Insolvency Professional;
 - g) Insolvency Professional Agency;
 - h) Insolvency Professional Entity;
 - i) Academics;
 - j) Investor; or
 - k) Others.
- vi. Select the kind of comments you wish to make, namely,
 - a) General Comments; or
 - b) Specific Comments.
- vii. If you have selected 'General Comments', please select one of the following options:
 - a) Inconsistency, if any, between the provisions within the regulations (intra regulations);
 - b) Inconsistency, if any, between the provisions in different regulations (inter regulations);
 - c) Inconsistency, if any, between the provisions in the regulations with those in the rules;
 - d) Inconsistency, if any, between the provisions in the regulations with those in the Code;
 - e) Inconsistency, if any, between the provisions in the regulations with those in any other law;
 - f) Any difficulty in implementation of any of the provisions in the regulations;
 - g) Any provision that should have been provided in the regulations, but has not been provided;or
 - h) Any provision that has been provided in the regulations but should not have been provided.And then write comments under the selected option.
- viii. If you have selected 'Specific Comments', please select para/regulation number and then sub-para/sub-regulation number and write comments under the selected para/sub-para or regulation/sub-regulation number.
- ix. You can make comments on more than one para/sub-para, by clicking on More Comments and repeating the process outlined above.
- x. Click 'Submit' if you have no more comments to make.

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New Delhi, Day, ____ October 2023**

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

NOTIFICATION

New Delhi, the ____ October 2023

Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Third Amendment) Regulations, 2023

No. IBBI/2023-24/GN/REG ____.- In exercise of the powers conferred by clause (a), clause (aa) and clause (t) of sub-section (1) of section 196, sections 207 and 208 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations further to amend the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, namely: -

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Third Amendment) Regulations, 2023.

(2) They shall come into force on the date of publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (hereinafter referred to as ‘the principal regulations’), in First Schedule,

(i) explanation after clause 23C shall be substituted as under: -

“Explanation.- For the purpose of clauses 23B to 23C, “related party” shall have the same meaning as assigned to it in clause (24A) of section 5, but does not include –

- a) an insolvency professional entity of which the individual insolvency professional is a partner or director.
- b) a partner or director of the insolvency professional entity registered as an insolvency professional, for the services other than related to valuation and auditing.”

(ii) the clarification after clause 22 shall be substituted as under: -

“**Clarification:**

(a) An insolvency professional,

- (i) who is an individual, may, at any point of time, not have more than ten assignments under the Code, of which not more than three shall have admitted claims exceeding one thousand crore rupees.

- (ii) which is an insolvency professional entity, may, at any point of time,
 - a. not have more than five assignments per partner or director who are insolvency professionals holding authorisation for assignment, under the Code; and
 - b. not have more than fifteen assignments having admitted claims exceeding one thousand crore rupees each.
- (iii) For the purposes of clause (i) above, the number of assignments under clause (ii) shall not be reckoned.

RAVI MITAL, Chairperson
[ADVT. -]

Note: The Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 were published *vide* notification No. IBBI/2016-17/GN/REG003 dated 23rd November, 2016 in the Gazette of India, Extraordinary, Part III, Section 4, No. 424 on 23rd November, 2016 and were last amended by the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Second Amendment) Regulations, 2023 published *vide* notification No. IBBI/2023-24/GN/REG104, dated 18th September, 2023 in the Gazette of India, Extraordinary, Part III, Section 4, No. 643 on 18th September, 2023.

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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
NOTIFICATION

New Delhi, the __ October, 2023

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2023.

No. IBBI/2023-24/GN/REG____.- In exercise of the powers conferred by clause (c) and clause (t) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, namely:-

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2023.

(2) They shall come into force on the date of their publication in the Official Gazette.
2. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as 'the principal regulations'), in regulation 34B, following sub-regulation (6) may be inserted: -

“(6) The provisions of this regulation shall not be applicable to the interim resolution professional or the resolution professional which is an insolvency professional entity.”

RAVI MITAL, Chairperson
[ADVT.-]

Note: The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 were published *vide* Notification No. IBBI/2016-17/GN/REG004, dated 30th November, 2016 in the Gazette of India, Extraordinary, Part III, Section 4, No. 432 on 30th November, 2016 and were last amended by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2023 published *vide* notification No. IBBI/2023-24/GN/REG096, dated the 18th September, 2023 in the Gazette of India, Extraordinary, Part III, Section 4, No. 461 on 18th September, 2023.

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**INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
NOTIFICATION**

New Delhi, the ____ October, 2023

Insolvency and Bankruptcy Board of India (Inspection and Investigation) (Amendment) Regulations, 2023.

No. IBBI/2023-24/GN/REG____.- In exercise of the powers conferred by sections 196, 207, 208, 217, 218, 219, 220 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations to amend the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017, namely:-

3. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Inspection and Investigation) (Amendment) Regulations, 2023.
- (2) They shall come into force on the date of their publication in the Official Gazette.
4. In the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 (hereinafter referred to as 'the principal regulations'), in regulation 2, in sub-regulation (1), after sub-clause (j), the following clarification shall be inserted, namely: -

“Clarification: For the purposes of this sub-clause, the insolvency professional who is an individual, the role in his individual capacity or as authorised signatory of the insolvency professional entity registered to carry on the activities of an insolvency professional shall be considered.”

RAVI MITAL, Chairperson
[ADVT.-]

Note: The Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 were published vide notification No. IBBI/2017-18/GN/REG011 on 12th June, 2017 in the Gazette of India, Extraordinary, Part III, Section 4, No. 239 dated 12th June, 2017 and were last amended by the Insolvency and Bankruptcy Board of India (Inspection and Investigation) (Amendment) Regulations, 2022 published *vide* notification No. IBBI/2022-23/GN/REG087, dated the 14th June, 2022 in the Gazette of India, Extraordinary, Part III, Section 4, No. 305 on 14th June, 2022.
