

**GNLU CENTRE FOR LAW & ECONOMICS**  
**Policy Recommendations**



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**Comments to the Insolvency and Bankruptcy Board of India on the Discussion Paper on Amendments to Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Process) Regulations, 2016**

Comments on behalf of the Policy Inputs Research Group on IBBI, GNLU Centre for Law & Economics

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### **I. INTRODUCTION:**

On 19th June 2024, the Insolvency and Bankruptcy Board of India invited public comments on amendments to Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Process) Regulations, 2016. The discussion paper solicited comments on following issues, namely: - (a) Registered valuer to submit valuation report for the Corporate Debtor (CD) as a whole. (b) One valuation estimate for companies up to a certain asset size and for micro, small and medium enterprises (MSME) companies. (c) Voting by authorised representative (AR) before appointment by Adjudicating Authority (AA). (d) Release of guarantees in the resolution plan.

With regards to the underlying purpose for which the Centre for Law and Economics was established at the Gujarat National Law University, the Centre constituted a special Research Group to look further into the proposed amendments and research on the recommendations so as to suggest significant amendments in order to achieve a comprehensive and consistent regulatory framework.

This document proposes comments which have addressed inconsistencies and efficient alternatives. It has further addressed any foreseeable difficulty in implementation of any of the provisions in the regulations.

Lastly, in order to ensure both the originality and practical viability of these recommendations, the Recommendations Document has undergone rigorous evaluation overseen by esteemed faculty members.

### **II. GENERAL COMMENTS:**

This section will provide an overview of the Centre's comments as stated below.

Firstly, the proposal to appoint two valuers for the valuation as a whole instead of six registered valuers for each particular class and ensuring compliance with the procedure as given under Section 8(2) of The Companies (Registered Valuers and Valuation) Rules, 2017 is deemed appropriate and efficient. However, the procedure to be undertaken by the registered valuer for the valuation of the registered class of asset must be made flexible.

Secondly, the proposal to reduce CIRP costs by providing for the appointment of only one registered valuer by default where the corporate debtor has an asset size of 1000 crores or has been classified as an MSME is considered erroneous. A uniform proposal based on the value of the output can perhaps create issues with compliance as industries operating in various sectors have different requirements and working frameworks. Therefore, it is suggested that the present provision should be retained as is and the flexibility of an alternative opinion and appeal mechanism should not be compromised.

Thirdly, the proposal to amend regulation 27(1) is welcomed. However, a few tweaks are suggested. The proposal to appoint the IP as the interim AR with all his powers and privileges until one is appointed by the FCs is appropriate and efficient, but there must be a time limit prescribed for him to exercise these powers after which there must be re-voting. Next, the number of days for which the AA can delay the appointment of the AR must be prescribed. If the AA fails to appoint the AR during such period and exceeds it, the reasons for the same must be recorded.

Lastly, the proposal to incorporate the Supreme Court's judgement in *Lalit Kumar Jain v. Union of India* is efficient and in the interests of minimising the overall costs of the CIRP process, but the same is vague. The proposal in its current form might cause more unnecessary litigation. Therefore, it is suggested that the proposal be that the approval of the resolution plan by the CoC does not *ipso facto* prevent the guarantors from enforcing their right to claim their debt from the guarantors of the corporate debtor, unless otherwise provided for in the resolution plan. This is in keeping with the latest NCLAT judgements.

### III. SPECIFIC COMMENTS:

| S.No. | ISSUES  | SUMMARY OF PROPOSAL  | COMMENTS / SUGGESTIONS  | RATIONALE   |
|-------|---|--|---|---|
| 1.    | <b>Registered valuer to submit valuation report for the Corporate Debtor (CD) as a whole.</b> | Regulation 27 and 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 for the determination of the fair value and liquidation value of the CD require the RP to appoint two registered valuers and permitted appointment of separate registered valuer in each asset class. The amendment proposes to | In order to ease the process of appointment of 2 valuers to undertake the valuation process for all three asset classes, the process of RV undertaking valuation of assets only for the registered class of asset must be made flexible. The proposal aiming to have 2 RVs prepare the valuation reports on behalf of the CD aims to create a consistency among procedures.<br><br>As per Rule 5 (1) of the Companies (Registered Valuers and Valuation) Rule, 2017, it is mandatory to undertake an Educational Course in the specified class. The | Since a registered valuer can undertake valuation of assets only for the class of assets for which he is registered for, the possibility of the two RVs not being registered for all assets classes would be a possibility. <sup>1</sup> Section 8(2) of The Companies (Registered Valuers and Valuation) Rules, 2017 provides that the RV has the option to obtain input for valuation or commission a separate valuation for a specific asset class from another RV in the instance that he is not registered under that particular asset class. Thereby, the liability |

<sup>1</sup> [https://ibbi.gov.in/uploads/register/FAQs\\_for\\_registration\\_of\\_Individuals\\_as\\_valuer.pdf](https://ibbi.gov.in/uploads/register/FAQs_for_registration_of_Individuals_as_valuer.pdf)

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|  |  | <p>appoint two valuers for the valuation as a whole instead of six registered valuers for each particular class and ensure that the procedure under Section 8(2) of The Companies (Registered Valuers and Valuation) Rules, 2017 is complied with.</p> | <p>IBBI also requires that at the time of applying for registration, an applicant must not be in employment. The IBBI for the registration of RVs under their educational qualifications may come up with measures to permit the registration of an RV during employment in another class of asset in order for him to ensure the valuation of all assets by himself. Thus, maintaining consistency.</p> | <p>for the resultant valuation would remain with the first mentioned RV, regardless of the nature or source of the inputs or valuation provided by the other RV.</p> <p>Allowing registration of an RV during employment in another class of asset would ensure that the two registered valuers themselves are sufficient to value all three different classes of assets. The Insolvency and Bankruptcy Board of India has laid down that an individual can be a member of only one RVO for a particular asset class.</p> <p>However, for other asset class, an individual can be a member with another RVO which is recognised for the said</p> |
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|    |  |   |   | asset class. In the event of the RV obtaining input for valuation or commissioning a separate valuation for a specific asset class from another RV under Section 8(2) of The Companies (Registered Valuers and Valuation) Rules, 2017 issues of inconsistency in valuation reports would tend to crop up.                   |
| 2. | <b>One valuation estimate for companies up to a certain asset size and for micro, small and medium enterprises (MSME) companies.</b> | Regulation 27 of the CIRP Regulations mandates that the resolution professional appoint two registered valuers within seven days of his appointment, but not later than the forty-seventh day from the insolvency commencement date, to determine | While the premise of cost reduction is compliant with the greater view of upholding the intent of the CIRP regulations, a uniform proposal based on the value of the output can perhaps create issues with compliance as industries operating in various sectors have different requirements and working frameworks. It is suggested that the | Micro, Small, and Medium Enterprises (MSMEs) are undoubtedly the backbone of the Indian economy and a crucial source of employment. Their scope ranges from agriculture to textile manufacturing, each with unique requirements. Therefore, while cost reduction and increased market efficiency are important goals as per |

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|  |  | <p>the fair value and liquidation value of the corporate debtor. If there is a significant discrepancy between the two valuers' estimates, a third valuer must be appointed, with the associated costs included in the insolvency resolution process costs. For companies with smaller asset sizes and MSMEs, these costs and potential delays are particularly burdensome.</p> <p>To address this, it is proposed that for corporate debtors with an asset size up to Rs. 1000 crore and for those classified as MSMEs, the resolution</p> | <p>regulation should continue in its existing format, flexibility of an alternative opinion in the form and mechanism to appeal should not be compromised</p> <p>Consideration should be given to the needs of various industries which are qualified as MSME's considering the differential requirements each industry has.</p> | <p>the CIRP regulations and the IBC Act, these should not come at the expense of reduced value of the proposal. A provision of alternate value ascertainment in case of legitimate grievances should be allowed</p> <p>It is essential to recognize that most MSMEs operate with limited capital resources, often hindering their ability to seek professional advice due to the increased variable costs, MSMEs can be left bereft of a proper valuation of assets. hence, a sensitive and tailored approach towards MSMEs can lead to better valuation and overall success.</p> |
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|    |  | <p>professional should appoint only one registered valuer by default. If the Committee of Creditors decides that two valuers are necessary due to complexities, they must record the reasons before the resolution professional proceeds. This proposal aims to reduce CIRP costs and delays, facilitating a more efficient resolution process for smaller companies and MSMEs.</p> |  |  |
| 3. | <p><b>Voting by authorized representative (AR) before appointment by</b></p> | <p>In view of the fact that the appointment of AR gets delayed in some cases and the AR is unable to</p>  | <p>The proposal is overall a welcome measure given that it would allow the class of creditors to be represented even</p> | <p>Firstly, the proposal does nothing to address the problem of delay in the appointment of AR by the AA. Although it is</p> |



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|  | <p><b>Adjudicating Authority (AA)</b></p> | <p>attend CoC meetings before his/her appointment, leading to inadequate representation of a class of Financial Creditor, thereby affecting the exercise of their right, it is proposed that sub-regulation (1) of regulation 27 be amended. This amendment becomes important because CoC decisions are not invalidated merely because of a delay in the appointment of AR.</p> <p>The proposal aims to bring in the following changes:</p> <p>1. The IRP, along</p> | <p>during the interim period, allowing them to enjoy their rights effectively. It would prevent the class of Financial Creditors (FC) from getting unfairly punished for the delay in appointment of Authorised Representatives (AR) by the Adjudicating Authority (AA).</p> <p>However, the proposal might need a few tweaks to address certain loopholes that may arise.</p> <p>It is pertinent to ensure that the right of a class of creditors to be represented in the CoC meetings does not negatively impact the right of all creditors to be represented by a person of their choice.</p> <p>There is also a need to ensure that the</p> | <p>stipulated that the AA has to appoint the AR within two days of verification of claims, no consequences are mentioned for any delay.<sup>2</sup></p> <p>Secondly, the provision of having an interim AR might disincentivize the speeding up of the appointment process and result in further delay in appointment of AR. This would be counterintuitive in nature.</p> <p>Thirdly, the grant of all powers and duties to the interim AR might work against minority viewpoints in the given class of creditors and defeat the purpose of Regulation 16A (3A), which allows creditors amounting to 10% or more of the class of creditors to</p> |
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<sup>2</sup> <https://ibclaw.in/cirp-regulation-16a-of-ibbi-insolvency-resolution-process-for-corporate-persons-regulations-2016-authorized-representative/>

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|  |  | <p>with submitting an application for the appointment of the AR chosen by the highest number of FCs of a class before the AA, would submit an application to allow the IP to act as interim AR until the appointment is made.</p> <p>2. The interim AR would be allowed to attend the CoC meetings after the application for appointment is made until the final appointment.</p> <p>3. In the same period, he would also be required to perform the duties under section 25A, read with Regulation 16A of CIRP Regulations.</p> | <p>proposal does not negatively impact the need for speedier appointment of ARs. Both of these problems may arise if the proposal is implemented in its current state. Therefore, it is suggested that the following recommendations be incorporated into the proposal:</p> <ol style="list-style-type: none"> <li>1. Stipulate a time limit on the maximum duration for which an interim AR can exercise the powers granted, after which there needs to be a re-voting.</li> <li>2. Stipulate the maximum number of days an AA can delay the appointment of the AR, and if that time limit is exceeded, make them accountable to record</li> </ol> | <p>seek the replacement of an AR with another RP and thereafter the change can occur through voting of the creditors in the concerned class. There is no provision for the removal of an interim AR in the proposal, thereby leaving the FCs at the mercy of the AA to appoint the AR if they wish to seek a replacement.</p> |
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|    |  |   | reasons for the same.  |  |
| 4. | <b>Release of guarantees in the resolution plan.</b> | In the principal regulations, under sub-regulation (f) of regulation 37, the following proviso shall be inserted: -<br><br><i>Provided that a resolution plan shall not prevent the creditors from enforcing their rights against the guarantors of the corporate debtor.</i> | The proposed provision reflects an attempt by the IBBI to codify and incorporate the Supreme Court's judgement in the case of <i>Lalit Kumar Jain v. Union of India</i> <sup>3</sup> . In this judgement, the Supreme Court laid down that the resolution plan as approved by the Committee of Creditors (CoC) does not <i>ipso facto</i> discharge the personal guarantors of their liability. This means that the creditors can recover from the Corporate Debtor (CD) their share under the resolution plan, and still have the | The Supreme Court in <i>Lalit Kumar Jain v. Union of India</i> <sup>4</sup> held that the liability of the guarantor being coextensive to that of the corporate debtor, is not <i>ipso facto</i> discharged upon the approval of the resolution plan <sup>5</sup> , as the discharge of the corporate debtor's debt is by operation of law. This being an involuntary process, has no effect on the guarantor's liability, which arises out of a separate and distinct liability. However, recently the NCLAT in the case of <i>SVA Family Welfare Trust v. Ujaas Energy</i> |

<sup>3</sup> Lalit Kumar Jain v. Union of India and Ors., (2021) 9 SCC 321.

<sup>4</sup> *Id.*

<sup>5</sup> <https://indiacorplaw.in/2024/04/extinguishment-of-personal-guarantee-in-resolution-plan-under-the-ibc.html#:~:text=The%20Supreme%20Court%20in%20Lalit,those%20against%20promoters%20and%20guarantors.>

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|  |  |  | <p>option to recover the shortfall from the CD's personal guarantors. However, this provision omits the scenario where the CoC, in exercise of its commercial wisdom, discharges or limits the liability of the surety by providing for it in the resolution plan as finally produced before the adjudicating authority.</p> <p>Therefore, the provision should ideally be formulated in the following manner:</p> <p><i>“Provided that a resolution plan shall not prevent the creditors from enforcing their rights against the guarantors of the corporate debtor, unless</i></p> | <p><i>Limited</i><sup>6</sup> allowed the discharge of the personal guarantor's liability as the same was agreed to by the Committee of Creditors by a 78.04% majority.<sup>7</sup> Hence, given the well-established principle that the commercial wisdom of the CoC is supreme and hence immune to judicial review, the same was allowed by the NCLAT. Thus, the new provision must reflect this recent development in the legal landscape which strikes a balance between the rights of the creditor and the rights of the guarantor. The proposed provision in its present condition reflects an ambiguity which if allowed to exist would</p> |
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<sup>6</sup> SVA Family Welfare Trust v. Ujaas Energy Limited, 2023 SCC ONLINE NCLAT 518.

<sup>7</sup> [https://www.jsalaw.com/newsletters-and-updates/extinguishment-of-personal-guarantee-permissible-in-a-resolution-plan-under-ibc/#\\_ftn1](https://www.jsalaw.com/newsletters-and-updates/extinguishment-of-personal-guarantee-permissible-in-a-resolution-plan-under-ibc/#_ftn1)

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|  |  |  | <i>otherwise provided for in the resolution plan.”</i> | cause unnecessary litigation which will detract from the very purpose of the Insolvency and Bankruptcy Code, which is the speedy disposal of insolvency and bankruptcy proceedings. |
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