



STATEMENT OF BEST PRACTICES

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

I. INTRODUCTION.

Statements of Best Practices are guidance documents the use of registered insolvency professionals being appointed as interim resolution professional / resolution professional under the Insolvency and Bankruptcy Code, 2016 (“**Code**”).

This Statement of Best Practices sets out-

- the legal provisions regarding the payments of fee and reimbursement of out-of-pocket expenses to an insolvency professional appointed under the Code, and
- required 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.

II. INTERIM RESOLUTION PROFESSIONALS AND RESOLUTION PROFESSIONALS

A. Provisions of Law.

- 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-
 - charge only such fee as has been disclosed to the persons fixing remuneration,
 - ensure that the fee charged is a reasonable reflection of the work necessarily and properly undertaken, and
 - ensure that the fee charged is in compliance with the applicable regulations.

In addition, insolvency professionals should-

- disclose all expenses and costs forming part of the insolvency resolution process costs or liquidation costs to all relevant stakeholders, and
- ensure that the expenses and costs incurred by him/her are reasonable.
- 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-

- Regulation 33 of the IRP Regulations provides that the fee to be paid to the interim resolution professional and the expenses that can be incurred by the interim resolution professional 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.
- Regulation 34 of the IRP Regulations provides that the fee to be paid to the resolution professional and the expenses that can be incurred by the resolution professional will be fixed by the committee of creditors. These shall form part of the insolvency resolution process costs.
- 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.

B. Factors to be considered while charging fee.

- 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-
 - directly related to the insolvency resolution process,
 - in furtherance of the exercise of the powers and functions under Code, professional standards, and the terms of agreement, and
 - in consonance with his/her duties under the Code and the Regulations thereunder.¹
- 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:
 - time based charging,
 - prospective fee (upto a cap),
 - fixed fee,
 - percentage based charging,
 - success or contingency fee, only to the extent that it is consistent with the requirements of integrity and independence of insolvency professionals.²

¹ Australian Restructuring Insolvency and Turnaround Association, *Code of Professional Practice* (3rd edn.), available at <http://www.arita.com.au/docs/default-source/code-third-edition-2014/009b-code-3rd-edition---final-arita-version-v3.pdf?sfvrsn=0>.

² Australian Restructuring Insolvency and Turnaround Association, *Code of Professional Practice* (3rd edn.), available at <http://www.arita.com.au/docs/default-source/code-third-edition-2014/009b-code-3rd-edition---final-arita-version-v3.pdf?sfvrsn=0>.

Illustration: X is appointed as an interim resolution professional. 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.

- An insolvency professional should consider the following factors while determining the quantum of fee to charged:
 - value and nature of the assets dealt with,
 - time properly given by the insolvency professional and her staff in attending to the affairs of the debtor,
 - the complexity of the case,
 - exceptional responsibility falling on the insolvency professional,
 - the effectiveness with which the insolvency professional carries out her duties.³

Illustration: X, an insolvency professional, may choose to charge higher fee if-

- the properties of the corporate debtor are in multiple locations all over the country (nature of property),
 - key trade suppliers are also unpaid creditors and thus hostile (complexity of the case), or
 - if the existing management is not capable which requires him to expend unusual effort to run the business as a going concern (exceptional responsibility).
- An insolvency professional should not increase the fee charged without the prior approval of the authority fixing his/her fee.

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

- The out-of-pocket expenses of insolvency professional constitute part of the insolvency resolution process costs.⁴ Since the applicant fixes the total expenses that can be incurred by the interim resolution professional and the committee of creditors fixes the total resolution professional costs that can be incurred, 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.⁵
- 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-
 - directly related to the insolvency resolution process,
 - in furtherance of the exercise of the powers and functions under Code, professional standards, and the terms of agreement,
 - determined on an arms' length basis, in consonance with the requirements of integrity and independence, and

³ Rules 18.15 and 18.16 of the Insolvency (England and Wales) Rules, 2016.

⁴ Section 13(c), Code and Regulation 31(1)(d), IRP Regulations.

⁵ Insolvency Practitioners Association, *Ethics Code for Members*, available at <http://www.insolvency-practitioners.org.uk/regulation-and-guidance/ethics-code>.

- in consonance with his/her duties under the Code and the Regulations thereunder. ⁶

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.

- The following expenses may be out-of-pocket expenses that can be reimbursed-
 - 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.
 - 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.⁷

Care must be taken to ensure that these expenses are not in the nature of overhead charges.

- An insolvency professional is not entitled to and should not claim reimbursement for the following kinds of expenses-
 - Incidental expenses, which are not directly related to the case. This includes expenses for the following-
 - office,
 - standing charges,
 - depreciation,
 - finance charges, etc.⁸
 - Personal expenses, which are not related to the professional duties of the insolvency professional. This includes expenses for the following-
 - recreation,
 - personal communications,

⁶ Australian Restructuring Insolvency and Turnaround Association, *Code of Professional Practice* (3rd edn.), available at <http://www.arita.com.au/docs/default-source/code-third-edition-2014/009b-code-3rd-edition---final-arita-version-v3.pdf?sfvrsn=0>.

⁷ Statement of Insolvency Practice 9 (England & Wales), *Remuneration of Insolvency Office Holders*, <http://www.icaew.com/-/media/corporate/files/technical/insolvency/regulations-and-standards/sips/england/sip-9-e-and-w-remuneration-of-insolvency-office-holders-eff-from-6-apr-10.ashx>. Australian Restructuring Insolvency and Turnaround Association, *Code of Professional Practice* (3rd edn.), available at <http://www.arita.com.au/docs/default-source/code-third-edition-2014/009b-code-3rd-edition---final-arita-version-v3.pdf?sfvrsn=0>.

⁸ Statement of Insolvency Practice 9 (England & Wales), *Remuneration of Insolvency Office Holders*, <http://www.icaew.com/-/media/corporate/files/technical/insolvency/regulations-and-standards/sips/england/sip-9-e-and-w-remuneration-of-insolvency-office-holders-eff-from-6-apr-10.ashx>

- personal staff, etc.
- The insolvency professional may separately charge for expenses incurred by him pre-appointment if approved by the applicant or committee of creditors.⁹
- The payment of expenses should be on actuals and should not be as a percentage of the amount charged as fee.¹⁰

D. Provision of Information.

Before Determination

- 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.¹¹
- Before determination of fee the insolvency professional must submit an estimate of:
 - the work he/she proposes to undertake,
 - the basis on which he/ she proposes to charge fee,
 - the unit rate at which he/she proposes to charge fee,
 - the total fee he/she proposes to charge,
 - the manner in which he/she proposes to be paid, and
 - the total costs he/she believes will be incurredto the applicant or committee of creditors.¹²
- Before determination of out-of-pocket expenses, an insolvency professional must submit an estimate of:
 - the items for which expenses will be incurred,
 - the total expenses he/she believes will be incurred,
 - the nature of expenses he/she believes will be incurred, and
 - the manner in which he/she proposes to be reimbursedto the applicant or committee of creditors.

⁹ Statement of Insolvency Practice 9 (England & Wales), *Remuneration of Insolvency Office Holders*, <http://www.icaew.com/-/media/corporate/files/technical/insolvency/regulations-and-standards/sips/england/sip-9-e-and-w-remuneration-of-insolvency-office-holders-eff-from-6-apr-10.ashx>.

¹⁰ Statement of Insolvency Practice 9 (England & Wales), *Remuneration of Insolvency Office Holders*, <http://www.icaew.com/-/media/corporate/files/technical/insolvency/regulations-and-standards/sips/england/sip-9-e-and-w-remuneration-of-insolvency-office-holders-eff-from-6-apr-10.ashx>

¹¹ Statement of Insolvency Practice 9 (England & Wales), *Remuneration of Insolvency Office Holders and Payments to insolvency office holders and their associates* available at <https://www.icaew.com/en/technical/insolvency/insolvency-regulations-and-standards/statements-of-insolvency-practice-sips-england>; Australian Restructuring Insolvency and Turnaround Association, *Code of Professional Practice* (3rd edn.), available at <http://www.arita.com.au/docs/default-source/code-third-edition-2014/009b-code-3rd-edition---final-arita-version-v3.pdf?sfvrsn=0>;

Insolvency Practitioners Association, *Ethics Code for Members*, available at <http://www.insolvency-practitioners.org.uk/regulation-and-guidance/ethics-code>.

¹² Schedule I, IP Regulations.

Illustration: X is to be appointed as a resolution professional 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-

- expenses will be incurred for travel,
- the total travel expenses she estimates will be incurred,
- the type of travel, the class of hotels, etc. she intends to take, and
- the manner in which she proposes to be reimbursed

to the committee of creditors.

- 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 interim resolution professional or resolution professional and an explanation of why it is being done.¹³

After Determination

- An insolvency professional must maintain written contemporaneous records to demonstrate full details of the work done and its correlation to the fee charged.
- 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-
 - an overview of the work done,
 - the detailed basis on which fee is determined,
 - narrative details of the work done, and
 - copies of supporting documents, including time sheet, vouchers, etc.¹⁴

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

- 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-
 - the amount of out-of-pocket expenses incurred and an overview of the work done for which out-of-pocket expenses were incurred,
 - actual bills and actual out-of-pocket expenses for reimbursements, and

¹³ Statement of Insolvency Practice 9 (England & Wales), *Remuneration of Insolvency Office Holders and Payments to insolvency office holders and their associates* available at <https://www.icaew.com/en/technical/insolvency/insolvency-regulations-and-standards/statements-of-insolvency-practice-sips-england>.

¹⁴ Statement of Insolvency Practice 9 (England & Wales), *Remuneration of Insolvency Office Holders and Payments to insolvency office holders and their associates* available at <https://www.icaew.com/en/technical/insolvency/insolvency-regulations-and-standards/statements-of-insolvency-practice-sips-england>; Australian Restructuring Insolvency and Turnaround Association, *Code of Professional Practice* (3rd edn.), available at <http://www.arita.com.au/docs/default-source/code-third-edition-2014/009b-code-3rd-edition---final-arita-version-v3.pdf?sfvrsn=0>.

- 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 interim resolution professional, to justify that his/her out-of-pocket expenses should be ratified by the committee of creditors in its meeting.

- 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.

III. LIQUIDATOR

A. Provisions of Law.

- 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-
 - charge only such fee as has been disclosed to the persons fixing remuneration,
 - ensure that the fee charged is a reasonable reflection of the work necessarily and properly undertaken, and
 - ensure that the fee charged is in compliance with the applicable regulations.

In addition, insolvency professionals should-

- disclose all expenses and costs forming part of the insolvency resolution process costs or liquidation costs to all relevant stakeholders, and
- ensure that the expenses and costs incurred by him/her are reasonable.
- 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.
 - 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.
 - 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.

- 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.

B. Factors to be considered while charging fee.

- If the fee is being fixed by the committee of creditors, an insolvency professional should consider the factors laid down in **Section II (B)** 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.
- In other cases, the fee will be fixed as per the scale provided in the Liquidation Regulations, and no other factors will be considered.

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

- The out-of-pocket expenses of the insolvency professional constitute part of the liquidation costs.¹⁵ 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.¹⁶
- To determine what out-of-pocket expenses can be incurred and reimbursed, the insolvency professional should consider the factors provided in **Section II (C)** of this Statement of Best Practices.

D. Provision of Information.

Before determination

- If the fee is being fixed by the committee of creditors, an insolvency professional should make the disclosures laid down in **Section II (D)** 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.
- 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.¹⁷
- 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.¹⁸ This will include-

¹⁵ Section 13(c), Code and Regulation 31(1)(d), IRP Regulations.

¹⁶ Insolvency Practitioners Association, *Ethics Code for Members*, available at <http://www.insolvency-practitioners.org.uk/regulation-and-guidance/ethics-code>.

¹⁷ Statement of Insolvency Practice 9 (England & Wales), *Remuneration of Insolvency Office Holders and Payments to insolvency office holders and their associates* available at <https://www.icaew.com/en/technical/insolvency/insolvency-regulations-and-standards/statements-of-insolvency-practice-sips-england>.

¹⁸ Regulation 13, Liquidation Regulations.

- the work he/she proposes to undertake,
 - the total fee he/she estimates to receive, and
 - the manner in which he/she proposes to be paid.
- 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-
 - the items for which expenses will be incurred,
 - the total expenses he/she believes will be incurred,
 - the nature of expenses he/she believes will be incurred, and
 - the manner in which he/she proposes to be reimbursed

in the Preliminary Report.¹⁹

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-

- expenses will be incurred for travel,
- the total travel expenses she estimates will be incurred,
- the type of travel, the class of hotels, etc. she intends to take, and
- the manner in which she proposes to be reimbursed

in the Preliminary Report.

After Determination

- An insolvency professional must maintain written contemporaneous records to demonstrate full details of the work done and its correlation to the fee charged.
- 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.²⁰ The update should include-
 - an overview of the work done,
 - the detailed basis on which fee is determined,
 - narrative details of the work done,
 - copies of supporting documents, including time sheet, vouchers, etc., and
 - changes in estimated costs.²¹
- An insolvency professional should make available information in respect of out-of-pocket expenses incurred by him in the Progress Reports.²² The update should include-

¹⁹ Regulation 13, Liquidation Regulations.

²⁰ Regulation 15, Liquidation Regulations.

²¹ Statement of Insolvency Practice 9 (England & Wales), *Remuneration of Insolvency Office Holders and Payments to insolvency office holders and their associates* available at <https://www.icaew.com/en/technical/insolvency/insolvency-regulations-and-standards/statements-of-insolvency-practice-sips-england>; Australian Restructuring Insolvency and Turnaround Association, *Code of Professional Practice* (3rd edn.), available at <http://www.arita.com.au/docs/default-source/code-third-edition-2014/009b-code-3rd-edition---final-arita-version-v3.pdf?sfvrsn=0>.

- the amount of out-of-pocket expenses incurred and an overview of the work done for which out-of-pocket expenses were incurred,
 - actual bills and actual out-of-pocket expenses for reimbursements, and
 - an explanation for incurring the out-of-pocket expenses, if they are not routine.
- 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.²³ This disclosure should contain details of the amount expected to be exceeded and the reasons and an explanation for the same.
- 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.²⁴ This disclosure should contain details of the amount exceeded and the reasons and an explanation for the same.

²² Regulation 15, Liquidation Regulations.

²³ Regulation 15, Liquidation Regulations.

²⁴ Regulation 45, Liquidation Regulations.