Insolvency and Bankruptcy Board of India

Sub: Amendments to the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017

1. The Insolvency and Bankruptcy Board of India, in exercise of its powers under the Insolvency and Bankruptcy Code, 2016 (Code), had on 31st March, 2017 notified the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 hereinafter as IU Regulations, 2017, which seek to provide a framework for registration and regulation of information utilities. The Board has granted in-principle approval to NESL, a Public Limited Company with major shareholding held by banks, insurance companies and depositories for carrying on its business as an information utility.

2. While suggesting certain changes in the Code, [redacted] has also suggested certain changes in the Regulations.

3. The Board has received a communication dated 20th June, 2017 [redacted] highlighting certain issues which make it difficult for credit information companies to set up an IU and requesting to amend regulations to address those issues. It may be mentioned that [redacted] is a Member of the IBBI Advisory Committee on Corporate Insolvency and Liquidation.

4. The Board has also received an email dated 22nd May, 2017 from [redacted] stating that few elements of the regulations could lead to confusion and to suboptimal functioning of IUs, along with a list of concerns. It may be mentioned that Dr. Shah was a Member of the Bankruptcy Law Reforms Committee and was also a Member of the Working Group constituted by MCA to draft IU regulations. He is a Member of the IBBI Advisory Committee on Service Providers. He is also a Director on the Board of NESL.

5. A tabular compilation of the suggestions made in the [redacted]

6. The Governing Board may decide if the regulations need to be amended.

ANNEXURE A

भारतीय रिज़र्व बैंक
RESERVE BANK OF INDIA
www.rbi.org.in

गवर्नर
Governor

DO.No.13/01.02.051/2017-18 June 29, 2017

Shri Arun Jaitley
Finance Minister
Government of India
North Block
New Delhi – 110 011

Dear Sir,

Insolvency and Bankruptcy Code

As you are aware, the Reserve Bank has, on the recommendations of the Internal Advisory Committee, directed banks to refer 12 large Non-performing Assets (NPA) for resolution under the Insolvency and Bankruptcy Code, 2016 (IBC). We are monitoring the action taken by the banks pursuant to these directions and banks are seen to be moving swiftly.

2. Certain issues that may have to be addressed to facilitate a smooth disposal of these and other cases that may be referred under IBC have been brought to our notice. I felt it appropriate to flag them for your consideration.

Changes in IBC

3. IBC is a revolutionary legislation with "creditor in control" as its central objective. However, it may require a few changes urgently:

(i) One of the mandatory conditions of a resolution plan is that it must comply with all provisions of law. For instance, a confirmed resolution plan as per the order of the National Company Law Tribunal (NCLT) may, according to current provisions of the IBC, need compliance with the provisions of Companies Act. Such approvals may get blocked by shareholders under the Companies Act. In order to prevent the resolution plan being frustrated by the current shareholders, the IBC should provide for deemed approved by the shareholders or suspension of shareholder rights in all such matters.

(ii) Most key commercial agreements require prior approvals for change in ownership from various authorities (e.g., FDI related, mining leases, telecom licenses, PPAs etc.) as well as consent of contractual counterparties (eg. key

...2/-

केन्द्रीय कार्यालय भवन, 18वी मंज़ील, शहीद भगतसिंह मार्ग, मुम्बई - 400 001. भारत
फोन : +91 22 2266 0868 फैक्स : +91 22 2266 1784 ई-मेल : urjitpatel@rbi.org.in
Central Office Building, 18th Floor, Shahid Bhagat Singh Marg, Mumbai - 400 001. INDIA

customers, suppliers, vendors, etc.). The value of an entity under resolution may be significantly lower unless these commercial arrangements and agreements are also available to a new buyer. It is not clear who takes the onus for securing these approvals and whether such approvals need to be obtained within or outside of the corporate insolvency resolution period. To the extent the terms of the resolution plan require the change in control over the corporate debtor and such change requires the prior consent of any contractual counterparty; or the Central Government, any State Government or any regulatory authority; the NCLT must by way of an interim order direct the relevant person or authority whose consent is so required to grant or refuse such consent in such timeframe, as the NCLT Adjudicating Authority deems fit, within the insolvency resolution process period of 180 days. Suitable amendments may be have to be brought in for facilitating this.

(iii) In terms of section 5(24)(j) of the IBC, any person who controls more than 20 percent of voting rights in the corporate debtor is deemed to be a related party and therefore, in terms of Section 21(2), does not have any right of representation, participation or voting in the Committee of Creditors (COC). In some cases the banks might have acquired shares by converting debt into equity under Strategic Debt Restructuring, Strategic Structuring of Stressed Assets (S4A), as also in the normal course. If the banks under the Joint Lenders' Forum (JLF) are seen as a single party acting in concert, they will be deemed to be related parties and will become ineligible to be in the COC. This may have to be obviated either by change in the IBC or if possible through a notification.

Institutional Arrangements

NCLT Benches

4. The 12 cases that RBI has directed the banks to refer under IBC are large borrowers. Moreover, some more large cases will likely be referred if they are not resolved in the next six months. We had in the past sought for a dedicated bench of NCLT to deal with these cases to ensure that they are disposed of in time. Even if this is not feasible for any reason, the NCLT benches in Mumbai and New Delhi will have to be strengthened, because more cases may fall in their jurisdiction. We understand that there are Presiding Officers of NCLT benches in other centres which may not have many references. Central Government may consider temporarily moving these Presiding Officers to benches where these large cases are being filed.

Information Utilities

5. Information Utilities (IU) are an important infrastructure in the IBC scheme of things. We understand that the current restrictions on shareholding and FDI are acting as dampeners in the development of this industry. We feel that restrictions on FDI should be removed subject to the requirement that the board of the company comprises majority

...3/-

of resident Indian nationals, bringing the norms for IUs on par with those for the Credit Information Companies (CIC).

6. I request you to kindly consider these suggestions so that some of the hurdles that we see in the evolution of a robust insolvency and bankruptcy regime in India are removed.

With regards,

Sincerely,

Sd/-

Urjit R. Patel

Copy for information to :

(i) Secretary, Ministry of Corporate Affairs, Government of India, New Delhi.
(ii) Secretary, Dept. of Financial Services, Ministry of Finance, Government of India, New Delhi.
(iii) Chairman, Insolvency and Bankruptcy Board of India, Connaught Place, New Delhi.

Urjit R. Patel

Annexure B

IBBI (Information Utilities) Regulations, 2017: Suggestions and views thereon

Regulation	Suggestions from:			Views of IU Division
	[redacted]	[redacted]	[redacted]	
Regulation 6 (2) (e)	-	-	Regulation 6(2)(e) provides that an information utility must pay a fee of fifty lakh rupees to the Board annually. This is a large sum of money, especially given that the business model is unproven. This will discourage entry, limit competition, and increase the fees charged to the users.	SEBI charges a similar annual fee from a depository which is in fact a miniature of an IU. The fee needs to be linked with regulatory load. IUs would be monolithic organisations processing trillions of information of billions of users. The Board needs to lay down technical standards for various matters under regulation 13, and monitor and supervise IUs effectively.
Regulation 7			Regulation 7 is unclear on the difference between a regular approval and an in-	In-principle approval and regular

			principle approval. It is also unclear as to why an applicant would choose one form of application over the other. In the draft regulations, the idea was that in-principle registrations would be granted faster than regular registration.	approval are two stages of approval. If a person is fully ready, it can seek regular approval at one go. In-principle approval is issued on satisfaction of that the applicant is a fit and proper person and would be able to meet all the requirements. This is valid for one year. The regulations carry the same idea as the draft regulations did. It is issued faster.
Regulation 8	The current restrictions on shareholding and FDI are acting as dampeners in the development of this industry. The restrictions on FDI should be removed subject to the requirement that board of the company comprises majority of resident Indian nationals, bringing	As against the present cap of 49% in FDI, the IU Regulations may enable 100% FDI. As a precedent, companies in a similar line of business, FDI limit for CICs as well as CRAs is 100%. 100% FDI will give the controlling entity the much-needed incentive and freedom to maximise its commitment towards this initiative to drive efficient and profitable operations of the IU.	-	RBI communication dated May 19, 2016 to CICs provides that RBI may allow higher FDI up to 49% for an investor having a track record of running a

	the norms for IUs on par with those for the Credit Information Companies (CIC)			credit information bureau in a well-regulated environment. The FDI can be up to 100% if the ownership of the investor is diversified or 50% of directors of the investee are Indian nationals. Probably an investor having a track record of running a credit information bureau, credit rating agency, depository, or a stock exchange, either in India or in a FATF compliant jurisdiction, may be allowed to hold up to 49% till the expiry of three years from the date of its registration, or such period as may be extended by the Board.

				The limit can be up to 74% if the investor is a listed company and 50% of directors of the CIC are Indian nationals.
Regulation 9	-	Specific clause of "majority of IU board to comprise of independent directors" would lead to the set-up of a very large board of directors, making prompt decision-making at the senior most level in the IU very difficult. The independent Directors may be as per provisions of the Companies Act, 2013, read together with Companies (Appointment and Qualification of Directors) Rules, 2014.	-	The provision of independent directors relates to governance of a market infrastructur e institution. It may be difficult to dilute it. The concern arises if every investor brings in a director and matching number of independent director are taken, the board would be bulky. This concern disappears if an investor is allowed to hold up to 49 / 74%.
Regulation 18 (1)			Regulation 18(1) suggests registration only for submitting and accessing information. Does this mean that unregistered parties can authenticate	There will be technical standards for authenticati on under

			information? If yes, it can lead to the danger that IU records will have little sanctity in court.	regulation 13.
Regulation 18(5)			This can be very dangerous, because of the possibility of misuse. For instance, can a bank be a registered representative of its borrower? Imagine a situation where an individual takes a loan from a lender, and in the paperwork, one of the signatures he signs authorises the lender as his representative for filing information with an Information Utility (IU). The lender can now declare, on behalf of the borrower, that the borrower has defaulted. This is a major conflict of interest. The misuse can also happen on the other side. A borrower can borrow money, and confirm this debt in an IU. He could then claim that it had an authorised representative who committed fraud. If this functionality (of enabling authorised representatives) is desired, appropriate safeguards need to be added to the regulations.	The law allows every person to act directly or through an authorised person. One cannot be denied this right, particularly in the context of big financial creditors who would use 'n' number of persons to deal with an IU.
Regulation 19(3)			A user can access information stored with an IU through any IU. There are several issues here: • This is commercially sensitive information. Can the aggregator IU store this information or use it in any way? • If incomplete information is provided at the time of information retrieval, and it	The regulations have provisions (23, 24 30, etc.) for confidentiality.

			will be clear whose fault it is: whether the primary IU or some more distant IU. • Regulation 24 treats this matter as well. Regulation 19(3) is duplication. • How is this to work? How are the other IUs to provide this info "directly" to the user? Presumably the intent is to avoid routing the information through the aggregator IU, but this is contradictory and unclear. The draft regulations expect that the user (or software deployed by him) would be able to query multiple IUs inexpensively and in parallel, such as happens every day in online air-ticket booking. This is a simple and straight forward architecture that avoids the problems above.	Regulation 31 provides for indemnification. Regulation 19(3) provides for rights of a user while regulation 24 provides for obligations on IUs. Will be laid down under technical standards under regulation 13.
Regulation 20 (1)			Items 37, 50 and 56 of Form C under regulation 20(1) lay down the documents to be attached as proof. This suggests that an IU must accept documentary proof of the financial information being submitted. This is a clear problem. The IBC design intended IUs to be an electronic repository of financial information, and not a document management system. That is why the requirement of authentication and verification of information submitted to an IU was envisaged. While it may be possible for IUs to accept documents in electronic form, even this process creates two challenges. First, storing documents will add to the cost of the IU	The Code defines financial information to mean records and the core services mean services include authentication of financial information. Regulation is consistent with the Code.

			infrastructure, which will then be passed on to users. This may make storing credit contracts in an IU expensive and may disincentivise users from doing so. This in turn will pose fundamental viability challenges for the IU business model. Second, if an IU stores financial information as well as documents, it is not clear whether both will need to be matched, and if so on whom the responsibility of doing so will fall upon.	
Regulation 20 (2)(b) Acknowledgement			Regulation 20 mandates that the IU should provide an acknowledgement. It is important to ensure that the IU has not manipulated or lost information. For this reason, the acknowledgement must be ir-repudiable. In the draft regulations, this is achieved by ensuring that: • The acknowledgement should echo the information submitted, along with the identities of the persons submitting and authenticating the information; • It should be digitally signed by the IU. Without this requirement, the acknowledgement will become repudiable, and opens the door for the IU to lose data or to manipulate it in connivance with parties to the debt. The information in the IU loses its sanctity, so that judges can no longer trust it.	The sanctity of an acknowledgement issued by a IBBI registered IU does not increase if it carries a digital signature. There is no reason to distrust an IU.
Regulation 20 and 21		During "Phase 1", the information is provided by regulated financial	The manner in which terms authentication and verification have been used	Authentication is a part of core

		institutions. The onus of submitting the correct, "validated" information/ data rest on the financial institutions only, without the need of any authentication /validation by the IU. This is the position under the current CIC regime as well. Also, historical precedence has shown that there have not been material cases where the 'principal' amount of credit facilities lent by banks have been challenged by the counterparties. If at all any such dispute cases arise, the parties concerned can easily refer to the financial institutions' well-documented records/ contracts for verification/ resolution of the same. During "Phase 2", the issue of authentication of this data may be explored in detail.	in the regulations creates confusion. It is not clear when authentication and verification will take place, after or before the information is submitted. As per Regulation 20(2)(ii), on receipt of information by an IU, the submitter of information will be provided with terms and conditions of authentication and verification of information. It is not clear why the terms and conditions should be provided once the information has been submitted. The user should be aware of these terms before the information is submitted to an IU. Regulation 21(1) states that on receipt of information about a default the IU shall expeditiously start the process of authentication and verification. This raises following questions: 1. Why is an IU is required to act expeditiously once information of default is received? The process of authentication and verification should be followed in case of any information received and not just for default. 2. What is meant by 'expeditious'? IUs should act expeditiously whenever any information is submitted and not just in case of default.	services and hence a statutory requirement. 20(2)(b)(ii) alerts the submitter of information as to the how the information will be processed. While certain processes will be driven by competition, trigger events need to be processed immediately. The authentication and verification are covered by technical standards.
Regulation 21 (2) (a)			Regulation 21(2)(a) places an obligation on the IU to communicate information of default to all creditors. The question arises, which	An IU shall communicate the information of default to

			creditors: the creditors on the same IU or the creditors of that debtor on other IUs as well? The IU that has learnt of default does not know of the creditors of that debtor on other IUs, but the Code clearly intends that all creditors of a debtor should learn of default, whichever IU they are on. The Working Group Report (WGR) thinks this through properly: an obligation is placed on each IU to inform all IUs about default, and on each IU to inform all creditors of a defaulting debtor. Also, in the draft regulations, the Working Group (WG) suggested that if any information is submitted that a debtor has defaulted, the debtor should be informed (draft regulation 15(6)). This is the proper thing to do, and gives the debtor some time (at least till the information is authenticated and stored in the IU) to resolve any misunderstanding or glitch. Without this, it can come entirely as a surprise to the debtor that some creditor has successfully initiated IRP against him. This provision needs to be added to the regulations.	its registered users and to all parties to debt. In any case, default is determined by adjudicating authority only.
Regulation 23 (1) (e)			The Regulation doesn't provide any conditions to be fulfilled for accessing this information. Since the information submitted to an IU is highly confidential and commercially sensitive, it is essential that there should be some accountability and	The regulations have provisions (23, 24 30, etc.) for confidentiality. Technical standards

			reasoning for access of information by the IBBI. The draft regulations provided that, in order to access information stored in an IU, the IBBI must pass a written order.	cover standard terms of service. As regards access by IBBI, it shall access information as per authority under delegation of powers.
Regulation 23 (2)			It is not clear why is the status of authentication is required after information has been submitted. The IBC mandates that information should be stored only after authentication, so an IU should never store any unauthenticated information. Section 214(e) of the IBC states that information should be authenticated by all 'concerned parties' before it is stored. This step is to avoid a scenario where the debtor has not authenticated the information submitted by the creditor and the veracity of the information is challenged by the debtor in a court. The draft regulations ensured that the above issues are addressed by obligating an IU to do the following: • Once information is submitted, the IU should make the information available to concerned parties for authentication. • IU should verify the identity of the concerned	23(2) provides the user to view the status of authenticati on. At all times, the IU shall be in possession of both authenticate d and unauthentic ated information, as information would flow continuousl y.

			party before allowing it to authenticate the information, so that there is no unauthorised access. • Concerned parties to be given seven working days to authenticate the information, so that there is no unauthenticated information for a long period of time. Unauthenticated information is of no use since it cannot be acceptable as evidence.	
Regulation 25			Regulation 25(2) suggests that a user can unilaterally mark any information as erroneous. This is very dangerous. A process needs to be specified for correcting errors, and it should involve confirmation by the counterparties, just like any other information that gets to the IU.	If an information is erroneous, it obviously needs to be corrected. It will go through the same process of authenticati on.
Regulation 29			Regulation 29 makes a broad provision: An information utility shall provide services without discrimination in any manner. An explanation follows that mentions specific kinds of discrimination. It is not clear whether the explanation is indicative or if it is exhaustive. If exhaustive, there is no need for the broad prohibition of all discrimination above. This creates confusion for potential IUs.	This provision ensures that every IU is a universal IU and accessible to every person irrespective of his constitution and geography. The expression 'explanation ' has the same meaning as in any other law.

Regulation 30			Section 30(2)(a) of the regulations says: An information utility shall not outsource the provision of core services to a third-party service provider. This clause is problematic, as it can create operating inflexibility for IUs. It is unclear what the extent of coverage of this clause may be. For example: does this mean that the IU platform cannot outsourced, or does this outsourcing ban apply to data center and related services, technology AMCs, technology support personnel, physical security including guards, etc. Technically, it can be read as an IU having to create every component of its core services delivery entirely on its own. This will increase the time taken for an IU to be set-up, as well as add to the costs of service delivery by an IU. Due to this problem, the WGR suggested that outsourcing of core services could be possible, subject to approval by the IBBI. Alternately, instead of a blanket ban on outsourcing, the IBBI may consider a two-stage outsourcing structure. First, a narrow list of services, such as authentication and verification, and any user interface may be classified as those that cannot be outsourced. For the remaining, an outsourcing model similar to the one that the RBI follows for its regulated entities may be followed. Under this model,	An IU is created for core services. This provision ensures that only the registered entity which is accountable under the law, provides core services. It does not prohibit hiring of services, for example, taking a building on rent for its office.

			two elements are taken into consideration by the regulator when allowing outsourcing: (1) that the standards of service for the user remain the same, whether the components of service delivery are in-house or outsourced; (2) the primary liability, even in case of outsourced services, lies with the regulated entity.	
Regulation 30			Even though the Technical Committee has not yet laid down the standards regarding security of data storage and maintenance, section 3(9)(a) of the Insolvency and Bankruptcy Code states that IUs have to accept electronic submission of information. Therefore, all information in an IU will be received and stored in electronic form. Regulation 30 mandates that IUs shall adopt "secure systems" for information flows, establish procedures and facilities to ensure that its records are protected against loss or destruction and unauthorised access. Even though each IU is obligated to perform the above duties, none of the standards of storage and maintenance of data that are mentioned in the regulations ensure that information stored in an IU will be treated as irrefutable or conclusive evidence. For example, IUs are required to use "secure systems" to transfer information. The definition of "secure systems" in the Information	These are the matters of technical standards. It goes without saying that electronic records must comply with the Information Technology Act, 2000.

			and Technology Act, 2000 does not ensure that information stored or transferred through secure systems will be admissible as evidence. It is important that the information available with the IUs passes the test of conclusive evidence in a court of law so that the parties do not get tangled in unnecessary litigation to establish basic facts about the debt and delay the resolution process. To ensure that IU records are admissible as evidence, the draft Regulations provided that an IU while performing its core services should ensure that the information stored will be in a manner which conforms to requirements laid down in section 65B of the Indian Evidence Act, 1872 (Evidence Act). Section 65B of the Evidence Act lays down the standards for storage and maintenance of electronic records so that they are admissible as evidence.	

Regulation 31		An IU is liable to provide indemnity to the users for losses that may be caused to them by any wrongful act, negligence or default of the information utility, its employees or any other person whose services are used for the provision of services. However, similar provisions under CICRA clearly specify the liability of CICs in its 'Offences and Penalty" section. It is requested to remove the alternate "Insurance/ unlimited liability" clause in the IU Regulations.		Punishment of the IU is not adequate. The users need to be compensated. Section 16 of the Depositories Act, 1996 provides for indemnification. Besides, the Code does not have many provisions which are in the CICRA. For example, the RBI can supersede the Board of CIC, while IBBI has no powers to supersede the Board of an IU.
Regulation 32			Regulation 32(1)(a) provides that IUs shall charge uniform fee for providing the same service to different users. Does this mean that an IU has to charge the same to an individual lender who wants to submit information about one loan, and a large bank such as SBI, which might want to submit information about thousands of loans every day, on the basis that the service is the same? Regulation 32(2)(a) provides that the fee	IU Regulations entail uniform fee for same service, repeat same service, to different users. There is no way to define 'reasonable'.

			charged for providing services shall be a reasonable reflection of the service provided. This is a very broad statement in the absence of any test of what is a "reasonable reflection", and again, creates confusion for IUs.	
Regulation 37			Regulation 37 does not provide for any procedural requirements or conditions to be adhered to by the IBBI while performing an inspection. Inspections must be performed according to due process, by issuing a written notice, adhering to timelines, etc. The draft regulations had detailed guidelines about how to conduct an inspection.	This is provided in the IBBI (Inspection and Investigation) Regulations, 2017.
Regulation 39			Regulation 39 mandates all IUs to have an exit management plan. Clause 1(a) of this regulation requires the IU to have mechanisms in place so the users can transfer information to other information utilities, in case there is a shut-down of one or more information utilities. This regulation places the onus of transferring information on the users of information utilities instead of the IBBI or the IUs themselves. This onus is highly burdensome and inappropriately placed since an IU will probably have a large number of users, who will most likely not have any means to ensure transfer of their information.	IBBI cannot take call on behalf of users. If IU takes responsibility, it will recover cost for the same. Every user will end up paying a higher fee throughout.

			The draft regulations put the onus of making sure information is transferred from one IU to another on IBBI and the IU instead. This ensured smooth transfer of information since they will be better equipped with resources to perform this task.	