

## **Insolvency and Bankruptcy Board of India**

### **Subject: Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018.**

The Governing Board considered the Board Note No. 21/2018 on the above subject in its last meeting on 26<sup>th</sup> June, 2018. After detailed deliberations, it approved draft regulations with certain changes, as annexed to draft. It, however, decided to revisit the provision relating to 'Guidance on law' in its next meeting, after considering provisions in the SEBI Informal Guidance Scheme and similar other schemes, before regulations are notified.

2. The provision relating to 'Guidance on law' reads as:-

*“The Board may provide for a scheme for general or specific clarification or guidance on the provisions of regulations made by it either on a request by a person or on its own, subject to the condition that such clarification or guidance shall not be binding on the Board and shall not be construed as determination of any question of fact or law.”*

3. A few statutory authorities in India and abroad have provisions for guidance to stakeholders. A brief of such provisions are as under:-

#### **I. In India**

**(a) The SEBI (Informal Guidance Scheme), 2003 (Annexure A) :** Paragraph 4 of the Scheme limits the persons eligible to seek informal guidance to: (i) an intermediary registered with SEBI (ii) a listed company (iii) a company intends to list its securities, (iv) a mutual fund trustee company or asset management company, and (v) an acquirer or prospective acquirer. The guidance under the Scheme may be given by a Department of SEBI in two forms, namely, 'No-action letters' and 'Interpretive letters'. As per Paragraphs 12 and 13 of the Scheme, these letters issued by a Department constitute the view of the Department and will not be binding on SEBI though it may generally act in accordance with such letters and cannot be construed as a conclusive decision or determination of any question of law or fact by SEBI.

**(b) The Authority on Advance Ruling (the Income-tax, 1961)'s “Handbook on Advance Rulings”:** The ruling pronounced by the Authority has binding effect under section 245R of the Income-tax Act, 1961, (a) on the applicant who had sought it, (b)

in respect of the transactions in relation to which the ruling had been sought, and (c) on the Commissioner and the income-tax authorities subordinate to him, in respect of the applicant and the said transaction. It may be seen that the Authority is an independent high-level adjudicatory body empowered to issue rulings under the statute.

## **II. Other Jurisdictions**

- (a) **The Food and Drug Administration (FDA) of U.S.’s Code of Federal Regulations [Title 21, Volume 1]:** Sec.10.115 provides for “Good Guidance Practices”. Sub-section (3) of thereof states that *“Although guidance documents do not legally bind FDA, they represent the agency’s current thinking. Therefore, FDA employees may depart from guidance documents only with appropriate justification and supervisory concurrence.”*
- (b) **The Australian Securities & Investment Commission (ASIC)’s Regulatory Guide 258:** The disclaimer to this regulatory guides states: *“This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act as amended by the Insolvency Law Reform Act 2016, the Insolvency Practice Rules (Corporations) 2016 and other applicable laws apply to you, as it is your responsibility to determine your obligations.”*
- (c) **The Insolvency Services of Ireland (ISI)’s ‘Guide to a Debt Relief Notice’:** It carries disclaimer: *“The ISI has no role in providing legal advice or interpreting the law and this guide is not an interpretation of, or advice on the law.”*
- (d) **The U.S. Securities and Exchange Commission’s “Staff Legal Bulletins”:** These summarise the Commission staff’s views on various aspects of the federal securities laws and SEC regulations and are not legally binding.
- (e) **Official Receiver’s Office of Government of Hong Kong’s ‘Debtor’s Bankruptcy Petition Procedural Guide’:** It mentions that the information provided in this publication is for reference only and Government does not accept any responsibility and liability for any loss or damage whatsoever arising in contract, tort or any cause whatsoever in connection with this publication. Users are responsible for making their own assessments and seek independent advice before relying on the information.

5. It thus emerges that guidance provided by regulators generally do not bind them. The guidance is available to a limited people for limited purposes.

6. There is no situation comparable to guidance on the regulations made by IBBI. First, the authorities usually make rules /regulations and administer them. Under the Code, IBBI makes regulations, but does not administer them. Further, section 60 (5) of the Code confers jurisdiction on the NCLT to entertain or dispose of any question of law or facts under the Code.

7. In view of the above, it is proposed that the guidance on regulations provided by IBBI may not have binding effect. The regulations may be notified accordingly.