

**IIPI - STANDARD OF BEST PRACTICES:
Payment of Fees and Expenses (PART-A)**

PAYMENT OF FEE AND REIMBURSEMENT OF OUT-OF-POCKET EXPENSES

A. INTRODUCTION

Statements of Best Practices are guidance documents for the use of registered insolvency professionals being appointed as an interim resolution professional (“IRP”), a resolution professional (“RP”) or a liquidator under the Insolvency and Bankruptcy Code, 2016 (“Code”)

This Statement of Best Practices sets out-

- (i) the legal provisions regarding the payments of fee and reimbursement of out-of-pocket expenses to an insolvency professional appointed under the Code, and
- (ii) (ii) practice for observance of the legal provisions in letter and spirit. This Statement of Best Practices does not set out on what factors insolvency resolution process costs or liquidation costs, other than fees and out-of-pocket expenses should be incurred.

B. INTERIM RESOLUTION PROFESSIONALS AND RESOLUTION PROFESSIONALS

1. Provisions of Law

(i) The Code of Conduct for insolvency professionals under the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (“IP Regulations”) requires that insolvency professionals should-

- (a) charge only such fee as has been disclosed to the persons fixing remuneration,
- (b) ensure that the fee charged is a reasonable reflection of the work necessarily and properly undertaken,
- (c) ensure that the fee charged is in compliance with the applicable regulations,
- (d) disclose all expenses and costs forming part of the insolvency resolution process costs or liquidation costs to all relevant stakeholders, and
- (e) ensure that the expenses and costs incurred by him/her are reasonable.

(ii) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“IRP Regulations”) specifically provide who can fix the fee of the insolvency professionals and the insolvency resolution process cost to be incurred by the insolvency professionals-

- (a) Regulation 33 of the IRP Regulations provides that the fee to be paid to the IRP and the expenses that can be incurred by the IRP will be fixed by the person who applies for an

insolvency resolution process under the Code. These fee and expenses are to be borne by the applicant, except to the extent the committee of creditors agrees to ratify and reimburse the fee and expenses. The ratified fee and expenses shall form part of the insolvency resolution process costs.

(b) Regulation 34 of the IRP Regulations provides that the fee to be paid to the RP and the expenses that can be incurred by the RP will be fixed by the committee of creditors. These shall form part of the insolvency resolution process costs.

(iii) The fee and out of pocket expenses of insolvency professionals are to be paid in priority both as part of the resolution plan and under liquidation, since they are part of insolvency resolution process costs and liquidation costs.

2. Factors to be considered while charging fee

(i) An insolvency professional may charge a fixed or variable fee to reasonably remunerate him/her for the work that he/she necessarily and properly undertakes for an appointment under the Code. In determining what is necessary and proper, the insolvency professional should consider if the work is-

(a) directly related to the insolvency resolution process,

(b) in furtherance of the exercise of the powers and functions under Code, professional standards, and the terms of agreement, and

(c) in consonance with his/her duties under the Code and the Regulations thereunder.

(ii) An insolvency professional may use one or a combination of bases to charge fee for carrying out different tasks or discharging different duties. The bases of charging fee include:

(a) time-based charging,

(b) prospective fee (upto a cap),

(c) fixed fee,

(d) percentage-based charging,

(e) success or contingency fee, only to the extent that it is consistent with the requirements of integrity and independence of insolvency professionals.

- Illustration: X is appointed as an IRP. She can charge a cumulative of fixed fee to suspend the board of directors and have the public announcement made, fee per hour spent on collecting and verifying claims, and a fee based on the percentage of assets handled for running the business as a going concern.

(iii) An insolvency professional should consider the following factors while determining the quantum of fee to charged:

(a) value and nature of the assets dealt with,

(b) time properly given by the insolvency professional and her staff in attending to the affairs of the debtor,

(c) the complexity of the case,

(d) exceptional responsibility falling on the insolvency professional,

(e) the effectiveness with which the insolvency professional carries out her duties.

- Illustration: X, an insolvency professional, may choose to charge higher fee if- (a) the properties of the corporate debtor are in multiple locations all over the country (nature of property), (b) key trade suppliers are also unpaid creditors and thus hostile (complexity of the case), or (c) if the existing management is not capable which requires him to expend unusual effort to run the business as a going concern (exceptional responsibility).

(iv) An insolvency professional should not increase the fee charged without the prior approval of the authority fixing his/her fee.

3. Factors to be considered for reimbursement of out-of-pocket expenses

(i) The out-of-pocket expenses of insolvency professional constitute part of the insolvency resolution process costs. Since the applicant fixes the total expenses that can be incurred by the IRP and the committee of creditors fixes the total expenses that can be incurred by the RP, the insolvency professional should disclose and obtain approval for the out-of-pocket expenses that he/she estimates will be incurred of the applicant or committee of creditors, as the case may be.

(ii) An insolvency professional should ensure that the out-of-pocket expenses incurred by him are reasonable. To determine the reasonability of these expenses, should consider if the expenses are-

(a) directly related to the insolvency resolution process,

(b) in furtherance of the exercise of the powers and functions under Code, professional standards, and the terms of agreement,

(c) determined on an arms' length basis, in consonance with the requirements of integrity and independence, and

(d) in consonance with his/her duties under the Code and the Regulations thereunder. However, an insolvency professional should not hesitate to incur out-of-pocket expenses for the efficient, effective and dignified conduct of the insolvency resolution process.

(iii) The following expenses may be out-of-pocket expenses that can be reimbursed-

(a) Expenses paid to third parties for expenditure directly in respect of the case. This includes the expenses for the following- ▪ travel for the purposes of discharging duties under the Code, ▪ printing costs conducted outside, etc.

(b) Allocated expenses, which are related to the case but not payable to a third party. This includes the expenses for the following- ▪ communication systems, ▪ document storage, ▪ printing costs, ▪ postage, etc. Care must be taken to ensure that these expenses are not in the nature of overhead charges.

(iv) An insolvency professional is not entitled to and should not claim reimbursement for the following kinds of expenses-

(a) Incidental expenses, which are not directly related to the case. This includes expenses for the following- ▪ office, ▪ standing charges, ▪ depreciation, ▪ finance charges, etc.

(b) Personal expenses, which are not related to the professional duties of the insolvency professional. This includes expenses for the following- ▪ recreation, ▪ personal communications, ▪ personal staff, etc.

(v) The insolvency professional may separately charge for expenses incurred by him pre-appointment if approved by the applicant or committee of creditors.

(vi) The payment of expenses should be on actuals and should not be as a percentage of the amount charged as fee.

4. Provision of Information Before Determination

(i) When seeking agreement to his fee and out-of-pocket expenses which may be reimbursed, the office holder should provide sufficient supporting information to the applicant or committee of creditors to form a judgement as to whether the proposed fee and out-of-pocket expenses are necessary, proper and reasonable having regard to all the circumstances of the case.

(ii) Before determination of fee the insolvency professional must submit an estimate of:

(a) the work he/she proposes to undertake,

(b) the basis on which he/ she proposes to charge fee,

(c) the unit rate at which he/she proposes to charge fee,

(d) the total fee he/she proposes to charge,

(e) the manner in which he/she proposes to be paid, and

(f) the total costs he/she believes will be incurred to the applicant or committee of creditors.

(iii) Before determination of out-of-pocket expenses, an insolvency professional must submit an estimate of:

(a) the items for which expenses will be incurred,

(b) the total expenses he/she believes will be incurred,

(c) the nature of expenses he/she believes will be incurred, and

(d) the manner in which he/she proposes to be reimbursed to the applicant or committee of creditors.

- Illustration: X is to be appointed as a RP for a company that has four plants, of which three are located outside the place of X's business. Assuming the only expenses to be incurred are travel expenses, X should disclose- (a) expenses will be incurred for travel, (b) the total travel expenses she estimates will be incurred, (c) the type of travel, the class of hotels, etc. she intends to take, and (d) the manner in which she proposes to be reimbursed to the committee of creditors.

(iv) An insolvency professional should provide the applicant or committee of creditors details of any work that is intended to be sub- contracted out which would normally be carried out by an IRP or RP and an explanation of why it is being done. After

Determination

- (i) An insolvency professional must maintain written contemporaneous records to demonstrate full details of the work done and its correlation to the fee charged.
- (ii) After the determination of fee, an insolvency professional should update the applicant and committee of creditors regularly on the work done and fee charged in relation to it, in accordance with the terms of appointment. The update should include-

(a) an overview of the work done,

(b) the detailed basis on which fee is determined,

(c) narrative details of the work done, and

(d) copies of supporting documents, including time sheet, vouchers, etc.

An update may be given by an insolvency professional appointed as an IRP, to justify that his/her fee should be ratified by the committee of creditors in its meeting.

(iii) An insolvency professional should make available information in respect of out-of-pocket expenses incurred by him to the applicant or committee of creditors. The update should include-

(a) the amount of out-of-pocket expenses incurred, and an overview of the work done for which out-of-pocket expenses were incurred,

(b) actual bills and actual out-of-pocket expenses for reimbursements, and

(c) an explanation for incurring the out-of-pocket expenses, if they are not routine. An update may be given by an insolvency professional appointed as an IRP, to justify that his/her out-of-pocket expenses should be ratified by the committee of creditors in its meeting.

(iv) In cases where an insolvency professional believes that his/her fee and/or out-of-pocket expenses will exceed the fee/expenses estimated, he/she should report the same to the applicant or committee of creditors not less than ten days before the fee/expenses estimated is exceeded. This report should contain details of the amount expected to be exceeded and an explanation for the same.

C. LIQUIDATOR

1. Provisions of Law

(i) The Code of Conduct for insolvency professionals under the IP Regulations requires that insolvency professionals should- (a) charge only such fee as has been disclosed to the persons fixing remuneration, (b) ensure that the fee charged is a reasonable reflection of the work necessarily and properly undertaken, (c) ensure that the fee charged is in compliance with the applicable regulations, (d) disclose all expenses and costs forming part of the insolvency resolution process costs or liquidation costs to all relevant stakeholders, and (e) ensure that the expenses and costs incurred by him/her are reasonable.

(ii) The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (“Liquidation Regulations”) specifically provide who can fix the fee of the insolvency professionals and the liquidation costs to be incurred by the insolvency professionals.

(a) Regulation 4 of the Liquidation Regulations provides that the fee to be paid to the liquidator will be fixed by the committee of creditors during the insolvency resolution process if the committee decides to liquidate the corporate debtor, or if the committee does not receive or rejects a resolution plan before the expiry of the one hundred and eighty or two hundred and seventy days’ period.

(b) However, in case liquidation is ordered on any other grounds, the liquidator would be entitled to a fee on the basis of a scale provided in the Liquidation Regulations. This scale calculates fee as a percentage of the amount of assets realised and distributed, and as a decreasing function of time. Only half the fee for realisation of assets will be paid till the realised amount is distributed. After such distribution, the entire fee will be payable.

(iii) The fee payable to the liquidator and the expenses incurred by the liquidator in conducting the liquidation process will form part of the liquidation costs. The liquidation costs (which include the fee of the insolvency professional) are to be paid in priority under liquidation.

2. Factors to be considered while charging fee

(i) If the fee is being fixed by the committee of creditors, an insolvency professional should consider the factors laid down in Section (B)(2) of this Statement of Best Practices. However, care should be taken to ensure that all matters for determination of fee are decided conclusively, since the committee of creditors will not exist after the order for liquidation is passed, and no prospective revision will be possible.

(ii) In other cases, the fee will be fixed as per the scale provided in the Liquidation Regulations, and no other factors will be considered.

3. Factors to be considered for reimbursement of out-of-pocket expenses

(i) The out-of-pocket expenses of the insolvency professional constitute part of the liquidation costs. While no authority fixes the total out-of-pocket expenses that can be incurred by the insolvency professional, he/she should disclose approval for the out-of-pocket expenses that he/she estimates will be incurred.

(ii) To determine what out-of-pocket expenses can be incurred and reimbursed, the insolvency professional should consider the factors provided in Section (B)(3) of this Statement of Best Practices.

4. Provision of Information Before determination

(i) If the fee is being fixed by the committee of creditors, an insolvency professional should make the disclosures laid down in Section (B)(4) of this Statement of Best Practices. However, care should be taken to ensure that all matters for determination of fee are decided conclusively, since the committee of creditors will not exist after the order for liquidation is passed, and no prospective revision will be possible.

(ii) An insolvency professional should provide the committee of creditors details of any work that is intended to be sub- contracted out which would normally be carried out by a liquidator and an explanation of why it is being done.

(iii) In other cases, since fee will be fixed as per the scale provided in the Liquidation Regulations, and no disclosures prior to the determination of fee may be required. However, the insolvency professional must disclose the estimated amount of fee that he will receive in the Preliminary Report. This will include-

(a) the work he/she proposes to undertake,
(b) the total fee he/she estimates to receive, and (c) the manner in which he/she proposes to be paid.

(iv) While no authority fixes the total out-of-pocket expenses that can be incurred by the insolvency professional, the insolvency professional should submit an estimate of-

(a) the items for which expenses will be incurred,

(b) the total expenses he/she believes will be incurred,

(c) the nature of expenses he/she believes will be incurred, and

(d) the manner in which he/she proposes to be reimbursed in the Preliminary Report.

- Illustration: X is to be appointed as a liquidator for a company that has significant assets located outside the place of X's business. Assuming that the only expenses to be incurred are travel expenses, X should disclose- (a) expenses will be incurred for travel, (b) the total travel expenses she estimates will be incurred, (c) the type of travel, the

class of hotels, etc. she intends to take, and (d) the manner in which she proposes to be reimbursed in the Preliminary Report.

After Determination

- (i) An insolvency professional must maintain written contemporaneous records to demonstrate full details of the work done and its correlation to the fee charged.
- (ii) After the determination of fee, an insolvency professional should provide an update on the work done and remuneration charged in relation to it, in Progress Reports. The update should include- (a) an overview of the work done, (b) the detailed basis on which fee is determined, (c) narrative details of the work done, (d) copies of supporting documents, including time sheet, vouchers, etc., and (e) changes in estimated costs.
- (iii) An insolvency professional should make available information in respect of out-of-pocket expenses incurred by him in the Progress Reports. The update should include- (a) the amount of out-of-pocket expenses incurred, and an overview of the work done for which out-of-pocket expenses were incurred, (b) actual bills and actual out-of-pocket expenses for reimbursements, and (c) an explanation for incurring the out-of-pocket expenses, if they are not routine.
- (iv) In cases where an insolvency professional believes that his/her fee and/or out-of-pocket expenses will exceed the fee/expenses estimated, he/she should disclose the same in the Progress Reports. This disclosure should contain details of the amount expected to be exceeded and the reasons and an explanation for the same.
- (v) In cases where the insolvency professional's fee and or/ out-of-pocket expenses exceeds the fee/ expenses estimated in the Preliminary Report, he/ she should disclose the same in the Final Report prior to Dissolution. This disclosure should contain details of the amount exceeded and the reasons and an explanation for the same.

IIPI - STANDARD OF BEST PRACTICES:

Payment of Costs (PART-B)

PAYMENT OF CORPORATE INSOLVENCY RESOLUTION PROCESS COSTS

B. INTRODUCTION

Statements of Best Practices are guidance documents for the use of registered insolvency professionals being appointed as an interim resolution professional (“IRP”), a resolution professional (“RP”) or a liquidator under the Insolvency and Bankruptcy Code, 2016 (“Code”)

This Statement of Best Practices sets out- (a) the legal provisions regarding insolvency resolution process costs incurred under the Code, and (b) practice for observance of the legal provisions in letter and spirit. This Statement of Best Practices does not set out on what factors fees and out-of-pocket expenses should be incurred.

C. PROVISIONS OF LAW

(i) Section 5(13) of the Code and Regulation 31 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 define ‘insolvency resolution process costs’. These include-

- (a) interim finance and the costs incurred in raising such finance,
 - (b) the fees payable to any person acting as a RP,
 - (c) any costs incurred by the RP in running the business of the corporate debtor as a going concern,
 - (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process,
 - (e) amounts due to suppliers of essential goods and services,
 - (f) amounts due to an owner or lessor of a property where such property is occupied by or in the possession of the corporate debtor whose rights are prejudicially affected on account of the moratorium imposed,
 - (g) expenses incurred on or by the IRP to the extent ratified by the committee of creditors,
 - (h) expenses incurred on or by the RP fixed by the committee of creditors, and
 - (i) other costs directly relating to the corporate insolvency resolution process and approved by the committee of creditors.
- (ii) Clause 27 of the Code of Conduct for insolvency professionals under the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 requires that insolvency professionals should-
- (a) disclose all costs towards the insolvency resolution process costs to all relevant stakeholders, and
 - (b) must endeavour to ensure that such costs are not unreasonable.

D. CATEGORIES OF COSTS

Costs are of two categories-

(i) Category 1: These are those costs which can be incurred without approval of the committee of creditors, although an insolvency professional should be prepared to disclose information about them as set out in Section E of this Statement. These costs include:

(a) Costs incurred in running the business of the corporate debtor as a going concern. Typically, these would be operational costs that would be incurred by the corporate debtor in the ordinary course of business. These may include wages of workmen, expenses on office supplies, sales and marketing costs, expenses on raw materials, etc.

(b) Any costs incurred at the expense of the Government to facilitate the insolvency resolution process. These may include costs of obtaining assistance from the local district administration, etc.

(c) Interim finance and the costs incurred in raising such finance by the IRP in accordance with section 20(2)(c).

(d) Amounts due to suppliers of essential goods and services. This includes costs payable to suppliers who are mandated to provide services during the corporate insolvency resolution process, such as suppliers of electricity, telecommunication, information technology and water.

(e) Amounts due to an owner or lessor of a property where such property is occupied by or in the possession of the corporate debtor whose rights are prejudicially affected on account of the moratorium imposed. This includes rent payments to be made to such owner or lessors.

(ii) Category 2: These are those costs which require the approval of the committee of creditors to be incurred. At the time of requiring approval for these costs, the insolvency professional should make appropriate disclosures as set out in Section E of this Statement. These costs include:

(a) The fees payable to any person acting as a RP.

(b) Expenses incurred on or by the IRP to the extent ratified by the committee of creditors. This includes the fee of the IRP, the out-of-pocket expenses incurred by the IRP, and any other expenses incurred by the IRP directly related to the insolvency resolution process, such as on appointment of professionals, etc.

(c) Expenses incurred on or by the RP fixed by the committee of creditors. This includes the out-of-pocket expenses incurred by the RP, and any other expenses incurred by the RP directly related to the insolvency resolution process, such as on appointment of professionals, etc.

(d) Interim finance and the costs incurred in raising such finance above the amount decided by creditors.

(e) Other costs directly relating to the corporate insolvency resolution process and approved by the committee of creditors. This includes costs that do not fall under any other head of costs, such as costs of renegotiated contracts of key managerial personnel.

E. FACTORS TO BE CONSIDERED FOR INCURRING COSTS

(i) Insolvency professionals must ensure that the costs incurred are reasonable. To determine the reasonability of these costs, they should consider if the costs are-

(a) directly related to the insolvency resolution process,

(b) necessary for meeting the objectives of the insolvency resolution process, and the Code,

(c) proportional to the work required to be done and the assets of the corporate debtor, and

(d) determined on an arms' length basis, in consonance with the requirements of integrity and independence.

(ii) To achieve this objective, the insolvency professional may choose to procure goods and services through a public announcement, or through direct outreach to the relevant providers. In determining how the procurements should be made, the insolvency

professional should give due regard to the timeliness, expense and probable outcome of any method of procurement.

(iii) An insolvency professional must endeavour to ensure that the insolvency resolution process costs are not unduly high.

(iv) An insolvency professional should not hesitate to incur costs for the efficient and effective conduct of the insolvency resolution process.

(v) Where costs are incurred on services provided by associates of the insolvency professional, he/she should take particular care to ensure that the services are being provided at the best value. In cases, where incurring of costs can be seen to be a threat to the integrity of the insolvency professional, he/she should take approval of the creditors for such costs even if they are Category 1 costs.

(vi) An insolvency professional should endeavour only pay costs incurred preadmission with the approval of the committee of creditors. However, if incurring these costs are integral to keep the corporate debtor a going concern, these costs may be paid without approval of the committee of creditors.

(vii) The payment of costs should be on actuals.

F. PROVISION OF INFORMATION

Before approval

(i) When seeking approval for incurring Category 2 costs, the insolvency professional should provide sufficient supporting information to the committee of creditors to form a judgement as to whether the proposed costs are necessary, proper and reasonable having regard to all the circumstances of the case.

(ii) Before seeking approval for costs, an insolvency professional must submit an estimate of:

(a) the items for which costs will be incurred,

(b) the total costs he/she believes will be incurred,

(c) the nature of costs he/she believes will be incurred, and

(d) the basis on which the costs will be incurred to the committee of creditors.

Illustration: X is appointed as a RP for a company, for which interim finance is to be raised. X should disclose-

1. the total interim finance that X believes should be raised,

2. the reasons for raising interim finance and what it is intended to be used for,

3. the type of interim finance that will be raised- secured/ unsecured,

4. the impact on the rights of the existing creditors, if any,

5. the terms of the interim finance, including rate of interest, etc. to the committee of creditors.

After approval/ After incurring (where approval not required)

(i) An insolvency professional must maintain written contemporaneous records to demonstrate full details of the costs incurred and its correlation to the corporate insolvency resolution process.

(ii) After incurring costs, an insolvency professional should update the committee of creditors on the work done, and the costs incurred for it in a clear and concise manner. The update should include- (a) the amount of costs incurred and details of the work done for which costs were incurred, (b) the detailed basis on which costs were incurred, (c) an explanation for incurring the costs, if they are Category 1, and (d) copies of supporting

documents, including vouchers, bills etc. Illustration: Costs incurred for payments to workmen of the same grade in Factory A & Factory B of the corporate debtor, may be represented as follows

- Amount Basis Explanation
- Supporting documents (where available)
- Example: Rs. 3,00,000 Wage: 100 Days: 30 Workmen Grade x: 1000
 $100*30*1000=3,00,000$ Costs incurred on workmen (of Grade x) for Factory A Xx Rs. 4,50,000 Wage: 100 Days: 30 Workmen Grade x: 1500
 $100*30*1000=3,00,000$ Costs incurred on workmen (of Grade x) for Factory A Xx

- (iii) An update may be given by an insolvency professional appointed as an IRP, to justify that expenses incurred by him/her should be ratified by the committee of creditors in its meeting as insolvency resolution process costs.
- (iv) In cases where an insolvency professional believes that the Category 2 costs will exceed the costs estimated, he/she should report the same to the applicant or committee of creditors not less than ten days before the costs are exceeded. This report should contain details of the amount expected to be exceeded and an explanation for the same.