

IBBI Updates

1. GUIDELINES ON USE OF CAVEATS, LIMITATIONS AND DISCLAIMERS BY THE REGISTERED VALUERS IN VALUATION REPORTS

On **September 01, 2020** Insolvency and Bankruptcy Board of India (IBBI) had issued the *Insolvency and Bankruptcy Board of India (Use of Caveats, Limitations, and Disclaimers in Valuation Reports) Guidelines, 2020*, which shall come into force in respect of valuation reports in respect of valuations completed by Registered Valuers (RVs) on or after **1st October, 2020**.

A. Background

Rule 8 of Companies (Registered Valuers and Valuation) Rules, 2017 mandates that the RVs shall state Caveats, Limitations and Disclaimers in their Valuation Report which explains the limitations faced by him. These Rules are made to ensure that, **a valuation report does not carry a disclaimer**, which has the potential to dilute the responsibility of the RV or make the valuation unsuitable for the purpose for which the valuation was conducted. Due to inexact interpretation of scope of Caveats, Limitations and Disclaimers by RVs, they are having different practices in presentation of caveats, limitations and disclaimers in valuation reports.

A committee was setup to develop a standard template for disclaimers, and the committee submitted their report to the Authority on 07th April, 2020, which was considered by the Authority in consultation with the Registered Valuers Organisations (RVOs) for finalisation of these Guidelines.

B. Objective

These Guidelines **provide guidance to the RVs** in the use of Caveats, Limitations, and Disclaimers in the interest of credibility of the valuation reports. These also provide an **illustrative list** of the Caveats, Limitations, and Disclaimers which shall not be used in a valuation report.

C. Adherence

- i. An RV shall **prepare valuations reports** under Rule 8 of the Companies (Registered Valuers and Valuation) Rules, 2017 in adherence to these Guidelines.
- ii. An RVO shall monitor adherence to these Guidelines through scrutiny of the valuation reports.

D. Structure of Guidelines

These Guidelines are divided into three sections as under which are explained in detail in the annexure to the guidelines (link provided below):

- i. **1st Section** - Need for Caveats, Limitations, and Disclaimers in a valuation report;
- ii. **2nd Section** - Guidance note on the use of Caveats, Limitations, and Disclaimers;
- iii. **3rd Section** - Illustrative list of Caveats, Limitations, and Disclaimers for each asset class provided in the Rules.

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In general, valuation is required in the context of the following:

- i. Consummation of certain transactions like acquisition, disposal, merger, amalgamation;
- ii. Internal decision making/Corporate Governance;
- iii. Regulatory Compliance: Companies Act, SEBI Regulations, Income Tax, Wealth Tax, FEMA, etc.;
- iv. Fund Mobilisation - both equity and debt;
- v. Disputes (within and outside the courts);
- vi. Borrowing and lending decisions; and
- vii. Insolvency and Bankruptcy proceedings.

Rule 10 read with section 247 of the Companies Act, 2013 require that a RV shall conduct valuations required under the Act. The Insolvency and Bankruptcy Code (Code) read with the regulations mandates that the valuations required under the Code or any of the regulations made thereunder shall be conducted by a registered valuer.

A detailed and well-reasoned valuation report shall be submitted to the Board in every case of valuation that is being processed, where an RV is appointed. Following contents shall be held by the valuation report:

- i. Background Information of the asset being valued;
- ii. Purpose of valuation and appointing authority;
- iii. Bases of Value;
- iv. Premise of Value;
- v. Identity of the RV and any other experts involved in the valuation;
- vi. Intended Users of the Valuation;
- vii. Disclosure of RV interest or conflict, if any;
- viii. Date of appointment, valuation date and date of report;
- ix. Inspections and /or investigations undertaken;
- x. Business interest, ownership characteristics;
- xi. Nature and sources of information;
- xii. Significant Assumptions, if any;
- xiii. Procedures adopted in carrying out the valuation and valuation standards followed;
- xiv. Restrictions on use of report, if any;
- xv. Major factors that were taken into account during valuation;
- xvi. Conclusion; and
- xvii. Caveats, limitations and disclaimers.

Procedure for the valuation shall vary according to the circumstances however the principal procedures shall be:

- i. Review of past financials;
- ii. Review and analysis of financial projections;
- iii. Industry analysis;
- iv. SWOT analysis;
- v. Comparison with similar transactions;
- vi. Comparison with other similar listed companies;
- vii. Discussions with the management;
- viii. Review of principal agreements/documents etc;
- ix. Site visit (external, internal or both) or desktop valuation;

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- x. Any assumption made for internal condition must be stated like in case of desktop valuation, a RV must state that the basis of the report is photographs and documents provided and secondary research only; and
- xi. Process of site identification, i.e., self-identified or with the help of clients representative or client itself.

The link for aforesaid Guidelines is as mentioned below:

<https://ibbi.gov.in/uploads/legalframwork/e5e1300db2dd6a8bebe289ba579a7c14.pdf>

2. GUIDELINES FOR APPOINTMENT OF INSOLVENCY PROFESSIONALS AS ADMINISTRATORS

On **September 05, 2020** IBBI issued *guidelines for appointment of Insolvency Professionals (IP) as administrators under the SEBI (Securities and Exchange Board of India) (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018.*

IBBI and SEBI have mutually agreed upon to use a Panel of IPs for appointment as Administrators for effective implementation of the Regulations. IBBI shall prepare a Panel of IPs keeping in view the requirements of SEBI and the Regulations and SEBI shall appoint the IPs from the Panel as Administrators, as per its requirement in accordance with the Regulations.

The Panel shall be valid only for six months and a new Panel will replace the earlier Panel every six months. These Guidelines shall come into effect for appointments as Administrator with effect from **October 01, 2020.**

An IP will be eligible to be included in the Panel of the IPs if:

- i. there is **no disciplinary proceeding**, whether initiated by the IBBI or the IPA of which he is a member, pending against him;
- ii. he has **not been convicted** at any time in the last three years by a court of competent jurisdiction;
- iii. he **expresses his interest** to be included in the Panel for the relevant period; and
- iv. he **undertakes to discharge the responsibility** as an Administrator, as and when he may be appointed by the SEBI;
- v. he has **made the compliance** under Regulation 7(2) (ca) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 for the year 2019-20;
- vi. he **holds an Authorisation for Assignment (AFA)**, which is valid on the date of expression of interest.

The Panel shall have **Zone wise list of IPs**. An IP will be included in the Panel against the Zone where his registered office (address as registered with the IBBI) is located. For example, an IP located in the city of Surat (Gujarat) will be included in Ahmedabad Zone, which covers the State of Gujarat. The areas covered in different Zones are detailed in the guidelines.

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Expression of Interest

The IBBI shall invite expression of interest from IPs in 'Form A' to act as Administrator by sending an e-mail to IPs at their email addresses registered with it and hosting the guidelines on its website.

An IP included in the Panel based on his expression of interest, must not:

- i. Withdraw his interest to act as an Administrator; or
- ii. Decline to act as Administrator, if appointed by SEBI; or
- iii. Surrender his registration to the IBBI or membership or AFA to his IPA; during the validity of the Panel;

It must also be explicitly understood that:

- i. An IP in the Panel will be **appointed as Administrator, at the sole discretion of SEBI**;
- ii. Submission of expression of interest is an unconditional consent by the IP to act as Administrator in accordance with the Regulations;
- iii. An IP who **declines to act as Administrator**, on being appointed by SEBI, shall not be included in the Panel for the next **five years**, without prejudice to any other action that may be taken by the IBBI.
- iv. These guidelines will be reviewed by the IBBI, in consultation with the SEBI, from time to time.

The link for aforesaid Guidelines is as mentioned below:

<https://ibbi.gov.in/uploads/legalframework/1d05f0423806860621ad259e52ed40f2.pdf>

3. INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (ANNUAL REPORT) AMENDMENT RULES, 2020

On **September 10, 2020** the **Ministry of Corporate Affairs vide Notification no. G.S.R. 563 (E)** notified the *Insolvency and Bankruptcy Board of India (Annual Report) Amendment Rules, 2020* to further amend the Insolvency and Bankruptcy Board of India (Annual Report) Rules, 2018.

Rule 4 of the Insolvency and Bankruptcy Board of India (Annual Report) Rules, 2018, which specifies **the time schedule for the submission of the annual report**, has been **substituted**, namely:

"The dates for submission of the annual report referred to in rule 3 of annual accounts for audit leading to the issue of Audit Certificate by the Comptroller and Auditor General of India and for submission to the Ministry of Corporate Affairs for timely submission to the Parliament are listed below:

1. **Approved and authenticated annual accounts** to be made available by the Insolvency and Bankruptcy Board of India to the concerned Audit Office and commencement of audit of annual accounts **on June 30**.
2. **Issue of the final Separate Audit Report (SAR)** in English with Audit Certificate to Insolvency and Bankruptcy Board of India on **October 31**.
3. **Submission of the annual report and audited accounts** to the Ministry of Corporate Affairs for it to be laid on the Table of the Parliament **on December 31**.

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Rule 3 of the Insolvency and Bankruptcy Board of India (Annual Report) Rules, 2018, which pertains to **Form of Annual Report** reads as - *The Board shall prepare its annual report, giving a true and full accounts of its activities, policies and programmes, during the previous financial year in the Form annexed to these rules.*

The link of the aforesaid notification is as mentioned below:

<https://ibbi.gov.in/uploads/legalframework/41e38e3aa3899eca305d79edf946b547.pdf>

4. THE INSOLVENCY AND BANKRUPTCY CODE (SECOND AMENDMENT) ACT, 2020

On **September 23, 2020** Ministry of Law and Justice notified the *Insolvency and Bankruptcy Code (Second Amendment) Act, 2020* after receiving the assent of the President to further amend the Insolvency and Bankruptcy Code, 2016. The **Act is deemed to have come into force from June 5, 2020** and the **Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 has been repealed.**

On **September 15 2020** the *Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020* was introduced in Rajya Sabha to further amend the Insolvency and Bankruptcy Code, 2016 and to replace an ordinance that was promulgated in June 2020 to suspend insolvency proceedings for up to one year against fresh COVID-19 Pandemic related default from March 25, 2020.

The following are the amendments to IBC, 2016:

A. Suspension of initiation of Corporate Insolvency Resolution Process (CIRP)

Insertion of Section 10A which states, “*Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of CIRP of a corporate debtor shall be filed, for any default arising on or after **25th March, 2020** for a period of 6 months or such further period, not exceeding one year from such date, as may be notified in this behalf. Provided that **no application shall ever be filed** for initiation of CIRP of a corporate debtor for the said default **occurring during the said period.***”

Explanation-For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020”

B. Amendment to Section 66- Fraudulent or wrongful trading

Section 66(1) states - *If during the CIRP or a liquidation process, it is found that **any business** of the corporate debtor has been carried on **with intent to defraud creditors** of the corporate debtor or for any fraudulent purpose, the **Adjudicating Authority** may on the application of the resolution professional **pass an order** that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.*

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Section 66 (2) states- *On an application made by a resolution professional during the CIRP, the Adjudicating Authority may by an order direct that a **director or partner of the corporate debtor**, as the case may be, shall be **liable to make such contribution to the assets of the corporate debtor** as it may deem fit, if—*

*(a) **before the insolvency commencement date**, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a CIRP in respect of such corporate debtor; and*

*(b) such director or partner **did not exercise due diligence** in minimising the potential loss to the creditors of the corporate debtor.*

Explanation—For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

Insertion of Section 66(3):

Notwithstanding anything contained in Section 66, **no application** shall be filed by a resolution professional under Section 66(2), in respect of such default against which initiation of CIRP is suspended as per section 10A (as explained above).

The link of the aforesaid bill and Act is as mentioned below:

<https://www.ibbi.gov.in/uploads/whatsnew/aa1ac00c9a594c699c71c2d34fb990f9.pdf>

<https://ibbi.gov.in/uploads/legalframework/c1d0cde66b213275d9cf357b59bab77b.pdf>

5. INSOLVENCY AND BANKRUPTCY (APPLICATION TO ADJUDICATING AUTHORITY) (AMENDMENT) RULES, 2020

On **September 24, 2020** the **Ministry of Corporate Affairs vide Notification no. G.S.R. 583(E)** notified the *Insolvency and Bankruptcy (Application to Adjudicating Authority) (Amendment) Rules, 2020* to further amend the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016.

The amendments are in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016:-

- a) **Rule 4(3)** on service of a copy of the application by the **Financial Creditor** shall be substituted to add electronic means as one of the ways to serve the copy of the application namely:

*“The applicant shall serve a copy of the application to the registered office of the corporate debtor and to the Board, **by registered post or speed post or by hand or by electronic means**, before filing with the Adjudicating Authority.”*

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- b) **Rule 6(2)** on service of a copy of the application by **Operational Creditor** shall be substituted to add electronic means as one of the ways to serve the copy of the application namely:

*“The applicant under sub-rule (1) shall serve a copy of the application to the registered office of the corporate debtor and to the Board, **by registered post or speed post or by hand or by electronic means**, before filing with the Adjudicating Authority.”*

- c) **Rule 7(2)** on service of a copy of the application by the **Corporate Applicant** shall be substituted to add electronic means as one of the ways to serve the copy of the application namely:-

*“the applicant under sub-rule (1) shall serve a copy of the application to the Board **by registered post or speed post or by hand or by electronic means**, before filing with the Adjudicating Authority.”*

- d) **Form 1** on particulars of Financial Debt, **Form 2** on written communication by proposed Interim Resolution Professional, **Form 5** on application by the Operational Creditor and **Form 6** on application by the Corporate Applicant under Part V of the Rules have been substituted, details of which are given in the notification.

- e) **Form 5A** has been inserted details of which are given in the notification.

The link of the aforesaid notification is as mentioned below:

<https://ibbi.gov.in/uploads/legalframework/27e336abe5b5328297a2ba5b35b39fac.pdf>