Investment Funds: Monthly Digest

July 22, 2022

A DECADE OF AIF REGULATIONS: REVIEW OF SEBI INFORMAL GUIDANCE

INTRODUCTION

Pursuing its broader objectives of ensuring better regulation and orderly development of the securities market, the Securities and Exchange Board of India ("**SEBI**") had, in the year 2003, introduced the SEBI (Informal Guidance) Scheme, 2003 (the "**Scheme**").

SEBI may issue an informal guidance under the Scheme as:

1. No-action letters: The specific department of SEBI, to which the request is made, shall indicate whether or not it shall recommend an action to SEBI should the proposed transaction in securities as described under such request upon being effectuated will result in violation of any applicable laws.
2. Interpretative letters: The specific department of SEBI, to which the request is made, shall interpret a specific provision of any legal regulation administered by SEBI in light of the factual position or a proposed transaction in securities.

SEBI is not bound to respond to a request for guidance made under the Scheme, and it is not liable to disclose the reasons for declining to answer the request.

Any letter issued by a department of SEBI under the Scheme is not to be construed as a conclusive decision of any question of law or fact by SEBI or construed as an order of the SEBI under section 15T of the SEBI Act, 1992 or as appealable.

Investment managers of Alternative Investment Funds ("**AIFs**" or "**Funds**") registered under the SEBI (Alternative Investment Funds) Regulations, 2012 ("**AIF Regulations**") also keep seeking SEBI's informal guidance to provide certain clarifications and guidance in respect of the AIF Regulations.

Given that it has been a decade since the AIF Regulations were introduced, in this edition of the monthly digest, we have reviewed all the available informal guidance provided by SEBI under the AIF Regulations and discussed our thoughts on the key issues. We have categorised the guidance matters in the following buckets (summarised in that order) for this purpose:

1. Open-ended and close-ended funds;
2. Corpus and Investable funds calculations;
3. Investment Conditions and Restrictions;
4. Obligations of the Sponsor and Investment Manager;
5. Angel Funds;
6. Disciplinary History.

A DECADE OF SEBI'S INFORMAL GUIDANCE ON AIFS

Open-ended and Close-ended funds

Given that the registration certificate of an AIF, particularly a Category III AIF does not specify whether it is 'open-ended' or 'close-ended', which document would be relied upon to make that determination? [Singular India Opportunities Trust – 2018]	SEBI clarified that such determination is to be made as per the disclosure made in Form A to SEBI while applying for the registration. This question becomes relevant only in the context of Category III AIFs which are permitted under the AIF Regulations to be open-ended or close-ended, whereas Category I and II AIFs are required to be close-ended only. There is no definition of either of these terms given in the AIF Regulations; however, it seems that SEBI expects the tenure of close-ended AIFs to be determined at the time of application to SEBI for a registration whereas no such specification has been made in the context of open-ended funds.
Is a Category III AIF permitted to launch both open-ended as well as closed-ended schemes?	SEBI stated that the nature of each scheme launched by the AIF is to be in accordance with the category / sub-category of the AIF.[1] It was unclear whether SEBI was referring to 'open-ended' and 'close-ended'

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[**Singular India Opportunities Trust** – 2018]	as sub-categories. However, in August, 2021, SEBI amended Regulation 13(3) of the AIF Regulations to specify that schemes of Category III AIF may be open-ended or close-ended (e.g. say 2 out of 3 schemes of a Category III AIF could be open-ended while the 3rd is close-ended).
Can an open-ended scheme of an AIF be converted into a close-ended scheme with the approval from super-majority of investors? Is it permissible to change sub-categorization of an AIF a close-ended fund? [**Singular India Opportunities Trust** – 2018]	SEBI stated that the AIF regulations do not envisage conversion of an open-ended fund into a close-ended fund and vice-versa. When SEBI reviews an AIF application, it also assesses the risk profile of the AIF, and the risk profile of an open-ended or evergreen structure would be different from that of a close-ended fund with a defined tenure. SEBI will accordingly need to undertake a fresh analysis of the facts and also the activities carried out by the AIF under its current nature.

Corpus & Investable Funds Calculations

Whether the per portfolio entity investment limit of 25% of the investible fund is to be compiled at final closing, or at each investment? [**India Realty** – 2014]	SEBI stated that the investment limit of 25% of the investible funds under Regulation 15(c)[2] must be complied with throughout the life cycle of the Fund or the scheme. While the response is not entirely clear, a position taken by AIFs is to do the 25% analysis each time that an investment is being made. On a conservative note, this could mean that if there are certain excused investors for a deal, the 25% should be calculated excluding the commitment of such excused investors from the base.
If the commitment of the sponsor is referenced to the corpus (i.e. as a % of the corpus) subject to a cap and a floor, what is the amount of commitment to be considered for calculating the 'investable corpus' of the AIF? [**India Realty** – 2014]	SEBI stated that the amount of the investable corpus shall be computed on the basis of commitment made by the sponsor inclusive of green shoe option as may be exercised on the date of such computation. Accordingly, if any investor's commitment to the AIF is referenced to the 'corpus' of the AIF, then the actual corpus on the date of such calculation (as defined under the AIF Regulations) will be the base for the calculation (which will include the green shoe option if the same has been exercised).
How much of its corpus does a Category II AIF need to invest in unlisted companies (directly or through investment in other AIFs) to satisfy the requirement of "primarily" under Regulation 17(a) of the AIF Regulations? [**India Realty** – 2014].	SEBI stated that the term 'primarily' is indicative of where the main thrust of the Category II AIF ought to be, i.e. its allocation should be more in unlisted securities as against the aggregate of other investments. This was further confirmed by SEBI in its circular dated June 19, 2014. Accordingly, at least a majority of the investments of a Category II AIF should be in unlisted securities.
Whether 'investible funds' shall be construed strictly to mean total amount of funds committed by the investors or shall be construed to mean total amount of funds committed by investors plus realized and unrealized gains from investments made? [**KellyGamma Fund**– 2019]	SEBI referred to the definition of investable funds under the AIF Regulations[3]. However, there was no reference to realized and unrealized gains being included in the definition of 'investable funds'. Most fund managers agree with their LPs to recycle proceeds from early exits, but even such recycling is typically limited by LPs to not more than 20 to 25% of the original commitment of such LPs. Even if LPs agree to such recycling, the AIF managers are not excused from the diversification requirement under the AIF Regulations. SEBI, in its amendment dated August 13, 2021, further clarified (to managers' relief) that 'net of expenditure for management and administration of the AIF' may be estimated for the tenure of the AIF.
Whether for the purpose of computing 25% threshold of Regulation 15(1) AIF should consider 25% of total commitment (less estimated expenses) or 25% of the total amount drawn down? [**BlackSoil Realty Investment Advisors LLP** – 2019]	SEBI, in its guidance, referred to the provisions of Regulation 15(1)(c) of the AIF Regulations which allows fund to take into account 25% of the investable funds (defined to refer to net commitments, and not drawdowns). Drawdown amount will be lower at all times than the amount of total commitments, and the diversification requirement would become too restrictive for AIF managers to comply.

Investment Conditions and Restrictions

Whether an AIF will also qualify as Qualified Buyer and can invest/acquire Security Receipts? [**SREI Multiple Asset Investment**	SEBI, while referring to the Reserve Bank of India's notification dated May 16, 2018[4], mentioned that Category II and III AIFs are considered as "Qualified Buyers" under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI**"). It also clarified that

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Trust – 2020]	Category II & III AIFs may subscribe to security receipts issued by an Asset Reconstruction Company ("**ARC**"), subject to the conditions in the RBI Notification, and the provisions of the AIF Regulations, SARFAESI, and other applicable laws. Subsequently, in January, 2022, SEBI introduced a new sub-category of AIFs under Category I called the 'Special Situation Fund'. Our analysis of this update is provided here.
When does the lock-in period of one year for investments made by Category I & II AIF Schemes commence in case of investment by such AIF Schemes before the IPO of companies i.e. is it from the date of IPO allotment? [**IIFL Asset Management Limited** – 2018]	SEBI clarified that for Category II AIFs, the lock-In period will start from the date of purchase of the shares by the AIF. SEBI's clarification, in the wake of the National Stock Exchange and Bombay Stock Exchange interpreting the extant SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 to mean that the date of the tenure to avail exemption commences from the date of allotment in the IPO process instead of date of purchase, ensured that the view is consistent with the widely accepted interpretation of the exemption condition. It provided better clarity for the Category I and II AIFs to deal with any future queries or questions raised by any of the stock exchanges.
Whether 'primarily in unlisted companies' under Regulation 17(a) would be satisfied if investment is in debt instruments of such unlisted companies. [**BlackSoil Realty Investment Advisors LLP** – 2019]	SEBI referred to the Explanation under Regulation 3(4)(b) which specifies that Category II AIFs include debt funds, defined to mean funds which invest primarily in debt or debt securities. If a Category II AIF could invest equally in debt and equity instruments of unlisted entities, even then this regulation should be considered satisfied. Separately, SEBI has now amended the definition of 'debt fund' to clarify to remove references to 'debt' and avoid an interpretation that AIFs can take up loans.
Whether an AIF is in compliance with the provisions of AIF Regulations, when its invests its unutilised funds in the units of the liquid mutual funds or bank deposits or other liquid assets of higher quality such as treasury bills, commercial papers, etc. [**JM Financial India Trust II** – 2018]	SEBI clarified that the AIF Regulations allow AIFs to invest proceeds arising from investments in liquid mutual funds or bank deposits or other liquid assets of higher quality such as treasury bills, commercial papers etc.[5] However, the AIF shall disclose the information about such proposed transactions periodically to the investors as mandated the AIF Regulations.[6] In this regard, the thresholds as specified under 15(1)(c)[7] shall remain applicable on the AIF. SEBI, in its amendment to the AIF Regulations dated August 13, 2021, has now expanded the scope of temporary investments to additionally include investments in Triparty Repo Dealing and Settlement and an added flexibility to make such investments pending distributions to investors as per the terms of the fund documents.
Whether the units issued by an AIF are covered under the definition of 'Securities' for the purpose of SEBI (Prohibition of Insider Trading) Regulations, 2015 ("**PIT Regulations**")? [**Yes Bank Limited** - 2022]	SEBI while referring to provisions of Section 2 (h) of Securities Contracts (Regulations) Act, 1956 ("**SCRA**") which defines "securities" as units or any other instrument issued by a pooled investment vehicle, clarified that since AIFs are defined as pooled investment vehicles under SCRA and AIF Regulations,[8] units of AIFs shall be considered as securities for the purposes of PIT Regulations. Further the term "securities" has the same meaning in PIT Regulations[9] as in SCRA, except for the exclusion of units issued by mutual funds.
Whether the employees of the Bank covered as Designated Persons ("**DPs**") and their immediate relatives in terms of PIT Regulations are allowed to invest in AIFs which have an existing relationship with the Bank? [**Yes Bank Limited** - 2022]	SEBI noted that investments made by the fund manager in AIFs on behalf of DPs and their immediate relatives may include investments in the companies whose unpublished price sensitive information ("**UPSI**") is with the Bank and in turn with the DPs. In this regard, SEBI clarified that given that AIFs will invest in securities that are listed or proposed to be listed or unlisted, any person in possession of UPSI in relation to such securities shall be considered as an 'insider'. Hence, Regulation 3[10], Regulation 4(1)[11] of the PIT Regulations and code of conduct specified in the Regulation 9[12] read with Schedule B[13] of the PIT Regulations may get attracted in case of trading/investment by the DPs or their immediate relatives in AIFs investing in securities that are listed or proposed to be listed with the DPs being in possession of UPSI in relation to such securities. Therefore, employees of the Bank covered as DPs and their immediate relatives are allowed to invest in such AIFs subject to the compliances with the applicable provisions of the PIT Regulations and AIF Regulations.
Obligations of the Sponsor and Investment Manager	
Whether there is any upper/maximum limit for investment	SEBI clarified that the AIF Regulations do not specify an upper or maximum limit for investments made by the fund manager or sponsor. However, SEBI

made by the Manager/Sponsor? [**BlackSoil Realty Investment Advisors LLP** – 2019]	also stated that the fund manager's or sponsor's quantum of investment shall not conflict with continuing interest obligations as applicable to the AIF. In the template PPM introduced by SEBI, it is mandatory to disclose whether the Sponsor intends to make a capital commitment in the fund in addition to the regulatory minimum.
Is there any kind of bar for an AIF to borrow funds from its manager? Would it tantamount to any violation of AIF Regulations? [**BlackSoil Realty Investment Advisors LLP** – 2019]	SEBI clarified that there is no express bar for an AIF to borrow funds from its manager. However, the fund manager shall be required to comply with its all other obligations on borrowing as provided under the AIF Regulations. This will also be a conflicted transaction and should accordingly be appropriately disclosed to investors, and if required, obtain necessary approvals as per the fund documents from the advisory board / LPAC.
Whether Investment Manager of AIF would be considered as a regulated entity in terms of the SEBI AIF Regulations 2012? [**Ace Lansdowne Investments Services LLP** – 2022]	SEBI clarified that the investment manager of an AIF shall be considered as a regulated entity in terms of AIF Regulations. SEBI's response re-confirms the position adopted by industry participants, it now ensures that an AIF manager by the virtue of being considered a regulated entity may receive up to 100% foreign investment through the automatic route rather than the government approval route (unless the manager been involved in any other financial services activity which is unregulated).
Whether the Investment Manager of an AIF is exempted from obtaining registration under PM Regulations to provide investment management services to the offshore fund as its activities are regulated under SEBI AIF Regulations 2012? [**Ace Lansdowne Investments Services LLP** – 2022]	SEBI, in its guidance confirmed that there is no exemption available to a manager of an AIF from obtaining registration under the PM Regulations for providing investment management services to an offshore fund. Further, due to the introduction of the 'Co-investment Portfolio Manager' ("**CPM**") license now, if the offshore fund (being an investor in the AIF) is investing in companies in which the AIF is also investing pursuant to such advice from the AIF manager, then the manager may need to obtain the CPM license.
Angel Funds	
Whether the minimum corpus will have to be maintained separately by the Angel Fund for each scheme or at the Angel Fund level. [**Scale Management Consultants LLP**– 2020]	SEBI clarified that a minimum corpus of five crore Indian rupees must be maintained at the fund level for an angel fund, i.e. aggregating all schemes under such angel fund.[14]
Whether the manager of an Angel Fund is required to obtain undertaking from the angel investors confirming their approval before investing in an VC undertaking? [**Ankur Fincon Management Pvt. Ltd.** – 2020]	In this regard, SEBI clarified that the manager of an angel fund is required to obtain an undertaking from the angel investors confirming their approval before investing the amount in any VCU thereby providing them an option to selectively participate in not only schemes but also each investment.
Whether an investor who does not approve to participate in a particular scheme, are ring-fenced from that investment scheme under Angel Fund Regulations. [**Ankur Fincon Management Pvt. Ltd.** – 2020]	SEBI clarified that Angel Funds are permitted to launch their schemes after filing the term sheets for those schemes. Accordingly, each Angel Fund scheme shall be considered as a separate venture with its own group of investors who have given their consent to participate in the scheme.
Whether an investor in Angel Fund who has not given approval to take part in a specific scheme is considered an investor in that scheme? Is Angel Investor of the Angel Fund protected from the activity of the other Angel Fund schemes in which they have not participated. [**Ankur Fincon Management Pvt. Ltd.** – 2020]	SEBI clarified that investors in Angel Funds who do not express approval to take part in a specific scheme are not considered investors in that scheme. As a result, the investor in question would not be included in the plan involving the particular investee company if they have not approved investing in it while they retain the flexibility to approve participation in other schemes of the Angel Fund. Thus, investors in each scheme are protected from the activity of other Angel Fund schemes in which they have not participated. As the AIF Regulations enable investor discretion to participate in a portfolio investment identified by an angel fund, the regulatory intent is for the investment manager to launch a new scheme for each new portfolio investment sought to be made by an angel fund. This enabled the investors to be segregated from the implications of another portfolio investment made by a separate scheme in which such investor may have not participated.

Whether investors of Angel Fund have right of wavier under Regulation 19G(3)[15] of the AIF Regulation? [**Lets Venture Advisors LLP** – 2020]	SEBI clarified that there is no provision in the AIF Regulations which provide for waiver of the said right. SEBI does not view such a waiver favorably from an investor protection standpoint. However, the industry expects that a right which has been given to an investor presumably for the benefit of the investor, should also have the ability to waive such a right especially if the investor finds such a right unnecessary or burdensome. However, waiver of statutory rights is typically subject to certain limitations and it has to be seen whether there is an element of public interest involved.
Whether an LLP not meeting net worth criteria of Rs. 10 Crores be eligible as an angel investor even though each partner of the LLP satisfies the minimum net worth criteria and qualify as "angel investors" in their individual capacity? [**Lets Venture Advisors LLP** – 2020]	SEBI clarified that an LLP and its partner(s) are distinct persons, if the LLP does not meet the minimum net worth criteria of Rs. 10 Crores, then it would not be eligible as an angel investor even though each partner of the LLP satisfies the minimum net worth criteria and qualify as "angel investors" in their individual capacity. In other words, SEBI does not enable the manager to look through an entity to assess whether it is eligible.
Whether manager and the sponsor together can maintain the continuing interest of 2.5% of the corpus or fifty lakh rupees whichever is lesser at the Angel Fund level? [**Scale Management Consultants LLP**– 2020]	SEBI clarified that the sponsor and manager of an Angel Fund together can maintain a continuing interest in an angel fund of at least 2.5% of the corpus or 50 lakh Indian rupees, whichever is less. It was a welcome move given that it provided the fund manager with the flexibility to also consider investments made by both the sponsor and investment manager towards the fulfilment of continuing interest obligation.
Whether an Investment Manager of the SEBI registered AIF can provide investment management services to the offshore fund and whether such Investment Manager is required to obtain registration as a Portfolio Manager under PM Regulations to provide such services? [**Ace Lansdowne Investments Services LLP** – 2022]	SEBI clarified that an investment manager of an existing registered AIF may offer investment management services to an offshore fund subject to the condition that it obtains a certificate of registration as a "portfolio manager" under the PM Regulations. While SEBI's guidance in respect of the aforementioned queries might have provided clarity on the scope and applicability of the PM Regulations, it may prompt investment manager providing management services to offshore funds to characterise their activities as 'investment advice' rather than 'portfolio management' in order to reduce costs, compliance requirements, maintain greater autonomy and flexibility.
Disciplinary History	
Whether SEBI requires the disciplinary history of (i) all the associates outside India to be reported or if the AIF can limit this disclosure only to associates in India and (ii) all directors of the sponsor, including the independent directors of the sponsor? [**Peninsula Brookfield India** – 2015]	SEBI clarified that all AIFs are required to mandatorily disclose disciplinary history of all the (i) associates outside India, and such details are required to be reported to SEBI; and (ii) directors including independent directors of the sponsor.

VIABILITY OF INFORMAL GUIDANCE BY SEBI

As discussed initially, a letter issued by a department of SEBI under the Scheme is not to be construed as a conclusive decision of any question of law or fact by SEBI or construed as an order of the SEBI under section 15T of the SEBI Act, 1992 or as appealable.

However, given the balance that SEBI has to maintain between keeping the AIF Regulations light-touch while also appropriately safeguarding investor interests, the outcome results in some of the provisions / guidance being open-ended. In some cases, SEBI's informal guidance have been helpful.

A deterrent for applicants while considering making requests for informal guidance is the public disclosure of such requests by SEBI. Given how private this industry is, it sometimes becomes difficult to take the decision of going ahead and making a request under the Scheme for certain industry participants.

Further, even if the hiccup of unwarranted publicity is adjusted for, there is no assurance that SEBI's guidance is reliable, and a definitive course of action may be decided pursuant to the same. True to its name, the letter is merely a guidance issued by SEBI which could help applicants better assess their course of action.

– Dibya Behera & Nandini Pathak

(The authors would like to thank Shrenik Dave for his contribution to this digest.)

You can direct your queries or comments to the authors

[1] Regulation 12 of the SEBI AIF Regulations, 2012 allows AIF to launch multiple schemes during their tenure.

[2] Regulation 15(c) of the AIF Regulations requires that not more than 25% of the investible funds are invested by an AIF into a single company directly or through investment in other AIFs.

[3] Regulation 2(1)(p) of the AIF Regulations defines “investable funds” to mean corpus of the AIF minus estimated expenditure for administration and management of the AIF for its tenure.

[4] RBI Notification No. DNBR (PD-ARC) No. 07/ED (SS)-2018, *available at*

http://egazette.nic.in/WriteReadData/2018/187058.pdf.

[5] Regulation 15 (1)(f) of the SEBI AIF Regulations, 2012 allows the AIF to invest uninvested portion of their investable funds and deploy temporary funds in the units of liquid mutual funds/money market funds.

[6] Regulation 22 of the SEBI AIF Regulations, 2012 requires the AIF to disclose the information of the proposed investments to the investors periodically.

[7] Regulation 15(1)(c) of the SEBI AIF Regulations, 2012 allows the AIF to invest not more than twenty-five per cent of the investable funds in an Investee Company.

[8] Regulation 2(b)(i) of the SEBI AIF Regulations, 2012 defines AIFs as a private pooling investment vehicle which collects funds from investors for investing.

[9] Section 2(i) of the PIT Regulations, 2015 defines the term "securities" as private investment vehicles as a fund that collects money from investors and invests them accordingly, as per Section 2 (da) of the SCRA, 1956.

[10] Regulation 3 of the PIT Regulations, 2015 prohibits communication or procurement of unpublished price sensitive information to any person except where this information is used for legitimate purposes and discharge of legal duties.

[11] Regulation 4(1) of the PIT Regulations, 2015 prohibits any insider trading in securities that are listed or proposed to be listed on a stock exchange when in possession of unpublished price sensitive information.

[12] Regulation 9 of the PIT Regulations, 2015 requires board of directors of every listed company and market intermediary to formulate a code of conduct to regulate, monitor and report trading by its employees and other connected persons.

[13] Schedule B of the PIT Regulations, 2015 sets out minimum standards to regulate, monitor and report trading by insiders.

[14] Regulation 19D(2) of the SEBI AIF Regulations requires an angel fund to have a corpus of at least five crore rupees.

[15] Regulation 19G(3) of the SEBI AIF Regulations requires the manager of the angel fund to obtain an undertaking from every angel investor, confirming his approval for such investment prior to making such investments.

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