



## THE ROAD AHEAD FOR VALUATION IN INDIA

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## BACKGROUND

1. The MCA had constituted a Committee of Experts (“**COE**”) on 30 August 2019 to examine the need for an institutional framework for the regulation and development of the valuation profession. On 31 March 2020, this COE submitted its Report, along with the Draft Valuers’ Bill 2020 (“**Bill**”).

2. Currently, valuation in India is regulated to a limited extent under the Companies (Registered Valuers & Valuation) Rules 2017 (“**Valuation Rules**”). Under these Rules, inter alia, only a valuer registered with the Insolvency and Bankruptcy Board of India (“**IBBI**”) can perform valuations in respect of assets, liabilities or net worth of a company, under the provisions of the Companies Act 2013 (“**Companies Act**”) and the Insolvency and Bankruptcy Code 2016 (“**IBC**”).<sup>i</sup>

3. On the other hand, Section 34AB of the Wealth Tax Act 1957 (“**WT Act**”) also provides for registration of individuals as valuers. In proceedings before any tax authority or appellate Tribunal under the WT Act, the Income Tax Act 1961 (“**IT Act**”) and the Black Money and Imposition of Tax Act 2015 (“**Black Money Act**”), an assessee can be represented by a valuer, provided such valuer is registered under Section 34AB of the WT Act. Further, valuations for sale immovable assets under the SARFAESI Act 2002 are also restricted only to valuers registered under the WT Act.<sup>ii</sup>

4. However, in the new regime proposed by Bill, all valuation services would be regulated. Specifically, the Report states that “... it is desirable to have a unified institutional framework for valuers instead of separate regimes for valuations under securities laws, valuations under corporate laws, or valuations under fiscal laws...”<sup>iii</sup> This is to be implemented by way of the following key changes:

- (a) The Bill will require all valuers to be registered with an authority to be known as the ‘National Institute of Valuers’ (“**NIV**”). The intent is that “*only valuers registered under the proposed institutional framework should be permitted to render valuation services.*”<sup>iv</sup> Section 51 of the Bill prohibits acting as a valuer or providing valuation services without registration. While this provision is worded carelessly, so that its literal meaning can be debated,<sup>v</sup> the object and purpose of the Bill as a whole makes it clear that the provision prohibits valuation without registration.
- (b) The ambit of ‘valuation services’ under the Bill extends to valuation of any asset or liability required under 14 statutes,<sup>vi</sup> as opposed to the present regime. Further, the Bill also allows any other valuation service (statutory or market-based) to be included within the scope of the Bill by prescribing rules to that effect.<sup>vii</sup> This broad scope can be understood by reference



to Annexure R of the Report, which lists several forms of valuation services commonly provided in the market, such as valuations required in dispute resolution, contractual negotiations, settlements, insurance and loss assessment, etc.<sup>viii</sup> The COE took note of these services, and proposed that the Bill should apply to all such valuations in due course of time.<sup>ix</sup>

5. Therefore, the new regime purports to affect all persons offering valuation services in India.

6. Consequently, there is a need to closely scrutinize the Bill, understand the way forward, and also understand the challenges that certain aspects of this Bill may pose to the market for valuation services in India.

### THE WAY FORWARD

7. Since this Bill is likely to be implemented, we provide a brief overview of how valuers would operate under this proposed regime. The Bill continues with several efficient provisions of the Valuation Rules, and also improves upon them in several areas.

8. As mentioned earlier, the Bill envisages the NIV as the apex regulator for valuers. The general superintendence and management of the business of the NIV would be carried out by the 'Council'. The NIV would also have an 'Administrative Law Department' to conduct disciplinary proceedings, a 'Valuation Standards Committee' to develop valuation standards which will be binding on all valuers, and a 'Committee of Valuers' to advise the Council on its decisions. Till the NIV is constituted, the Report proposes that its functions could be discharged by the IBBI.<sup>x</sup>

9. The Bill envisages 'Valuation Professional Organisations' ("**VPO**") as the front-line regulators. This is the same as a 'Registered Valuers Organisation' under the Valuation Rules, and are analogous to State Bar Councils under the Advocates Act 1961 or Insolvency Professional Agencies under the IBC. Every valuer must be enrolled with a VPO to be eligible for registration.<sup>xi</sup> VPOs would have bye-laws for their members, promote development of their professional skills, monitor their compliance with the Bill and redress grievances against their members. The professional education for valuation shall be provided by 'Valuation Institutes' registered with the NIV.

10. The Bill envisages registration of four types of valuers:

- (a) associate valuers,
- (b) fellow valuers: individuals who have 5 years of experience and have demonstrated a high order of professional excellence,



(c) honorary valuers: individuals who have made significant contribution to the profession, but who cannot practise.

(d) valuation entities: partnership firms or companies.

11. The registration of valuation entities is a welcome development from the present regime under the WT Act, where only individual valuers can be registered. Further, the Bill has also improved on the regime under the Valuation Rules, by allowing subsidiaries, joint ventures or associate companies to be registered as valuers, subject to such conditions as may be prescribed by the NIV.<sup>xii xiii</sup>

12. Each of these kinds of valuers must be registered with the NIV. The qualifications and eligibility requirements are provided under Section 49 of the Bill. In addition, a registered valuer can only provide services if they have a certificate of practice.<sup>xiv</sup>

13. To enable smooth transition from the Valuation Rules to the Bill, 'registered valuers' and 'registered valuers organisation' which are currently registered under the Valuation Rules will be deemed to be registered as valuers and valuation professional organisations respectively under the Bill.<sup>xv</sup>

## CHALLENGES AHEAD

14. Although the Bill has several progressive provisions, at the same time, there are several provisions that are likely to have a detrimental impact on the market for valuation services in India. We have outlined some of these challenges in the following sections.

### A. EXCLUSION OF FOREIGN VALUERS UNDER THE BILL

15. The Report does not take a clear position on foreign entities acting as valuers in India. This aspect is mentioned vaguely in the discussion on whether subsidiaries should be allowed to be registered as valuers. The relevant discussion is -

*"4.40 There were, however, two views whether a subsidiary of a company should be registered as a valuer. One, it should not matter whether a valuer is a standalone company or a subsidiary of another company. Subsidiary valuer may enable leveraging 'network effect' and improve quality of service. Second, exposing domestic valuation firms to global competition may not be advisable at least in initial years as it is not conducive to develop capacity within the country..*

*4.41 The CoE noted that competition from global firms is inevitable and, therefore, domestic valuation firms should develop capacities to deal with such competition and establish their footprints globally. The fear that Indian firms may not be able to compete is misplaced going by the example of*



*merchant bankers who conduct valuations...*"

16. However, the combined effect of several provisions of the Bill, is that foreign persons are severely restricted from providing valuation services in India. The following provisions are noteworthy:

- (a) Section 49(2)(e) provides that an individual shall not be eligible for registration as a valuer if he is not a person resident in India.<sup>xvi</sup>
- (b) While Section 49(3) allows 'partnership firms' and 'companies' to be registered as valuers, the meaning of these terms is restricted to firms and companies registered under Indian laws.<sup>xvii</sup>
- (c) Section 49(3)(c) provides that a partnership firm or company is only eligible for registration as a valuer if all partners and directors of these entities individually comply with the eligibility requirements of Section 49(2), which means that they must also be persons resident in India.
- (d) Section 59(3) of the Bill prohibits a valuer from outsourcing valuation services to another person, except in such manner as the NIV may allow by regulation. A clarification to this provision notes that the services which are generally expected to be carried out by a valuer shall not be outsourced. Only services which are generally not expected to be carried out by a valuer may be outsourced. Therefore, valuers registered in India will also not be able to sub-contract their services to reputed foreign valuers.

17. The Report notes a suggestion in this regard that, "*the valuers having membership of global valuation associations (American Society of Appraisers, USA and RICS) should be allowed direct entry in the new system, as they are globally certified.*"<sup>xviii</sup> However, this suggestion has then not been incorporated into the Bill.

18. This exclusion of foreign valuers will create a dearth of high-quality services which are required in several niches of the Indian market. Although some of the following examples may be services that are currently restricted to domestic valuers under Valuation Rules or the WT Act, the Bill, as a progressive instrument, should recognize the benefits of valuation by foreign persons in these areas, and take steps to allow them:

- (a) The Bill applies to valuations under the IT Act. This Act requires income from international transactions to be computed having regard to the arms' length price, known as 'transfer pricing'. Since these transactions are international, they are better valued by firms specialising in such transactions. Typically, foreign valuation entities have significant experience in this area.



- (b) The Bill applies to valuations under the Black Money Act. This Act requires assessment of the 'undisclosed foreign income' of persons, which is defined in Section 5 of the Act. Valuation of such income which is from foreign sources and foreign assets will be better achieved by a foreign valuation entity located in that territory. Further, foreign valuation entities can generally have better experience with valuing such cross-border incomes.
- (c) The Bill applies to valuations under the IBC. Whenever a person goes into liquidation, the IBC requires valuation of the assets and liabilities of that person. Similarly, as another example, the Adjudicating Authority requires an independent expert to assess the value of a transaction before it can be avoided as an undervalued transaction. Cross-border insolvencies raise a further complexity in this area, as assets of a company can be located in several territories, and transactions can also be cross-border. Foreign valuation entities can provide better services in this area.
- (d) One of the several forms of valuation services recognized in the Report is valuation as an expert before an arbitral tribunal.<sup>xix</sup> In international arbitrations, parties often hire foreign valuation entities due to their greater credibility and wider experience. If this Bill would prohibit the services of foreign valuers in international arbitrations seated in India, it would greatly inhibit parties from selecting India as a seat of arbitration. This would conflict with India's stated objective of developing India as a major seat of arbitration.

## B. PROVISION OF VALUATION SERVICES AS PART OF A MULTI-DISCIPLINARY PRACTICE

19. Presently, valuation services in specific sectors are often provided by entities that are not practising valuation exclusively. For example, investment banks such as JP Morgan provide valuation services for the purpose of transfer pricing. These kinds of organisations need to be allowed to operate in the new regime, as they offer unique expertise in those areas.

20. In this regard, Section 49(3) of the Bill allows a partnership firm or a company to be registered as a valuer only if "*its primary objective is to provide valuation services*". Explanation 1 to this provision clarifies that "*The objective shall be considered primary where at least 50% of revenue is derived from valuation services.*" This would prevent a significant range of entities from providing valuation services.

21. Further, the First Schedule to the Bill, that defines acts as professional and other misconducts, provides in clause 10 that it is a misconduct for a valuer to "*engages*



in any business or occupation other than the profession of valuers unless permitted by the Institute so to engage."

22. However, the COE did recognize the practice of professionals of different fields practicing together under one entity in the following paragraphs:

*"4.35 ... Further, it is at times beyond the ability of members of one profession to fully serve the needs of a customer. This has prompted members of different professions join hands in the form of Multi-Disciplinary Practices (MDPs)... most MDPs, partnership firms, or companies are often organisations of individual professionals, who actually render the service behind these organisations...*

*4.41 ... After a long debate, a view emerged that it may not be desirable to prohibit a subsidiary from serving as a valuer... Similar is the view of the CoE in respect of MDPs. Valuers and other professionals should be able to join hands to provide several services... If a particular organisational form for delivery of professional services is in the interest of the stakeholders and the profession, there should be no inhibition to allow that organisational form, after proper study of the implications and putting in appropriate safeguards, if warranted."*

23. Accordingly, Section 49(4) of the Bill allows a multi-disciplinary firm ("MDF") to be registered as valuer, subject to such safeguards as the NIV may prescribe. The Explanation to this provision defines an MDF as "a partnership firm formed by members of different professions to carry on multi-disciplinary practice."

24. While Section 49(4) is a welcome provision, it raises two concerns. First, it is not clear whether Section 49(4) is subject to the general eligibility requirements for partnership firms prescribed in Section 49(3). It would be appropriate to clarify this by adding appropriate language in Section 49(4).<sup>xx</sup> Second, the definition of MDF only allows partnership firms to operate in multiple disciplines, and not companies. This may unduly restrict some entities operating in the market as of now. This is despite the fact that the Report noted that multi-disciplinary practices do operate as companies, and any organisational form that is in the interests of the stakeholders and the profession should be allowed.<sup>xxi</sup>

### C. LACK OF REPRESENTATION TO THE NIV

25. As mentioned earlier, the general superintendence, direction and management of the affairs and business of the NIV vest in a Council. This Council consists of a Chairperson, five ex-officio members, 3 whole-time members and 8 part-time members.<sup>xxii</sup> Other than ex-officio members, all other members are



appointed by the Central Government on the recommendation of a Selection Committee consisting of the following persons:

- (a) Cabinet Secretary;
- (b) Secretary to the Government of India to be nominated by the Central Government;
- (c) Chairperson of the Council, in case of selection of members other than the Chairperson;
- (d) three experts of repute from the fields of economics, finance, law, management, accountancy, public policy, engineering, valuation or related subjects, to be nominated by the Central Government.<sup>xxiii</sup>

26. This makes it clear that the nomination of members to the Council will be in the control of the Central Government itself. VPOs, which are otherwise recognized as front-line regulators under the Bill, do not have any role in or any right to nominate members to the Council. This is due to apprehensions that the presence of practising valuers on the Council may focus decision-making on the interests of the valuers, and not on the users of their services.<sup>xxiv</sup>

27. Further, Section 14(5) of the Bill provides that a member of the Council shall not provide services as a valuer or be associated with any valuer, valuation professional organization or valuation institute in any manner whatsoever for a period of two years from the date of vacating office. This further disincentivizes practising valuers from being on the Council.

28. To mitigate this, the Bill includes Section 20, which provides for a 'Committee of Valuers' consisting of five valuers nominated by the NIV, and fifteen members nominated by valuation professional organisations from amongst their members ("**Committee**"). The Committee may advise the Institute from time to time. Every advice by the Committee must be considered by the Council, and the advice along with the Council's decision thereon must be published in the public domain.<sup>xxv</sup>

29. While this does allow industry bodies to make representations to the Council in an organized and accountable manner, an absence of practicing professionals on the Council can still create a strong disconnect with the industry. A system for making representations may not overcome this disconnect.

#### **D. ARBITRARINESS IN TRANSITORY PROVISIONS**

30. Persons who are acting as valuers in the market must possess certain minimum qualifications and experience to be registered as a valuer. Currently, under the Valuation Rules, such minimum qualifications and experience are provided in Rule



4 of the Valuation Rules, read with Annexure IV of the Rules. In the Bill, such qualifications and experience are prescribed in Section 49(1)(c) and 49(1)(d).<sup>xxvi</sup>

31. As mentioned earlier, to ensure smooth transition, Section 50(3) of the Bill allows valuers who are registered under the Valuation Rules to be deemed to be registered under the Bill. However, no such transitory relief has been provided for valuers registered under the WT Act.

32. Further, the Bill has increased the minimum qualifications and experience for registration as compared to the Valuation Rules. The difference has been explained in the following table:

| Requirements   | Valuation Rules <sup>xxvii</sup>                    | Bill   |
|--|---|--|
| Post-graduate degree in Mechanical, Electrical, Electronic and Communication, Electronic and Instrumentation, Production, Chemicals, Textiles, Leather, Metallurgy, or Aeronautical Engineering              | <u>Three</u> years of experience. <sup>xxviii</sup> | <u>Five</u> years of experience. <sup>xxix</sup> |
| If a person has post-graduate degree in Civil Engineering, Architecture or Town Planning   | <u>Three</u> years of experience. <sup>xxx</sup>    | <u>Five</u> years of experience. <sup>xxxi</sup> |
| If a person has membership of a professional institute established by an Act of Parliament enacted for the purpose of regulation of a profession with at least three years' experience after such membership | Direct registration. <sup>xxxii</sup>               | Not an acceptable qualification                  |

33. Consequently, it is easier for valuers to be registered under the Valuation Rules, than for them to be registered under the Bill. As a result, if this provision is brought into force in its present form, it would create an arbitrary distinction between persons who apply to be registered under the current regime, and those that apply under the proposed regime, merely on the basis of the date on which the new regime came into force. This may make the provision invalid as against Article 14 of the Constitution.



34. Further, this would incentivize individuals to get registered under the Valuation Rules, and then simply transit over to the new regime with less qualifications and experience. That would defeat the objective of setting higher benchmarks for practising valuers to be registered.

## CONCLUSION

35. It is certainly a welcome step that the government has recognized the important role played by valuers in the economy, and they are attempting to promote the development of the profession as well as regulate the quality of services provided by them. The Report does reflect progressive ideas in several respects, such as the wide range of legal persons allowed to register as valuers, the selection of modern models of regulation and the intent to set the Bill up only as a skeletal framework, leaving most aspects to be determined by the NIV flexibly from time to time.

36. However, at the same time, it is important that care is taken in drafting the Bill, so that the provisions do not end up having detrimental impact on the market. Presently, some aspects of the Bill raise significant concerns. All stakeholders must study these concerns carefully and ensure that the regulation of valuation is brought about only in the most optimal manner.

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<sup>i</sup> Paragraph 2.68, Report of the COE

<sup>ii</sup> Table 5, Paragraph 2.92, Report of the COE

<sup>iii</sup> Paragraph 4.65, Report of the COE

<sup>iv</sup> Paragraph 4.66, Report of the COE

<sup>v</sup> Section 51(1) provides "No person shall act as a valuer or hold out as a valuer except under... a certificate of registration granted under this Act." Since the term 'valuer' has been defined in Section 2(48) as, "a valuer who is registered as such under section 50...", it may be argued by some that an unregistered person is only prohibited from 'acting' or 'holding out' as being registered as a valuer under the Bill. Consequently, it does not necessarily prohibit unregistered persons from providing valuation services in the market.

<sup>vi</sup> These statutes are: (i) the Banking Regulation Act, 1949; (ii) the Securities Contracts (Regulation) Act, 1956; (iii) the Wealth Tax Act, 1957; (iv) the Income Tax Act, 1961; (v) the Securities Exchange Board of India Act, 1992; (vi) the Insurance Regulatory



and Development Authority Act, 1999; (vii) the Foreign Exchange Management Act, 1999; (viii) the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002; (ix) the Prevention of Money Laundering Act, 2002; (x) the Limited Liability Partnership Act, 2008; (xi) the Companies Act, 2013; (xii) the Pension Funds Regulatory and Development Authority Act, 2013; (xiii) the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015; and (xiv) the Insolvency and Bankruptcy Code, 2016

<sup>vii</sup> See Section 2(52)(a)(xv) and 2(52)(b) of the Bill

<sup>viii</sup> Annexure R, Report of the COE

<sup>ix</sup> Paragraph 6.4, Report of the COE

<sup>x</sup> Paragraph 6.3(e), Report of the COE

<sup>xi</sup> Section 50(1) of the Bill

<sup>xii</sup> Section 49(4) of the Bill

<sup>xiii</sup> These terms are not defined under the Bill. The Companies Act defines these terms as follows:

“(6) “associate company”, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence, and includes a joint venture company.

Explanation.—For the purpose of this clause,—

(a) the expression “significant influence” means control of at least twenty per cent. of total voting power, or control of or participation in business decisions under an agreement;

(b) the expression “joint venture” means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement;

(87) “subsidiary company” or “subsidiary”, in relation to any other company (that is to say the holding company), means a company in which the holding company—

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies...

<sup>xiv</sup> As per Section 51 of the Bill, a certificate of practice is only granted when a valuer is not in the employment of any person. The NIV can also prescribe additional conditions to the issuance of this certificate.

<sup>xv</sup> Sections 50(3) and 53(4) of the Bill

<sup>xvi</sup> The explanation to this section provides that ‘person resident in India’ shall have the same meaning as defined in Section 2(v) of the Foreign Exchange Management Act, 1999 (42 of 1999). Section 2(v) of FEMA provides in the relevant part:

“person resident in India” means—

(I) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—



(A) a person who has gone out of India or who stays outside India, in either case—

(a) for or on taking up employment outside India, or

(b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than—

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

<sup>xvii</sup> The relevant provisions are:

S. 2 (11) “company” means a company registered under the Companies Act, 2013 (18 of 2013);

S. 2 (31) “partnership firm” means a partnership firm registered under the Indian Partnership Act, 1932 (9 of 1932) or a limited liability partnership registered under the Limited Liability Partnership Act, 2008 (6 of 2009);

<sup>xviii</sup> Para 2.35, Report of the COE

<sup>xix</sup> See Annexure R, Report of the COE

<sup>xx</sup> The provision could be amended to read, “Notwithstanding anything contained in Section 49(3),...”

<sup>xxi</sup> See paragraphs 4.35 and 4.41, Report of the COE, which are extracted hereinabove

<sup>xxii</sup> Section 13(1) of the Bill

<sup>xxiii</sup> Section 14(2) of the Bill

<sup>xxiv</sup> See paragraph 5.28, Report of the COE

<sup>xxv</sup> Section 20 of the Bill

<sup>xxvi</sup> Notably, practicing valuers will only have a window of 2 years under Section 49(1)(c) and 3 years under Section 49(1)(d) to get registered.

<sup>xxvii</sup> As amended by the Companies (Registered Valuers and Valuation) Fourth Amendment Rules, 2018

<sup>xxviii</sup> Annexure IV, Valuation Rules

<sup>xxix</sup> Section 49(1)(d) of the Bill

<sup>xxx</sup> Annexure IV, Valuation Rules

<sup>xxxi</sup> Section 49(1)(d) of the Bill

<sup>xxxii</sup> Rule 4(c), Valuation Rules



## About Us

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- Advising an Indian company for its dispute against a Turkish employer relating to the construction of a circulating fluidized bed combustion boiler in Istanbul, Turkey (ICC Rules, Turkey seated, Turkish law)
- Representing a Singaporean and an Indian company in an ad-hoc arbitration concerning termination of a contract for conversion of a mobile offshore drilling unit to a mobile offshore production unit, against an Indian state-owned enterprise (India seated, Indian law)
- Representing two Singaporean upstream oil and gas companies in an arbitration for their disputes under a joint venture agreement against their ex-managing director for breach of fiduciary duties and non-compete agreement (SIAC Rules, Singapore seated, Singapore law)
- Representing an Indian company in an arbitration concerning the termination of a contract for the construction of an ethanol and power plant in Philippines against an Australian employer and Filipino co-contractor (SIAC Rules, Singapore seated, English law)
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