

President promulgates amendment to insolvency and bankruptcy law

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The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, dated 23 November 2017, was promulgated by President RN Kovind to amend the provisions relating to the insolvency resolution process contained in the Insolvency and Bankruptcy Code, 2016. The ordinance has made several amendments in order to bring clarity to the resolution process under the code. Some of the key changes are:

Applicability of the code. The ordinance has expanded the applicability of the code to include personal guarantors who have provided a guarantee for a borrowing by a corporate borrower, which was hitherto an uncertain position. The ordinance makes the code applicable to proprietorship firms, which could potentially bring several small and medium enterprises within the ambit of the code.

Invitation to submit resolution plans. Prior to the ordinance, any person could submit a resolution plan to the resolution professional (i.e. the professional appointed to oversee and conduct the corporate insolvency resolution process) and become a resolution applicant, making suggestions as to the manner in which insolvency resolution of a particular company could take place. However, the ordinance has made it mandatory for a resolution professional to first invite prospective resolution applicants (who satisfy the requisite criteria and conditions) to submit resolution plan(s). Only those persons who meet the eligibility criteria, and who are invited to submit resolution plans by the resolution professional, may do so under the code.

Eligibility criteria for being a resolution applicant. The resolution applicant or any other person acting jointly with such person, or any person who is a promoter/controls such person, should not:

- be an undischarged insolvent
- be identified as a willful defaulter by the Reserve Bank of India (RBI),
- have his account identified as a non-performing asset (as per the guidelines laid down by the RBI) for more than one year, such person having failed to make payments of all overdue amounts with interest and charges thereon
- have been convicted of an offence punishable with imprisonment for two or more years
- have been disqualified to act as a director under the Companies Act, 2013,

- have been prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities market
- have indulged in preferential or undervalued or fraudulent transaction in respect of which an order has been made by an adjudicating authority under the code
- have executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor undergoing an insolvency resolution process under the code
- be a 'connected person' who satisfies any of the aforementioned conditions (a connected person being any person who (i) is a promoter/in the management or control of the resolution applicant, (ii) shall be the promoter/in the management or control of the business of the corporate debtor during implementation of the resolution plan, or (iii) the holding company, subsidiary company, associate company, or related party, of a person referred to above), or
- have been subject to any disability corresponding to the aforementioned disqualifications under any law in a jurisdiction outside India.

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