

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

### **Subject: Note on contraventions committed by Insolvency Professionals during the conduct of Processes under the Code**

A Board Note [REDACTED] on the above-mentioned subject, was placed before the Governing Board for consideration at its 25<sup>th</sup> meeting held on 24<sup>th</sup> September, 2021. However, it could not be considered due to paucity of time. The same was updated and revised and placed again as Board Note [REDACTED] before the Governing Board for its consideration in its 26<sup>th</sup> meeting held on 24<sup>th</sup> December, 2021. However, it could not be considered due to paucity of time.

The same has been updated and is placed again before the Governing Board for its consideration.

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

### **Subject: Note on contraventions committed by Insolvency Professionals during the conduct of Processes under the Code**

An insolvency professional (IP), when acting as an Interim Resolution Professional (IRP) or Resolution Professional (RP), is vested with an array of statutory and legal duties. An IP takes over the affairs of the company upon initiation of the corporate insolvency resolution process (CIRP) and exercises the powers of the Board of the corporate debtor (CD). He/she is vested with the duty of management of operations of the CD as a going concern and to make every endeavour to protect and preserve the value of the CD. Regulation 17(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) provides that where the appointment of RP is delayed, the IRP shall perform the functions of RP from the 40<sup>th</sup> day of insolvency commencement date (ICD), till a RP is appointed.

2. The role of an IP as an IRP/RP during CIRP includes receiving and collating claims; constituting committee of creditors (CoC) and convening CoC meetings; preparation of information memorandum; appointing registered valuers; filing avoidance applications, inviting resolution plans and verifying compliances; submitting compliant resolution plans to CoC, submitting the resolution plans approved by CoC to the Adjudicating Authority (AA). Thus, an IP is responsible to conduct the process in such a manner, that it meets the objectives envisaged under the Code. Therefore, it is imperative for an IP to possess the highest level of professional excellence and his/ her actions must reflect integrity, objectivity, independence, and impartiality.

3. In order to regulate affairs of IP, the Board has been conferred with powers under the Insolvency and Bankruptcy Code (Code) and as per section 196(1) (aa) of the Code, one of the functions of the Board is to promote the development of, and regulate, the working and practices of, IPs, IPAs and IUs and other institutions, in furtherance of the purposes of this Code. Section 196(1)(f) of the Code further provides that the Board shall carry out inspections and investigations on IPs, IPAs and IUs and pass such orders as may be required for compliance of the provisions of the Code and the regulations made thereunder.

4. Section 217 of the Code enables any aggrieved person to file a complaint before IBBI against a service provider including IPs. In this regard, Board has also notified the IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017 which inter alia provides for the procedure of filing as well as time bound redressal of the complaints.

5. Till 31<sup>st</sup> January 2022, a total of 5785 complaints/ grievances have been received by the Board. Out of which, 5553 complaints/ grievances have been disposed of. The brief analysis of the complaints/ grievances are as follows:

A. **Distribution of Complaints in respect of CIRP:** From the data it is observed that 51.21% of the total complaints/ grievances (5110) that merited examination were with respect to following 10 Corporate Debtors (CD):

Sl. No	Name of CD	Assignment	Number	%age of Total complaints/ grievances
1	Jaypee Infratech Ltd	CIRP	893	17.48
2	Sovereign Developers and Infrastructure Ltd	CIRP	410	8.02
3	Dream Procon Pvt Ltd (DPPL)	CIRP	259	5.07
4	EMCO Ltd	CIRP	256	5.01
5	Granite Gate Properties Pvt Ltd	CIRP	180	3.52
6	Dewan Housing Finance Corporation LTD (DHFL)	CIRP	178	3.48
7	Adel Landmarks Ltd	CIRP	124	2.43
8	Three C Projects Pvt Ltd	CIRP	107	2.09
9	Trading Engineers (International) Ltd	CIRP	107	2.09
10	Horizon Buildcon Pvt Ltd	CIRP	103	2.02
<b>Complaints in Top 10 CDs</b>			<b>2617</b>	<b>51.21</b>
Complaints in other CDs			2493	48.79
<b>TOTAL</b>			<b>5110</b>	<b>100.00</b>


C. **Sources of Complaints/ Grievances:** Further a detailed analysis of stakeholders who have filed the complaint/grievances has been done, details of which are as follows:

i. **Complaints:**

Sl. No	Stakeholders	Percentage of Total Complaints
1	Homebuyer	26.81
2	Suspended Management	21.47
3	Financial Creditor	16.26
4	Operational Creditor	9.78
5	Workman/ Employee	6.86
6	Resolution Applicant	3.05
7	Insolvency Professional / Valuers / Other Professionals	6.61
8	Others	9.15
<b>Total</b>		<b>100.00</b>

ii. **Grievances:**

Sl. No	Stakeholders	Percentage of Total Complaints
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1	Homebuyer	46.60
2	Workman/ Employee	14.45
3	Investor / Claimant	5.24
4	Ministry / Statutory Body / NCLT	4.52
5	Operational Creditor	3.62
6	Insolvency Professional/ Valuers / Other Professionals	4.22
7	Suspended Management	3.52
8	Retail/ Small/ Minority Shareholder	2.50
9	Financial Creditor	2.60
10	Others	12.72
<b>Total</b>		<b>100.00</b>

It is submitted that as per the last Board note submitted to the Governing Board, 3996 complaints/ grievances were received in the Board till 31<sup>st</sup> December 2020. In the last 13 months 1789 new complaints / grievances have been received. It is observed that the majority of the complaints as well as grievances are being filed in real estate projects and by homebuyers. It may be observed that out of the top 10 CD, as per the number of complaints/ grievances, 8 CDs pertain to the real estate sector. Further, out of the total 5785 complaints/grievances received by the Board, around 43.90% complaints/ grievances are received from homebuyers. After the homebuyers, suspended management of CD and the workmen / employee(s) are largest among the complainants.

6. **Contravention by IP:** On the examination of complaints as well as on the basis of other material on record, if IBBI has reasonable grounds to believe that IP has contravened any of the provisions of the Code or rules or regulations, it may initiate inspection against the service provider including IPs. Other than that, routine inspections of IPs are also conducted based upon the inspection policy approved by the Board. Based on examination of the inspection report, or any other material available on record, Board may decide to issue show cause notice (SCN) to IPs detailing the specific conduct and contravention of specific provision of law. In this regard Board has also framed IBBI (Inspection and Investigation) Regulations, 2017. The

data of the last 5 financial years related to inspection conducted and SCN issued till 31<sup>st</sup> January 2022 is placed below:

**A. Data related to Inspections:**

Year	Inspections by IBBI			
	Ongoing at beginning	Inspections Ordered	Inspections Closed	Ongoing at the end
2017-18	0	2	0	2
2018-19	2	10	3	9
2019-20	9	55	27	37
2020-21	37	62	53	46
2021-22	46	64	46	64
<b>Total</b>	<b>NA</b>	<b>193</b>	<b>129</b>	<b>64</b>

**B. Data related to SCN and DC Orders:**

Year	Show cause notices by IBBI			
	Ongoing at beginning	Issued	Disposed of	Ongoing at the end
2017-18	0	4	0	4
2018-19	4	9	11	2
2019-20	2	14	7	9
2020-21	9	50	48	11
2021-22	11	18	12	17
<b>Total</b>	<b>NA</b>	<b>95</b>	<b>78</b>	<b>17</b>

It is observed from the above data that there is a substantial increase in the enforcement action taken by the Board in the last two and a half years. [REDACTED]

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7. **Nature of Contraventions:**

Based on the analysis of orders passed by the DC, contraventions by IPs as found in these matters are summarized as under:

1. **Inclusion of ineligible cost of CoC in IRPC:** Section 5(13) of the Code read with Regulation 31 of the CIRP Regulations and IBBI Circular No IBBI/IP/013/2018 dated 12<sup>th</sup> June 2018 specifies what is included in insolvency resolution process cost (IRPC). The costs which are necessary for CIRP may be included in IRPC, but it does not include cost incurred by the members of the CoC for seeking professional advice. It is observed that IPs are including the cost incurred by CoC for seeking legal advice or for engaging a professional as part of the IRPC. Such inclusion of the said expenses results in diminishing in the value of asset of CD which is not consistent with the objective of the Code of maximizing the value of CD.
2. **Payment to creditors during moratorium:** Section 14(1)(b) of the Code clearly prohibit actions by the CD including transferring, encumbering, alienating or disposing of the assets of the CD. However, it has been noted during few instances that IPs have made prematurely payment to creditors during CIRP towards amount outstanding as on ICD which is in contravention of section 14(1)(b) of the Code. Such actions not only impact the interest of remaining stakeholders but also may be seen as compromising independence and integrity of IP.

3. **Non-filing/ delay in filing of application for cooperation:** A CIRP requires cooperation of promoters, suspended directors and management of CD. Section 19 of the Code enables the IRP/RP to file an application before the Adjudicating Authority (AA) for necessary direction in case of non-cooperation from personnel of the CD, its promoters or from any other person for suitable directions to cooperate with IP. However, there were instances where IRP/RPs, despite having non-cooperation from suspended management/ personnel of the CD, failed to file such application under section 19 of the Code or filed it so late that it lost its purpose and effectiveness.
4. **Non-representation of CD in judicial proceedings:** Section 25(2)(b) of Code casts a duty upon RP to represent CD in judicial, quasi-judicial or arbitration proceedings. However, it has been observed that, there was a non-representation of IPs on behalf of CD in such proceedings which results in not realizing the benefits accruing to the CD and also adversely impacts the value maximization of the CD.
5. **Appointment of professionals on the basis of recommendation of CoC:** It is the duty of the RP to preserve and protect the assets of the CD including continuing its business operations. As per section 25(2)(d) of the Code, IRP/RP may appoint accountants, legal or other professionals for this purpose. As the fee of these professionals, ratified/ fixed by the CoC, forms part of the IRPC, RP should exercise due care while appointing such professionals so as to keep the CIRP cost reasonable. However, it has been observed that IRP/RPs are appointing professionals on the recommendation of the CoC without exercising their own due diligence. This compromises the independence of IP and also imposes avoidable cost on the CD and other stakeholders.
6. **Not forming an opinion pertaining to avoidance transactions:** As per section 25(2)(j) of the Code read with regulation 35A and 40A of CIRP Regulations, it is duty of the RP to file an application in respect of avoidance transactions (preferential, undervalued, extortionate and fraudulent transactions) for appropriate directions. It is important to resort to these provisions with a view to claw back the gains made by the erstwhile related parties to the promoters of the CD. RP needs to form an opinion on such transactions within 75 days of the ICD and file applications with AA within 135 days of ICD. However, it has been observed that RPs failed to form their individual opinion on



the same and abdicated their duty in favor of CoC to form such opinion. This clearly reflects serious dereliction of duty and breach of trust in addition to depriving the stakeholders of their legitimate dues.

7. **Related Party transactions without prior approval of CoC:** Section 5(24) and section 5(24A) of the Code explicitly defines the term ‘related party’ in relation to a CD as well as in relation to an individual. Section 28(1)(f) of Code requires the RP to take prior approval of the CoC before undertaking any related party transactions during the CIRP. However, it has been observed that IRP/RPs undertook such related party transactions without the prior approval of CoC in violation of section 28(1)(f) of the Code.
8. **Delegation of Authority without prior approval of CoC:** Section 28 (1)(h) of the Code requires that IP must take prior approval of CoC before delegating his authority to any other person for performing various duties under the Code and regulations made thereunder. However, it has been observed that IRP/RPs are delegating their authority for taking various actions without the prior approval of CoC in violation of Section 28(1) (h) of the Code.
9. **Non-adherence to timelines for circulation of minutes of CoC meetings:** Regulation 25(5) of CIRP Regulations require the IRP/RP to circulate the minutes of the CoC meeting by electronic means to members of CoC and authorised representative (AR), if any, within forty- eight hours of the conclusion of the meeting. In numerous instances, it was observed that RPs are not strictly adhering to such timelines in contravention to regulation 25 (5) of the CIRP Regulations.
10. **Not taking approval for fee of Professionals:** Regulation 34 of CIRP Regulations provide that CoC shall fix the expenses to be incurred on or by the IRP/RP, which includes fee to be paid to professionals and such expenses shall form part of IRPC. In myriad occasions, IRP/RP failed to take approval of fee of the professionals from the CoC as provided in the said regulation.
11. **Providing information without confidential undertaking:** Section 29(2) of the Code requires the RP to provide access to all relevant information of CD to the resolution applicant subject to resolution applicant undertaking to comply with the confidentiality requirements. Regulation 36(4) of CIRP Regulations also provide for taking an

undertaking of confidentiality from every prospective resolution applicant and CoC members before sharing the information memorandum. Further, regulation 35(2) of CIRP Regulations also require RP to obtain undertaking of confidentiality from every member of CoC before sharing with them the report of the registered valuer(s) containing details of fair and liquidation value of the CD, after receipt of the resolution plans. Despite having explicit provisions, it was noted that RPs shared information memorandum/reports of valuation with the members of the CoC and/or with prospective resolution applicants in violation of section 29(2) read with regulation 35(2) and regulation 36(4) of the CIRP Regulations.

12. **Non-cooperation with Inspecting Authority:** In order to monitor the performance of the IPs, Board conducts inspections of the IPs as and when required. As per regulation 4 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 read with clause 18 of Code of Conduct specified in First Schedule of IBBI (Insolvency Professional) Regulations, 2016, it is the duty of the IP to provide all assistance to the Inspecting Authority (IA) in connection with the inspection. The IP is required to produce all records in his custody or control and furnish all statements and information which the IA may require. However, it has been reported during various inspections that IPs failed to cooperate with IA in contravention to the said provisions.
13. **Non-disclosure of fee and relationship:** Regulation 34A of CIRP Regulations as well as the circular dated 16<sup>th</sup> January 2018 issued by the Board require the IRP or RP, as the case may be, to submit relationship and cost disclosure in the manner required by the Board. Thus, it is the duty of an IP to disclose the fee payable to him as well as the fee payable to professionals engaged by him while performing the duties as an IP. It is also his duty to disclose the relationship he has with the professionals engaged by him. During the course of various inspections, it has been observed that IPs failed to file the said disclosures or filed the same with substantial delay which is breach of regulation 34A of CIRP Regulations read with Clause 25A of the Code of Conduct specified in First Schedule of IBBI (Insolvency Professional) Regulations, 2016.
14. **Raising invoices for services rendered by IP in the name of his/her firm:** An IP is an independent professional who is registered with the Board in his/her individual capacity

and therefore, should charge the requisite fee for his/her assignment as IRP/RP/Liquidator in his/her own name and said fee should also be credited in his/her own account. Similarly, any other professional appointed by an IP should also raise bills / invoices in his / her own name towards such fees, and such fees shall be paid into his / her bank account. Board vide its Circular no. IP/004/2018, dated 16<sup>th</sup> January 2018 has also clarified the same. Despite such clear directions, it has been observed that IPs raised invoices for services rendered by them in the name of other person/ entities which is not in conformity with the aforesaid circular.

15. **Appointment of Non-Registered valuers:** Valuation of the assets of CD is critical exercise, as the said values serve as reference for evaluation of choices, including liquidation, and selection of the choice decides the fate of the CD as well as the stakeholders. Regulation 27 of CIRP Regulations requires determination of fair value and liquidation value of the CD by two registered valuers, and it is the duty of the resolution professional to appoint valuers registered with IBBI only. However, in many instances it was observed that IPs appointed unregistered valuers for conducting the said valuations. Such conduct of IPs is in contravention of regulation 27 of CIRP Regulations read with IBBI circular IBBI/RV/019/2018 dated 17<sup>th</sup> October 2018 and IBBI circular IBBI/RV/022/2019 dated 13<sup>th</sup> August 2019.
16. **Acceptance of assignment without having Authorisation for Assignment (AFA):** Regulation 7A of IP regulations requires that any IP shall not accept or undertake any assignment, including CIRP, unless he holds an AFA on the date of such acceptance or commencement of such assignment, as the case may be. However, it has been observed that IPs undertook assignments without holding valid AFA which is in contravention of regulation 7A of IP Regulations.
17. **Not taking control and custody of assets of CD:** As per section 18(1)(f) of the Code, one of the duties of an IRP is to take control and custody of asset over which CD has ownership as recorded in balance sheet of CD or with information utility or the depository of securities or any other registry that records the ownership of assets including tangible assets whether moveable or immovable. Further, Section 25(2)(a) of the Code provides that duties of the RP which makes it mandatory for the RP to take

immediate custody and control of all assets of CD, including the business records of the CD. Despite the above said provisions, it has been observed that IPs failed to take control and custody of assets of CD in contravention of section 18 and 25 of the Code.

18. **Inclusion of interest incurred after ICD in claim: Regulation 13(1) of the CIRP**

Regulations requires IRP/RP to verify each claim of the creditor as on the Insolvency Commencement Date (ICD). Further, various forms provided in the schedule of CIRP Regulations for filing of claims also provide that claim of the creditor should be the total amount of claim including any interest as on ICD. However, in some cases, RP had included the interest amount charged/incurred after the ICD in the claim amount of FC resulted in additional voting share to that FC in CoC.

19. **Deferment of publication of Invitation for Expression of Interest (EoI):** The Code

envisages resolution of a CD in a time bound manner for maximization of value of its assets. Invitation for EoI is the first step to achieve the time bound resolution and therefore should not be deferred. However, RP had, in some instances, deferred the publication of Invitation of EoI on the request of suspended management or any other stakeholder on the ground that a parallel settlement negotiation is ongoing. This reflect that RP in such cases was not independent and was acting under the influence of other stakeholders.

20. **Non-adherence of timelines provided under the Code/ Regulations:** Time is essence

of the CIRP and therefore, there is a specific timeline provided for each task, i.e., appointment of valuers, preparation of IM, publication of Form G etc. under regulation 40A of CIRP regulations. However, there were various instances, where IP failed to adhere to specified timelines which resulted in the delay of whole process.

21. **Non- preservation of records:** As per the regulation 39A of CIRP Regulations, IRP/RP

shall preserve physical as well as electronic copy of the records relating to the assignments of the CD. Further, regulation 7(2)(g) of the IP Regulations requires an IP to maintain records of all assignments undertaken by him under the CoC for at least three years from the completion of such assignment. However, despite explicit provisions, it has been observed that IPs failed to produce complete records in respect of assignments conducted by them.

22. **Acceptance of EoI after the time specified in invitation:** According to regulation 36A of the CIRP Regulations, any EOI received after the time specified in the invitation shall be rejected. However, RP has in some cases accepted EOI after the last date of submission, thereby violated regulation 36A of the CIRP Regulations.

8. The year-wise status of Disciplinary Action taken against the IPs by the Board, till date is tabulated below:

<b>Year</b>	<b>2017-18</b>	<b>2018-19</b>	<b>2019-20</b>	<b>2020-21</b>	<b>2021-22</b>	<b>Total</b>
<b><u>A. SCNs issued</u></b>						
(i) Inspection based	0	2	12	18	14	<b>46</b>
(ii) Material available on record	4	7	2	32	4	<b>49</b>
<b>Total (A)</b>	<b>4</b>	<b>9</b>	<b>14</b>	<b>50</b>	<b>18</b>	<b>95</b>
<b><u>B. SCNs disposed by DC of IBBI</u></b>						
(i) Cancellation of registration	0	4	0	0	1	<b>5</b>
(ii) Suspension of registration	0	2	1	14	3	<b>20</b>
(iii) Imposition of Monetary Penalty only	0	4	2	2	1	<b>9</b>
(iv) Imposition of Monetary Penalty with other directions (PREC, Internship etc.)	0	1	0	2	2	<b>5</b>
(v) Warning (only) to IP	0	0	3	2	1	<b>6</b>
(vi) Internship, PREC only	0	0	1	1	0	<b>2</b>
(vii) No action	0	0	0	27	4	<b>31</b>
<b>Total (B)</b>	<b>0</b>	<b>11</b>	<b>7</b>	<b>48</b>	<b>12</b>	<b>78</b>

9. It is submitted for information of the Governing Board.