Investment Funds: Monthly Digest

May 31, 2021

FOREIGN INVESTMENTS BY ALTERNATIVE INVESTMENT FUNDS

The securities market regulator Securities and Exchange Board of India ("**SEBI**") in its latest circular[1] has enhanced the overseas industry-wide investment limit for Alternative Investment Funds ("**AIFs**") and Venture Capital Funds ("**VCFs**") to USD 1, 500 million from the erstwhile limit of USD 750 million (the "**Circular**"). The limit has been enhanced after consultation with the Reserve Bank of India ("**RBI**"). In this edition of the digest, we discuss the regulatory framework around the overseas investments by AIFs.

BACKGROUND

The SEBI (Alternative Investment Funds) Regulations, 2012 ("**Regulations**") regulate alternative investment funds set up in India for pooling of funds on a private placement basis. AIFs are permitted to invest in securities of companies incorporated outside India subject to the conditions or guidelines issued by the RBI and SEBI.[2] One such condition for overseas investment before the Circular was issued was that the maximum permissible block limit ("**Block Limit**") for overseas investment by all SEBI registered AIFs and VCFs should not exceed USD 750 million. This Block Limit has been doubled by SEBI vide the Circular to USD 1,500 million.

FRAMEWORK FOR OVERSEAS INVESTMENT BY AIFS AND VCFS

Circulars released by the SEBI dated July 03, 2018[3] ("**2018 Circular**") and October 01, 2015[4] ("**2015 Circular**") provide the legal framework within which the overseas investment by AIFs and VCFs takes place. A summary of this framework is provided below.

Limits for Investment

The investment limit for AIFs and VCFs is allocated on 'first come-first serve' basis depending upon the availability in the Block Limit.

In addition to the Block Limit for all the SEBI registered AIFs and VCFs, the 2015 Circular provides that not more than 25% of an AIF's investible funds can be invested overseas.

Conditions for Investment

Overseas investments by AIFs is allowed only in equity and equity linked instruments of offshore venture capital undertakings. According to the 2015 Circular, the term "Offshore Venture Capital Undertakings" means a foreign company whose shares are not listed on any of the recognized stock exchange in India or abroad. AIFs cannot make overseas investment in joint ventures or wholly owned subsidiaries. Overseas investment by AIFs and VCFs is allowed only in those entities with respect to which some form of Indian connection is established for generating indirect benefits to India. SEBI in its 2015 Circular had referred 'Indian connection' to include situations where back office operations of a company are carried out in India with the front office being in an offshore jurisdiction. However, there is no exhaustive definition of 'Indian connection' provided by SEBI, and SEBI reviews each application on a case-by-case basis to determine whether there is an India connection for such applicant (*See Procedure for Approval below*).

Regulatory Compliances

Overseas investments by AIFs and VCFs are subject to Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 including amendments and related directions issued by the RBI from time to time. Such AIFs and VCFs also need to ensure compliance with any other foreign exchange management regulations and RBI guidelines from time to time with respect to any structure which involves the Overseas Direct Investment (ODI) route.

Procedure for Approval

AIFs and VCFs desirous of making an overseas investment are required to submit a proposal for such investment to SEBI for prior approval. The format for the said proposal has been specified thereunder as an Annexure to the 2015 Circular. AIFs may now make their application for such purpose online. Separate approval from the RBI is not required for such overseas investments. AIFs and / or VCFs that have already been allocated certain overseas investment limit by SEBI also have the option of applying again for allocation of further investment limit by submitting a fresh application for the same. However, such AIFs and / or VCFs shall not be entitled to any preferential treatment with respect to the fresh allocation.

Timeline of Investment

After receiving SEBI's approval, the concerned AIF or VCF is expected to make allocated investments in offshore investee entity within a period of 6 months from the date of receipt of such approval. In case the allocated limit is not

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utilized within the stipulated period, SEBI has the power to allocate the unutilized limit to other applicants.

Disclosure Requirements

AIFs and VCFs are required to report the utilization of the overseas limits within 5 working days of such utilization, on SEBI intermediary portal. If an AIF or a VCF fails to utilize the allotted overseas limit or a part thereof within the stipulated time period of 6 months, the same has to be reported to the SEBI within 2 working days after the expiry of said validity period. If an AIF or a VCF wishes to surrender the overseas limit allotted to it, the same is required to be reported to SEBI within 2 working days from the date of decision to surrender the limit. These disclosure requirements are aimed at ensuring easy monitoring of utilization of overseas investment limits allotted by SEBI.

INDUSTRY FEEDBACK

This Circular is a welcome move, as the previous limit was quite close to exhaustion and there was a general sense of additional requirement among various AIFs in the industry.

Additional steps that SEBI could take towards enabling easier execution of overseas investments by AIFs and VCFs is to provide additional guidelines with respect to determination of the term ‘India connection’, and also expand the scope of overseas investments from ‘companies’ to other common corporate structures prevailing overseas such as ‘limited partnerships’. Further, a clarification from SEBI on the timelines for the approval will be appreciated as it will help the fund managers to better evaluate the investment opportunities.

– Dibya Behera, Shivam Ahuja & Nandini Pathak
You can direct your queries or comments to the authors

[1] SEBI Circular No. SEBI/HO/IMD/DF6/CIR/P/2021/565 dated May 21, 2021.
[2] Regulation 15(1)(a) of the AIF Regulations, 2012.
[3] SEBI Circular No. SEBI/HO/IMD/DF1/CIR/P/2018/103/2018.
4 SEBI Circular No. CIR/IMD/DF/7/2015.

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