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Insolvency Resolution Professionals appointed as Administrator under the SEBI (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018

In this article, the author provides an overview of the SEBI (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018 under which Insolvency Resolution Professional has been appointed as Administrator.

Introduction

The Securities and Exchange Board of India (SEBI) has recently released the norms for recovery of the investors' money. The Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018 ('Regulations') have been notified in this regard. These Regulations have been issued by the SEBI in exercise of the powers conferred by Section 30 read with Section 11(1) and Section 28A of the Securities and Exchange Board of India Act, 1992 ('Act'); Section 23JB of the Securities Contracts (Regulations) Act, 1956 (SCRA); and Section 19-IB of the Depositories Act, 1996 (Depositories Act). These Sections inter alia casts a duty upon the SEBI to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and recovery of amounts.

Appointment of Administrator

Regulation 4 prescribes that the SEBI shall, after attachment of the properties of the defaulter by the Recovery Officer, appoint an Administrator. Regulation 2(b) defines an 'administrator' to be a person registered with the Insolvency and Bankruptcy Board of India (IBBI) as an Insolvency Resolution Professional and who has been engaged by the Recovery Officer for the purposes of these Regulations. Recovery Officer is an officer of SEBI, who is authorised by a general or special order in writing, to exercise the powers of a recovery officer under Section 28A of the Act or Section 23JB of the SCRA or Section 19-IB of the Depositories Act. However, it is clarified under Regulation 3(2) that unless otherwise specifically ordered, these Regulations shall not be applicable to cases where the Securities Appellate Tribunal or a Court has appointed an administrator or any other person for the purposes of recovery and/or repayment to investors.

Eligibility norms and terms of appointment as an Administrator

An Insolvency Resolution Professional registered with the IBBI and empanelled by SEBI is eligible to be appointed as an Administrator. A person shall not be eligible if the appointment may be objected to on the grounds that give rise to justifiable doubts as to the independence or impartiality. The question involving issues of conflict of interest in the appointment shall be decided by the Recovery Officer. The Administrator shall provide an undertaking to SEBI of absence of any conflict of interest with the defaulter, its directors, promoters, key managerial personnel and its group entities. He shall also forthwith disclose to the Board any conflict of interest which may come to his knowledge during his tenure. The terms and conditions of appointment including remuneration shall be specified by SEBI, on a case to case basis, after taking into consideration the quantum of work, the number of investors and the quantum of money involved.

Functions of the Administrator

An Administrator shall perform the following functions :

- Obtain from the defaulter or any other person, any information or document including documents relating to ownership and possession of properties, details of amount raised from investors, claims of investors, amount claimed to have been refunded to investors
- Make a record of the properties that have been attached by the Recovery Officer including the additional properties that have been entrusted by the Recovery Officer from time to time and those properties which are not part of the attachment order
- Make a record of the bank accounts and dematerialised accounts of the defaulter and value of the monies and securities held thereunder
- Arrange for a proclamation for the sale of the property and arrange affixation of the copy of such proclamation in accordance with the provisions of the applicable Act

- Open an interest bearing bank account, under the control of the Recovery Officer, with a scheduled public sector bank for depositing the proceeds of the money recovered from the sale of the assets and for making repayment to the investors
- Sell the attached properties in accordance with these Regulations or as may be directed by the Recovery Officer
- Call for claims, in the manner specified in these Regulations or as may be directed by the Recovery Officer, for the purposes of repayment to investors, pursuant to an order of SEBI for refunds
- Verify the claims of investors and also that of the defaulter in respect of repayment of monies, either partly paid or wholly paid, claimed to have been made to investors on the basis of documentary evidence. The verification may involve forensic auditing
- Carry out any other necessary incidental and supplementary act, with the prior approval of the Recovery Officer that may be required for the purpose of carrying out its obligations under these Regulations

While discharging the functions under these Regulations, the Administrator -

- (i) may engage the services of a peer reviewed chartered accountant for verifying the claims of investors on the basis of documentary evidence and for submission of a certified report to the Administrator ;
- (ii) shall engage the services of a registered valuer to evaluate the properties of defaulter that are attached by the Recovery Officer and for submission of a certified valuation report in accordance with the guidelines issued by SEBI ;
- (iii) may engage the services of a registrar and share transfer agent registered with SEBI or such other agency as may be approved by the Recovery Officer, for managing the entire repayment process.

The fees paid for these services shall be fixed by the

Administrator taking into account the relevant factors like the number of investors and the claims that are made; quantum of work involved; the number of assets to be evaluated; the geographical location of the property and its proximity with the valuer's place of business. The fees payable to these professionals and agencies shall be within the overall remuneration fixed for the Administrator. The Administrator shall submit a monthly report or a report as and when called for by the Recovery Officer on the progress of work entrusted including the monies realised pursuant to the sale of the properties and the repayments made to the investors.

Obligations and Responsibilities

An Administrator –

- (i) shall maintain high standards of integrity, promptitude and fairness in the conduct of all his business ;
- (ii) shall act with due skill, care and diligence in the conduct of all his business ;
- (iii) shall not misrepresent any facts or situations and shall refrain from being involved in any action that would bring disrepute to the profession ;
- (iv) shall act with objectivity during the course of his professional dealings by ensuring that all decisions are made without any bias, conflict of interest, coercion, or undue influence of any party, whether directly or indirectly connected to sale of properties, verification of claims and refund of monies ;
- (v) shall not acquire, directly or indirectly, any of the assets of the defaulter ;
- (vi) shall maintain complete independence in all professional relationships and conduct the verification and refund process, as the case may be, independent of external influences ;
- (vii) shall not conceal any material information or knowingly make a misleading statement to the Recovery Officer or SEBI ;
- (viii) shall not act with mala fide or be negligent while performing the functions and duties under the Regulations ;

- (ix) shall provide all information and records as may be required by the Recovery Officer within the time specified by him ;
- (x) shall ensure that confidentiality of the information relating to the sale of properties, verification and refund process, is maintained at all times and the Administrator may disclose any information after obtaining written authorization of the Recovery Officer or SEBI ;
- (xi) shall disclose all costs towards the verification and refund process and endeavour to ensure that such costs are not unreasonable ;
- (xii) shall comply with the terms and conditions of its appointment.

Sale of properties by the Administrator

The Regulations define 'property' to mean and include assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes securities, bank accounts, deposits, any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property.

The Administrator shall undertake the process of sale of properties after conducting an independent valuation of such properties by a registered valuer. Based on the valuation report, the Recovery Officer may decide on the reserve price below which the property may not be sold. The Administrator may undertake the sale of properties through e-auction process (public auction conducted through electronic mode) and for this purpose engage an e-auction agency and shall in consultation with the Recovery Officer repeat the auction process till the time such properties are disposed off. The process of disposing off the properties shall be under the supervision of the Recovery Officer. On completion of the sale and receipt of the sale consideration, the Recovery Officer shall issue an order confirming such sale in accordance with the applicable Act. The amount realized in respect of sale of properties of the defaulter

shall be deposited in a separate bank account with a scheduled public sector bank and such account shall be under the control of the Recovery Officer.

Refund to investors

'Investor' is defined to mean the person, whether identified or not, in whose favour the refund of monies had been directed by SEBI. For inviting the claims from the investors and making payment thereof, the Administrator shall follow the following procedure :

- *Issuing advertisement*: Under the Regulations, the 'advertisement' includes (i) notices, brochures, pamphlets, circulars, show-cards, catalogues, hoardings, placards, posters, insertions in newspapers, pictures, films and documentaries; and (ii) any publicity through print medium, radio, television programmes or electronic media. For the purposes of inviting claims, the administrator shall (a) issue advertisements in an English and a Hindi newspaper having nationwide circulation and, if so directed by the Recovery Officer, issue such advertisement in vernacular newspaper(s) having circulation in the area(s) where the investors are concentrated; and direct the defaulter to issue advertisement in its website, if available. (b) The advertisement may also be hosted on the website of SEBI. (c) The advertisements shall contain instructions on the manner of making claims by investors and the documents and information that are to be submitted for verifying and processing their claim applications. (d) The invitation of claims from the investors shall be through electronic mode or be received in the office of the Administrator.
- *Consideration of claims* : For considering claims and refunding monies, the Administrator, or the chartered accountant engaged by the Administrator, shall consider the total eligible claims as against the monies available for distribution to investors in order to determine whether the whole amount or a proportionate amount may be repaid to the investors as may be directed by the Recovery Officer. Upon ascertaining the eligibility, the Administrator in consultation with the Recovery Officer, shall repay the money to the eligible investors only through pay orders, demand drafts and electronic

transfer through NEFT or RTGS. The refund process shall be kept open for an appropriate period as may be decided in consultation with the Recovery Officer. The monies remaining in the interest bearing escrow bank account after satisfying all the permissible claims of investors and other charges, shall be retained therein for a period of three years in order to meet the claims that may be received from any unpaid investor. Upon completion of the period of three years, the unpaid monies due to investors, if any, shall be transferred to the Investor Protection and Education Fund of SEBI. In case any claim is received from an unpaid investor after the refund process has been closed, the same may be made from the Investor Protection and Education Fund after necessary verification by the Administrator in consultation with the Recovery Officer. Such claim shall be made within a period of three years only from the date of transfer of monies to the Investor Protection and Education Fund. The defaulter, and its officers who are in default as defined under Section 2 of the Companies Act, 2013, as applicable, shall furnish an undertaking that they shall be liable for payment if any complaint is received in future by SEBI from any investor.

Costs incurred in administration and repayment process

The entire costs incurred in relation to the sale of properties, verification of investors' claims, remuneration of Administrator including the fees paid, if any, to other professionals, intermediaries etc. and all other expenses incurred in connection with the recovery and/or the repayment process shall be borne by the defaulter(s), failing which, the monies recovered by SEBI shall be appropriated in priority to the other liabilities. Where the Administrator is appointed on the request of a person against whom an order for disgorgement or refund had been issued by SEBI, the remuneration of the Administrator and the other costs incurred in respect of recovery and/or refund to the investors shall be borne by such person.

Priority in distribution of sale proceeds

The proceeds from the sale of properties of the defaulter shall be distributed in the following order of priority :

- The costs of administration incurred by SEBI, if any, and the fees and charges payable to the Administrator and other persons appointed by the administrator in performing its functions under these Regulations
- Disgorgement and/or monies payable to investors. SEBI may however direct the Administrator to initiate the process of refund to the investors with the monies realized at the relevant time. For this purpose, the Administrator may call for claims in tranches
- Any other penalty or fees due from the defaulter to SEBI under the provisions of the applicable Act.

Return of monies exceeding the liability

In case the proceeds realised by way of sale of properties of the defaulter is in excess of the monies due from him under the certificate and the applicable interest and other charges, the excess money shall be paid to the defaulter after completion of three years from the date of completion of the refund process.

Filing of the repayment report

Upon completion of the repayments to all investors or recovery of the disgorgement amount from the defaulter, the Administrator shall file a detailed repayment/recovery report to the Recovery Officer or SEBI, as the case may be, within the period as may be specified.

Disgorgement of amounts

The provisions of these Regulations in relation to recovery of disgorgement amount ordered by SEBI shall be applied in so far as it is applicable and the disgorgement amount so recovered shall be credited to the Investor Protection and Education Fund of SEBI. The disgorgement amount shall be paid to investors only in cases where the eligible investors are identified in the order passed by SEBI and the remaining amount, if any, after such payment, shall be credited to the account of Investor Protection and Education Fund of SEBI.

Action in case of default by an Administrator

In case of default by an Administrator, SEBI / Recovery Officer are empowered with the following rights :

- The Recovery Officer may, for reasons to be recorded in writing, recommend for replacement of the Administrator in case the Administrator has failed to comply with the terms and conditions of appointment; engaged valuers or chartered accountants or such other persons who are ineligible to act so; failed to comply with any of the obligations and responsibilities specified under these Regulations; acted against the instructions of the Recovery Officer or SEBI; or acted in such manner that is prejudicial to the interest of the investors.
- The Recovery Officer may recommend for initiation of appropriate action under the Act.
- On receipt of such recommendation or suo moto, SEBI may take appropriate action against the Administrator or such intermediary or such other person engaged by the Administrator, under the Act including the following :
 - remove such Administrator from the Panel
 - forward the matter to the Insolvency and Bankruptcy Board of India for appropriate action against the Administrator who is an Insolvency Resolution Professional
 - issue suitable directions restraining such person from engaging in activities in the securities market in his professional capacity.
 - SEBI shall replace an Administrator in the event his registration with the Insolvency and Bankruptcy Board of India is cancelled or suspended.

Conclusion

The IBBI has been doing a great job of regulating the insolvency professionals. An effective disciplinary mechanism designed by the IBBI has ensured that the professionals perform their task in a diligent manner. The decision of SEBI to authorise the appointment of only those professionals who are registered with IBBI is a welcome move. The same would certainly result in expeditious completion of the refund process and in turn benefit the investor community.

