

Insolvency and Bankruptcy Board of India

10th September, 2020

Discussion Paper

Subject: Governance Issues in Insolvency Professional Agencies (IPAs)

1. The insolvency profession has a two-tier regulatory architecture with Insolvency and Bankruptcy Board of India (IBBI or Board) as the principal regulator, and the three Insolvency Professional Agencies as frontline regulators. The IPAs are registered with IBBI and are subject to the oversight of the Board. A company registered under section 8 of the Companies Act, 2013 with a minimum net worth of Rs. 10 crores is eligible to be an Insolvency Professional Agency (IPA), if it complies with other requirements provided in the Code and the regulations. The Insolvency and Bankruptcy Code (Code) empowers the Board to promote the development and regulate the working and practices of the IPAs and monitor their performance. IPAs monitor the conduct and performance of their members and also initiate appropriate action against their members who do not comply with the provisions of the Code. The Board has mandated that an insolvency professional (IP) shall obtain authorisation for assignment (AFA) from the IPA before accepting or undertaking any assignment as interim resolution professional, resolution professional, liquidator, bankruptcy trustee, authorised representative or in any other role under the Code. The IPAs conduct pre-registration educational course as provided under the Regulations, and also undertake continuous professional education and professional development of their members by conducting webinars, workshops, roundtables, seminars and conference.

2. The Bankruptcy Law Reforms Committee (BLRC), which conceptualised the Code, felt that regulations must ensure that IPs are competent to perform the variety of tasks they may be hired for and that IPs are fair and impartial, as also conflict of interests are minimised. To this end, the BLRC recommended that the Insolvency Professional Agencies (IPAs) establish rules and standards for their members through bye-laws, create and update relevant entry barriers, and have mechanisms in place to enforce their rules and standards effectively. It observed: *“Thus, the Committee believes that a new model of “regulated self-regulation” is optimal for the IP profession. This means creating a two-tier structure of regulation. The Regulator will enable the creation of a competitive market for IP agencies under it. This is unlike the current structure of professional agencies which have a legal monopoly over their respective domains. The IP agencies under the Board will, within the regulatory framework defined, act as self-regulating professional bodies that will focus on developing the IP profession for their role under the Code. They will induct IPs as their members, develop professional standards and code of ethics under the Code, audit the functioning of their members, discipline them and take actions against them if necessary. These actions will be within the standards that the Board will define. The Board will have oversight on the functioning of these agencies and will monitor their performance as regulatory authorities for their members under the Code. If these agencies are found lacking in this role, the Board will take away their registration to act as IP agencies.”*

3. The BLRC visualised IPAs as a mini State having the following functions:

“1. Regulatory functions - drafting detailed standards and codes of conduct through bye-laws, that are made public and are binding on all members;

2. *Executive functions - monitoring, inspecting and investigating members on a regular basis, and gathering information on their performance, with the overarching objective of preventing frivolous behaviour and malfeasance in the conduct of IP duties;*
3. *Quasi-judicial functions - addressing grievances of aggrieved parties, hearing complaints against members and taking suitable actions.”*

4. The IBBI has notified: (a) the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, and (b) the IBBI (Insolvency Professional Agencies) Regulations, 2016. In November, 2016, it registered three IPAs, namely, the Indian Institute of Insolvency Professionals of ICAI, the ICSI Institute of Insolvency Professionals, and the Insolvency Professional Agency of ICAI. These IPAs have been promoted by the three professional institutes, namely, the Institute of Chartered Accountants of India, the Institute of Company Secretaries of India and the Institute of Cost Accountants of India respectively. All the three IPAs have adopted the model bye-laws.

5. Section 205 of the Code empowers an IPA to make bye-laws consistent with the model bye-laws specified by the IBBI. Section 204 of the Code provides that an IPA shall perform the following functions:

- (a) *Grant membership to persons who fulfil all requirements set out in its bye-laws on payment of membership fee;*
- (b) *Lay down standards of professional conduct for its members;*
- (c) *Monitor the performance of its members;*
- (d) *Safeguard the rights, privileges and interests of insolvency professionals who are its members;*
- (e) *Suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws;*
- (f) *Redress the grievances of consumers against insolvency professionals who are its members; and*
- (g) *Publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.*

6. An IPA has broadly two sets of interests. One is public interest, as enumerated in section 204 of the Insolvency and Bankruptcy Code, 2016 (IBC or Code), encompassing the interests of the debtors, creditors, other stakeholders, the market and the society. An IPA also pursues the private interest, encompassing the top and bottom lines of the business, the interests of professional members, shareholders and employees. Accordingly, section 203 of the Code emphasises on governance of IPAs. There is limited presence of IPs in the Governing Board which has 50% independent directors and the Chairman of the Governing Board is an independent director. There are other provisions relating to organisational structure, shareholding pattern, the board composition and the Managing Director which enable an IPA to discharge its responsibilities effectively. However, issues like appointment of members of the Governing Board and performance of the Governing Board need to be addressed by making an amendment in the regulations in order to improve the effectiveness of the IPAs. Thus, this paper solicits comments of public in respect of the following issues:

- Issue 1: Requirement of certain minimum qualifications, experience and other criteria for appointment of directors of the IPA
- Issues 2: Self-evaluation by the Governing Board of an IPA

Issue 1: Requirement of certain minimum qualifications, experience and other criteria for appointment of directors of the IPA

Statement of the Problem

7. The Model Bye Laws Regulations provide that the independent directors are nominated by the Board from a list of names proposed by the IPA. The promoter institute of an IPA may have its members as directors on the Governing Board of the IPA. However, such directors shall not be appointed as independent directors. This is to ensure the independence of the Governing Board and to avoid a potential conflict of interest.

8. In a few instances the Board has requested for a fresh list from the IPAs because the list of names submitted for nomination were not suitable for appointment. Further, it has been observed that the shareholder directors are appointed by the promoter institute and while the regulations require a director to be “fit and proper”, there are however, no requirements of suitability by way of minimum qualifications or professional experience.

Proposed Amendment

9. In view of the above, it is suggested that the Governing Board of the IPAs may provide for certain minimum qualifications, experience and other requirements including, but not limited to being “fit and proper” as per the provisions of the IPA Regulations, for appointment in respect of both independent and shareholder Directors, which may include their expertise in the field of finance, law, economics, management or insolvency. The Governing Board of the IPAs before approving any name for appointment as director shall assess and certify that the person concerned is “fit and proper” as per the criteria laid down in the regulations and have the qualifications, experience and other requirements laid down.

10. It is proposed to amend the Model Bye laws Regulations to enable the Governing Board of the IPA to provide for certain minimum qualifications, experience and other requirements for appointments as suggested in Para 9 above, in respect of both independent and shareholder directors.

Economic Analysis

11. This will ensure that the Governing Board of IPAs consists of directors with relevant expertise and would facilitate the IPAs in identifying challenges proactively and make appropriate course corrections as required so that the IPAs remain relevant in the ever-evolving market environment.

Issue 2: Self-Evaluation by the Governing Board of IPA

Statement of the Problem

12. There is a need to upgrade the quality of board deliberation in Governing Board of the IPAs to provide greater strategic focus. The themes namely professional development, compliance, disciplinary matters, services to the members, strategy, technology, and human resources appear to be critical. All other items for discussion should be brought to the Board by exception and should typically be discussed in respective committees of board. Among the themes identified for detailed board scrutiny, a predominant emphasis needs to be provided to professional development, compliance and disciplinary matters.

Proposed Amendment

13. Governing Board of an IPA should conduct its deliberations in a manner that does not compromise its ability to accomplish its mandate or undermine public confidence in the ability

of members to discharge their responsibilities. Accordingly, Governing Board of IPA shall do a periodic self-evaluation which could be broadly on three dimensions, namely:

- a. *Board Composition and Quality*: which could cover aspects such as expertise and experience of Board Members, strategy to achieve laid down objectives, quality of debate and discussion in its meetings and its engagement with stakeholders.
- b. *Board Meetings and Procedures*: which cover aspects such as regularity and frequency of Board meetings, accuracy of minutes, amount of time spent on strategic and important matters and follow up on actions arising from Board meetings.
- c. *Board Functions and Development*: which include aspects such as integrity of accounting and financial reporting, promoting transparency and good governance and open channels of communication with the top management.

14. It is proposed to amend the Model Bye laws Regulations to provide for the Governing Board of an IPA to conduct a periodic self-evaluation in the manner proposed in paragraph 13 above.

Economic Analysis

15. The Governing Board provides strategic direction to the Board and establishes its objectives, and monitors the management, reviews its performance and holds it accountable for delivering on the objectives. A well-functioning Governing Board builds a bridge between the organisation and the stakeholders and the society at large and further articulates a strategy for the organization. Therefore, a periodic self-evaluation by the Governing Board will ensure that it is fulfilling its duties and responsibilities and that appropriate processes are in place to ensure that Board is giving due diligence to planning and oversight over the organization.

Amended Regulations

16. A draft of the amended Model Bye laws Regulations is given in **Annexure**.

17. It is expected that the amendments proposed above in the Model Bye laws Regulations, would have the desired effect of bringing improvement in governance of IPAs.

Public Comments

18. It is considered necessary to solicit public comments on the following points relating to the afore-stated issues:

On Issues 1: Governing Board of the IPA to provide for certain minimum qualifications, experience and other requirements for directors

- a) Should the Governing Board of IPA provide for certain minimum qualifications, experience and other requirements for appointment in respect of both independent and shareholder directors?
- b) If yes, whether the proposal at **Para 9** is adequate or any change is required?
- c) If no, what should be the criteria for ensuring Governing Board of IPA consists of Directors with relevant expertise?

On Issue 2: Self-Evaluation by the Governing Board of IPA

- a) Should the Governing Board of an IPA conduct self-evaluation periodically?
- b) If yes, whether the proposal at **Para 13** is adequate or any change is required?
- c) If no, what should be the criteria for ascertaining the performance of the Governing Board?

19. This is issued in pursuance to regulation 4 of the Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018. The Board accordingly, solicits comments on:

- a. discussion points mentioned in **Para 18** above; and
- b. any specific regulations in the draft Insolvency and Bankruptcy Board of India (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) (Second Amendment) Regulations, 2020, placed at **Annexure**.

20. Comments may be submitted electronically by 05th October, 2020. For providing comments, please follow the process as under:

- (i) Visit IBBI website, www.ibbi.gov.in;
- (ii) Select ‘Public Comments’; and then select ‘Discussion paper – Governance Issues in Insolvency Professional Agencies (IPAs)’;
- (iii) Provide your Name, and Email ID;
- (iv) 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.
- (v) Select the kind of comments you wish to make, namely,
 - a) General Comments; or
 - b) Specific Comments.
- (vi) 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; and
 - 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.

(vii) 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.

- (viii) You can make comments on more than one para/sub-para or regulation / sub-regulation number, by clicking on more comments and repeating the process outlined above from point 20 (v) onwards.
- (ix) Click 'Submit', if you have no more comments to make.

**GAZETTE OF INDIA
EXTRAORDINARY
PART III, SECTION 4
PUBLISHED BY AUTHORITY
NEW DELHI, ___ SEPTEMBER, 2020**

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

NOTIFICATION

New Delhi, the -- September, 2020

**Insolvency and Bankruptcy Board of India (Model Bye- Laws and Governing Board of
Insolvency Professional Agencies)(Second Amendment) Regulations, 2020**

No. IBBI/2020-21/GN/REG063.—In exercise of the powers conferred by sections 196, 203 and 205 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 (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, namely: -

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Second Amendment) Regulations, 2020.

(2) They shall come into force on the date of publication in the Official Gazette.
2. In the Insolvency and Bankruptcy Board of India (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, in Regulation 5,-
 - (i) after sub-regulation (6), the following sub-regulation shall be inserted, namely:-

“(6A) A shareholder director shall be an individual-

 - (a) who is a person of ability and integrity; and
 - (b) who satisfies other conditions, including experience and qualifications as decided by the Governing Board.”
 - (ii) after sub-regulation (13), the following sub-regulation shall be inserted, namely:-

“(14) Governing Board of an insolvency professional agency shall conduct self-evaluation at least once in a financial year and such evaluation shall broadly be on three dimensions, namely:-

 - (a) Governing Board composition and quality covering aspects, such as expertise and experience of Board Members, strategy to achieve laid down objectives,

quality of debate and discussion in its meetings and its engagement with stakeholders;

- (b) Governing Board meetings and procedures covering aspects such as regularity and frequency of Board meetings, accuracy of minutes, amount of time spent on strategic and important matters and follow up on actions arising from Board meetings;
- (c) Governing Board functions and development covering aspects such as integrity of accounting and financial reporting, promoting transparency and good governance and open channels of communication with the top management.”

DR. M. S. SAHOO, Chairperson
[ADVT. III/4/Exty./.../2020-21]

Note: The Insolvency and Bankruptcy Board of India (Model Bye- laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 were published *vide* notification No. IBBI/2016-17/GN/REG001 dated 21st November, 2016 in the Gazette of India, Extraordinary, Part III, Section 4, No. 421 on 22nd November, 2016 and were subsequently amended by-

(1) The Insolvency and Bankruptcy Board of India (Model Bye- laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2018 published *vide* notification No. IBBI/2018-19/GN/REG35 dated 11th October 2018 in Gazette of India, Extraordinary, Part III, Section 4, No. 383 on 11th October, 2018;

(2) The Insolvency and Bankruptcy Board of India (Model Bye- laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2019 published *vide* notification No. IBBI/2019-20/GN/REG043 dated 23rd July 2019 in Gazette of India, Extraordinary, Part III, Section 4, No.261 on 23rd July, 2019; and

(3) The Insolvency and Bankruptcy Board of India (Model Bye- laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2020 published *vide* notification No. IBBI/2020-21/GN/REG058 dated 20th April 2020, in Gazette of India, Extraordinary, Part III, Section 4, No.155 on 24th April 2020.