

Funds Hotline

August 18, 2021

THE CHANGING CONTOURS OF AIF REGIME IN INDIA: THIRD AMENDMENT REGULATIONS, 2021 AND PROPOSALS

- Framework for Accredited Investors of AIFs basis financial parameters;
- AIFs with only Accredited Investors are exempt from minimum investment criteria; diversification requirements relaxed; allowed to extend the tenure of the fund beyond 2 years; and
- Issue of partly paid-up units by AIFs; relaxing investment restrictions on venture capital funds, and filing of PPM through merchant bankers.

The Securities and Exchange Board of India (“SEBI”) has released the SEBI (Alternative Investment Funds) (Third Amendment) Regulations, 2021 (“**Amendment Regulations**”) on August 03, 2021. The amendment introduces the criteria for certain investors in an Alternative Investment Fund (“**AIF Fund**”) to be identified as Accredited Investors (“**AIs**”). SEBI had released a consultation paper on this concept earlier this year seeking comments from the industry¹ and seems to have received a positive response. Recently, SEBI in its board meeting accepted the proposal in the consultation paper in furtherance of which the Amendment Regulations have been released. We have discussed the Consultation Paper and SEBI's board meeting in detail [here](#) and [here](#).

Further, in its recent board meeting on August 06, 2021 (“**Board Meeting**”), SEBI has discussed additional amendments to the SEBI (Alternative Investment Funds) Regulations, 2012 (“**AIF Regulations**”) to cover the issuance of partly paid-up units by AIFs, relief from certain investment restrictions for AIFs set up as venture capital funds, and introduction of Private Placement Memorandum (“**PPM**”) filing through merchant bankers.

This hotline will cover our preliminary analysis of the AI framework under Part-A, as well as our analysis of the changes approved in the Board Meeting under Part-B.

PART A Accredited Investors

As per the Amendment Regulations, an AI is any person who is granted a certificate of accreditation by an accreditation agency² (“**AA**”). An AA for this purpose can be a subsidiary of a recognised stock exchange or a subsidiary of a depository, or any other entity as may be specified by SEBI.³ The Amendment Regulations provide certain financial parameters which need to be satisfied to grant the AI status to resident Indians. The parameters are as provided below:

Category	Parameters
Individuals, Hindu Undivided Family, Family Trust or Sole Proprietorship	<ul style="list-style-type: none"> · Annual income of INR 2 crores; or · Net worth of INR 7.5 crores out of which not less than INR 3.5 crores is in the form of financial assets; or · Annual income of INR 1 crore and minimum net worth of INR 5 crores, out of which not less than INR 2.5 crores is in the form of financial assets,
Body Corporate	Net worth of INR 50 crores
Trust other than family trust	Net worth of INR 50 crores
Partnership firm set up under the Indian Partnership Act, 1932	Each partner should independently meet the eligibility criteria for accreditation

Deemed Accredited Investor

The Amendment Regulations provide a deemed AI status to (i) Central and State Governments; (ii) any developmental agencies set up under the aegis of the Central and State Governments; (iii) any funds set up by the Central Government or the State Governments; (iv) qualified institutional buyers⁴; (v) Category I Foreign Portfolio Investors; (vi) sovereign wealth funds; and (vii) multilateral agencies and any other entity as may be specified by

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SEBI. Since these entities are deemed to be AI, it is not incumbent on them to obtain any certification of accreditation from an AA.

Accreditation Fund

Any AIF or any scheme of an AIF in which each investor (other than the Investment Manager (“IM”), Sponsor, employees or directors of the AIF or employees or directors of the IM) is an AI and invests not less than INR 70 crores would be classified as a “large value fund for accredited investors (“AI Fund(s)”). Relaxations given to AI Funds from the provisions of AIF Regulations are summarized below:

■ Minimum commitment criterion not applicable to AI Funds

The minimum capital commitment of INR 1 crore that each investor (other than the employees or directors of the Fund and the employees or directors of the IM) is required to make under the AIF Regulations is not applicable to AI Funds⁵.

■ Timelines for certain regulatory filings relaxed for AI Funds Filings

A Fund can launch multiple schemes under it, provided, a different PPM is filed with SEBI thirty days prior to the launch of such scheme. The AI Fund would not be required to mandatorily submit the PPM to SEBI thirty days prior to the launch and can be submit at any time. Further, they are not required to revise the PPM based on the comments received from SEBI before launching the Fund.

■ Extension of Tenure beyond two years

Under the AIF Regulations, a close-ended AIF is permitted to extend the tenure up to two years if permitted by two-thirds of the unit holders by the value of their investment in the AIF.⁶ The Amendment Regulations now allow AI Funds to extend the tenure beyond two years subject to the terms of the contribution agreement, other fund documents and conditions specified by SEBI from time to time.

■ Relaxation of Diversification norms

Under the AIF Regulations, AIFs are subject to the portfolio diversification norms which provide that Category I and Category II AIFs cannot invest more than 25% of the investible funds⁷ in one portfolio company,⁸ and Category III AIFs cannot invest more than 10% of the investible funds in the same portfolio investment.⁹ The Amendment Regulations permit AI Funds registered as Category I or II AIFs to invest up to 50% of their investible funds in one portfolio company and accordingly AI Funds registered as Category III AIFs can invest up to 20% of their investible funds in a portfolio company.

Analysis

The introduction of AI framework is consistent with the regulatory framework for investors in various other jurisdictions such as the United States, Singapore, Canada – as summarised below.

S. No.	Parameter	US ¹⁰	Singapore ¹¹	Canada ¹²
1.	Monetary thresholds for individual investors	Income > USD 2 Million in each of the 2 most recent years	Income in the preceding 12 months > SUSD 3 Million	Financial Assets (individually or with a spouse) > USD 1 Million before taxes but net of related liabilities
		Networth > USD 1 Million	Net personal assets > SUSD 2 Million	Net Assets (individually or with a spouse) > USD 5 Million
2.	Monetary thresholds for other entities	Assets > USD 5 Million	Corporations with assets > SUSD 10 Million	Company □ USD 5 Million
3.	Other criteria	Any natural person holding in good standing one or more professional certifications or designations or credentials from an accredited educational institution that the Commission ¹³ has designated as qualifying an individual for AI status	NA	An individual who currently is, or once was, a registered adviser or dealer, other than a limited market dealer

Securities market regulators worldwide tend to exempt managers or advisers dealing with accredited investors from the scope of their regulation because of the higher risk appetite of such investors. This allows more flexibility while structuring their portfolio to IMs whose funds have such accredited investors.

In the European Union (EU)¹⁴ the corollary of AI is Elective Professional Clients (“EPCs”). Investors are required to fulfil the quantitative¹⁵ as well as qualitative¹⁶ norms to be certified as EPCs.

The key benefits available to AI Funds as compared to other AIFs, with their benefits as well as concerns have been summarized as below:

SN	Amendment	Benefits	Concerns
1.	Minimum Commitment Amount not applicable to AIs	<p>AI Funds could tap more investors, especially domestic investors who are AIs, because of the inapplicability of minimum commitment amount to AIs.</p> <p>This is particularly relevant at present because of the increasing popularity of and comfort with alternative investments among Indian institutional investors</p>	<p>The requirement of obtaining an AI accreditation could be considered too cumbersome by some investors, unless the procedure is charted out in a manner that such accreditation is quick and efficient. Until 2019, in Singapore,¹⁷ any investor who satisfied the given financial parameters was automatically accorded accreditation without even applying for the same. This led to several issues as many investors were not aware of them being granted accreditation due to which they failed to undertake compliances required by the relevant regulatory laws in Singapore.</p> <p>Alternatively, SEBI may consider introducing a sub-category of AI Funds under each of the categories of AIFs, whereby such AI-AIFs would only be permitted to raise from AIs who meet the given criteria (without any requirement of accreditation by such AIs). This is already the framework applicable to Angel Funds (category I AIFs under the venture capital fund sub-category) who are only permitted to raise from angel investors.</p>
2.	Relief from certain Scheme launch provisions for AI Funds	Saving of costs as well as time on launch of new schemes should bring operational efficiencies for AI IMs, and therefore, could enhance performance as well.	Generally, AIF IMs prefer launching a new AIF over launching a new scheme because it is cleaner for segregation of assets and liability. Until a dedicated corporate structure for AIFs is introduced in India, a new scheme should be permitted to be launched as a new entity under the AIF Regulations as long as the IM continues to be the same, or from the same investor group.
3.	Extension of tenure beyond 2 years	A relief for AI Funds for structuring exits and undergoing liquidation more comfortably, without unnecessary regulatory concerns.	While this is a welcome clarification, it should also be possible for non-AI AIFs to amend their original tenure in the AIF documents subject to necessary investor approvals if they are facing issues with respect to exits or liquidation.
4.	AI Funds (Category I and II) can invest up to 50% of investable funds in a single company directly or through other funds. Category III AI Funds can invest up to 20% of investable funds in a single company directly or through other funds.	AI Funds can now have a more concentrated portfolio, and accordingly design its strategy in a more focused manner. The AIF structure could now be used for investing in as less as a couple of identified deals which may not constitute a 'portfolio' but would still be alternative investments.	In general, there are practical concerns which most AIF IMs face regarding the determination of the diversification provisions under the AIF Regulations. While there has been informal guidance issued by SEBI on this topic, it still continues to be confusing. Some clarity from SEBI whether as a circular or as amendments to the AIF Regulations that such determination is to be made at the time when the AIF stops making any further investments and closes its books for that purpose would be welcome.

In addition to the above, given that the criteria for becoming an AI Fund requires at least INR 70 Crore of investment by each AI into such fund, the waiver from (i) filing the PPM in the template provided by SEBI¹⁸; (ii) annual audit of compliance with PPM terms; and (iii) compliance with the SEBI Circular released in October 2020¹⁹ shall automatically apply to AI Funds, despite SEBI not clarifying this in the Amendment Regulations.

The scope of relaxations provided by SEBI to AI Funds could further be extended in a few years' time.

In its consultation paper, SEBI had noted that an investor is given the AI status by the regulatory body only on the presumption that such AI is well versed with the risks and regulatory compliances involved.²⁰ This means that for an investor to be an AI he need to not only satisfy the net worth and income criteria but also needs to have experience in the financial services market to understand the regulatory compliances as well as the risk involved.

More mature jurisdictions like the US²¹ have recently amended their laws²² to add the experience requirement.

SEBI could consider gradually providing a requirement for prior experience in dealing with securities or in the financial services market as a criterion for providing accreditation. Given that the rationale to allow a waiver to investors committing more than INR 70 crores in an AIF from the regulatory compliances under the AIF Regulations, is also rooted in the assumption that the investor is well versed with the regulatory risks involved and has the means and resources to carry out requisite due diligence.

PART B

In the Board Meeting, certain amendments to the AIF Regulations were approved in order to simplify the compliance requirements for AIFs as well as to provide AIFs flexibility in terms of investment.

The following amendments to the regulations have been approved:

Investment Restrictions on Venture Capital Funds (“VCFs”) removed

Under the AIF Regulations,²³ Category I AIFs under the VCF sub-category were mandatorily required to invest at least two-thirds (66.67%) of the total investable funds in (i) unlisted equity shares or equity-linked instruments (“Equity”) of a venture capital undertaking (“VCU”) or (ii) in companies listed or proposed to be listed on a Small and Medium Enterprise exchange or Small and Medium Enterprise segment of an exchange. This requirement has been changed to investing 75% (three-fourth) of the total investable funds in the abovementioned avenues.

Further to this, other investment restrictions applicable on the residual portion of the investable funds (i.e. one-third of the total investable funds) of the VCF²⁴ have been done away with.

Removal of the investment restrictions should give more autonomy to the IM to invest in entities which could maximize the overall returns of the AIF instead of being subject to a regulated investment allocation criteria.

Grants received from AIs

AIs will be provided more relaxation in terms of statutorily defined minimum thresholds of investments and grants. As per Regulation 16(4) of the AIF Regulations, any grant accepted by a social venture fund should be a minimum of INR 25 lakhs. This threshold has been proposed to be relaxed for AIs. This would imply that a social venture fund would be able to accept a grant of an amount lesser than INR 25 lakhs from AIs.

Issue of partly-paid up units

The proposed amendment allows AIFs to issue partly-paid up units to investors to represent the portion of the committed capital invested. This should allow more clarity from an accounting perspective to the AIFs. The mechanism for voting as well as distributions would need to be carefully crafted for AIFs which are considered partly-paid up unit structure.

Filing of the PPM through Merchant Bankers

SEBI has proposed that AIFs shall be required to file the PPM through registered Merchant Bankers.²⁵

The intent of SEBI is to ensure that a third party regulated under SEBI laws verifies the contents of the PPM before it is filed with SEBI and circulated to the investors. However, such a requirement could lead to further delay in launching of AIFs. Further, an additional requirement of getting the PPM verified by a third party would increase the costs and would lead to additional documentation for availing the services of the Merchant Bankers. Alternatively, it could fill the gap in terms of efficiency for the AIF application review process.

CONCLUSION

The Amendment Regulations can be viewed as a step forward towards more relaxed regulatory environments for sophisticated investors which in turn will bring India at par with other global financial hubs. It is a welcome move. However, owing to the fact that further clarification on the processes and timelines is required, we believe that the investors may not be able to jump on the wagon so soon. Further, the proposed amendments by SEBI seem to bring about more flexibility for IMs to take investment decisions. It is to be noted that the industry feedback on the proposed requirement of filing the PPM of the fund through a Merchant Banker is not positive. Among all the progressive changes, further regulation of PPM could be seen as a regressive step by industry participants unless Merchant Bankers introduce the efficiency which is required for quick clearance of marketing documents. PPM review is known to be a major roadblock in the application review process by SEBI for AIFs. Introduction of an intermediary should accelerate the process of application in order for the industry to celebrate this change.

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You can direct your queries or comments to the authors

¹ SEBI, Consultation Paper on introduction of the concept of Accredited Investors, February 24, 2021 available at https://www.sebi.gov.in/reports-and-statistics/reports/feb-2021/consultation-paper-on-introduction-of-the-concept-of-accredited-investors_49269.html

² Regulation 2 of the SEBI (Alternative Investment Funds) Regulations, 2012 (“AIF Regulations”)

³ Regulation 2 of the AIF Regulations.

⁴ As defined under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018

⁵ Regulation 10 (c) of the AIF Regulations

⁶ Regulation 13(4) of the AIF Regulations

⁷ Regulation 2(p) – investible funds mean - *corpus of the Alternative Investment Fund net of estimated expenditure for administration and management of the fund*

⁸ Regulation 15(1) (c) of the AIF Regulations

⁹ Regulation 15(1)(d) of the AIF Regulations

¹⁰ The Securities Act of 1933, 17 CFR §230.501 (United States), <https://www.law.com/lln/cfr/text/17/230.501>.

¹¹ <https://sso.agc.gov.sg/Act/SFA2001#pr4-> Section 4A(A) & Securities and Futures (Prescribed Specific Classes of Investors) Regulations 2005, §4A(a), <https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Consultation-Papers/Annex-4-Part-III-Nonretail-investor-legis-amdmts.pdf>

- ¹² National Instrument 45-106, § 1.1, available at https://www.osc.gov.on.ca/documents/en/Securities-Category4/rule_20090918_45-106_3238-supplement.pdf
- ¹³ The US Securities and Exchange Commission
- ¹⁴ Directive 2014/65/EU of the European Parliament; Amending Directive 2002/92/EC; Directive 2011/61/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0065>.
- ¹⁵ Annexure II of the Directive 2014/65/EU of the European Parliament; Amending Directive 2002/92/EC; Directive 2011/61/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0065>
- ¹⁶ Annexure II of the Directive 2014/65/EU of the European Parliament; Amending Directive 2002/92/EC; Directive 2011/61/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0065>
- ¹⁷ Monetary Authority of Singapore, *FAQs on the Definition of Accredited Investor and Opt-in Process*, 7th August 2021 (11:32 PM), https://www.mas.gov.sg/-/media/MAS/FAQ/FAQs-on-the-Definition-of-Accredited-Investor-and-Opt-In-Process_23-Oct-2019.pdf.
- ¹⁸ SEBI Circular dated February 05, 2020 *available at* https://www.sebi.gov.in/legal/circulars/feb-2020/disclosure-standards-for-alternative-investment-funds-aifs-_45919.html
- ¹⁹ SEBI notification dated October 19, 2020 *available at* https://www.sebi.gov.in/legal/regulations/oct-2020/securities-and-exchange-board-of-india-alternative-investment-funds-amendment-regulations-2020-_47914.html
- ²⁰ SEBI, Consultation Paper on introduction of the concept of Accredited Investors, February 24, 2021 *available at* https://www.sebi.gov.in/reports-and-statistics/reports/feb-2021/consultation-paper-on-introduction-of-the-concept-of-accredited-investors_49269.html
- ²¹ Womble Bond Dickon, SEC Expands Definition of Accredited Investor, <https://www.womblebonddickinson.com/us/insights/alerts/sec-expands-definition-accredited-investor>.
- ²² Amendments to Accredited Investor Definition *available at* <https://www.sec.gov/corpfin/amendments-accredited-investor-definition-secg>.
- ²³ Regulation 16 of the AIF Regulations
- ²⁴ Regulation 16 (2)(b) of the AIF Regulations
- ²⁵ As defined under Securities and Exchange Board of India (Merchant Bankers) Regulation, 1992.

Benchmark Litigation Asia-Pacific: Tier 1 for Government & Regulatory and Tax
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