

Funds Hotline

January 20, 2023

AIF PARTICIPATION IN CREDIT DEFAULT SWAPS

INTRODUCTION

As of 30 June 2022, Alternative Investment Funds ("AIFs") registered with the Securities and Exchange Board of India ("SEBI") were reported to have collectively allocated 30% of their total investments towards debt and securitized debt instruments.¹ In response, SEBI² has amended³ the AIF Regulations ("Amendment") to authorise AIFs to buy and sell credit default swaps ("CDS")⁴ to hedge or assume credit risks. This authorisation, however, is subject to certain restrictions and conditions, which vary for various categories of AIFs, which have been explained further in a circular ("Circular").⁵ These are outlined below.

Particulars	Category I	Category II	Category III
AIF as a buyer of CDS	Category I and Category II AIFs may buy CDS, but only to hedge risks on underlying debt investments.		Category III AIFs may buy CDS for hedging risks on an underlying debt investment. A Category III AIF may also buy CDS for purposes other than hedging of risks. However, such exposure to CDS may not exceed twice the net asset value of the fund. ⁶
AIF as a seller of CDS	The Amendment and Circular are silent in this regard. We view this as being not permitted.	Category II AIFs may to sell CDS by earmarking unencumbered Government bonds/treasury bills equivalent to the CDS exposure so that it does not amount to leverage.	Category III AIFs may sell CDS provided that "effective leverage is undertaken" within permissible limits (i.e., twice the net asset value of the fund). They may sell CDS by earmarking unencumbered Government bonds/treasury bills equivalent to the CDS exposure. Such CDS exposure may not amount to leverage.
Concentration Norms	Not applicable as the Amendment and the Circular are silent on the sale of CDS by Category I AIFs.	Total exposure to investee companies via CDS should not breach the concentration norms. These norms, for Category II AIFs, provide that no more than 25% of an AIF's investible funds may be invested in one investee company.	Any unhedged position resulting in the gross value of unhedged positions across all CDS transactions exceeding 25% of investable funds may be undertaken only after intimating all investors.
Custodian	Sponsor / Manager of a Category I or Category II AIF undertaking CDS transactions must appoint a custodian who is registered with SEBI irrespective of the corpus size. ⁷		All Category III AIFs are required to appoint a custodian under the AIF Regulations. ⁸
Reporting	Details of CDS transactions must be reported to the appointed custodian before the end of the following working day (in the manner prescribed by the custodian).		
Breach due to earmarked securities falling	Not applicable as the Amendment and the Circular are silent on the sale of CDS	If the earmarked securities of a Category II or III AIF fall below its CDS exposure, it must 1. report the breach to its custodian on the same day of the breach;	

Research Papers

Evolution of Generative AI

July 11, 2024

From Capital to Impact: Role of Blended Finance

June 15, 2024

Opportunities in GIFT City

June 14, 2024

Research Articles

Private Client Insights - Sustainable Success: How Family Constitutions can Shape Corporate Governance, Business Succession and Familial Legacy

January 25, 2024

Private Equity and M&A in India: What to Expect in 2024?

January 23, 2024

Emerging Legal Issues with use of Generative AI

October 27, 2023

Audio

Dabba Trading and Its Regulatory Landscape in India

July 25, 2024

Pursuing Remedies against Non-signatories in Investment Agreements

July 03, 2024

Why is the ad industry unhappy with MIB's self-declaration mandate?

June 18, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

Union Budget: Key takeaways for Private Equity Investors and Foreign Companies

July 24, 2024

below the CDS exposure by Category I AIFs. 2. bring the amount of earmarked securities equal to CDS exposure and report the rectification details to the custodian by the end of the following trading day;

If the AIF fails to rectify the breach, then the custodian is required to report the details thereof to SEBI on the following working day.

Breach in leverage limits	Not Applicable as Category II AIFs are not permitted to sell CDS in a manner that is tantamount to leverage.	A Category III AIF in breach of the leverage limits must <ol style="list-style-type: none">1. report the breach to its custodian on the same working day;2. report the breach to investors by 10 am on the next working day;3. square off excess exposure and bring back the exposure within limits, and report this to all investors by the end of the day of squaring off.
Cooling-off period	Category I and Category AIFs transacting in CDS must maintain a cooling-off period of thirty days between two periods of any borrowing or leverage that they undertake.	Not applicable.

The Circular stipulates that all CDS transactions must be performed on a platform which is regulated by SEBI or the Reserve Bank of India (“**RBI**”). These transactions ought to also be compliant with the Master Direction – Reserve Bank of India (Credit Derivatives) Directions, 2022 (“**Master Direction**”). The key features of the Master Direction which are relevant to AIFs transacting in CDS are outlined below

- i. Reference Entities: AIFs may enter into a CDS contract only to hedge against or assume risks of investees (called “reference entities”) which are residents of India, against whose credit risk the CDS contract is entered into.⁹
- ii. Reference Obligations: The Master Direction refer to the underlying assets to which a CDS contract is linked as “reference obligations”. AIFs are prohibited from entering into CDS contracts which are linked to asset-backed securities/mortgage-backed securities or structured obligations.¹⁰
- iii. Related Parties: CDS transactions are not permitted when the reference entity is a related party to either the “protection buyer” or the “protection seller”.¹¹
- iv. Accounting: To follow SEBI prescribed accounting standards. In the absence such standards, AIFs ought to follow the guidance issued by the Institute of Chartered Accountants of India.¹²

OBSERVATION AND REMARKS

By permitting AIFs to participate in CDS, SEBI has facilitated AIFs to manage and transfer their credit risks, and also introduce new institutional players in the market. SEBI remains circumspect about allowing Category II AIFs to become protection sellers without earmarking certain unencumbered securities of an equivalent value to the CDS. Despite this circumspection, the Amendments are welcome inasmuch as they allow AIFs to guarantee the creditworthiness of certain debt instruments. This allows greater flexibility as opposed to SEBI's traditional stance against allowing AIFs to undertake any guarantees.

Be that as it may, it remains to be seen whether the AIF industry's demand for CDS transactions is sustainable in the current regulatory framework. One might remember that mutual funds were permitted to participate in the CDS market a decade ago. However, the market did not take off. The premium for buying CDS ought to be commensurate with the advantage derived by AIFs by hedging credit risks. In the absence of market makers enabling commercial viability of CDS transactions, the new regulatory environment is unlikely to make the market be sustainable. It remains to be seen whether the AIFs' interest in CDS transactions is sustainable in the long term, or if it will follow the footsteps of mutual funds.

– Nandini Pathak & Dhruv Sanghavi

(The authors would like to acknowledge and thank Athul Kumar (student, Symbiosis Law School, Pune) for his contribution to this hotline.)

You can direct your queries or comments to the authors

¹ SEBI Board Meeting Memorandum dated December 20, 2022.

² SEBI (Alternative Investment Funds) (Amendment) Regulations, 2023.

³ Regulations 16(1)(aa), 17(da), 18(ab) and 20(11).

⁴ A CDS is defined as “a credit derivative contract in which one counterparty (protection seller) commits to pay to the other counterparty (protection buyer) in the case of a credit event with respect to a reference entity and in return, the protection buyer makes periodic payments (premium) to the protection seller until the maturity of the contract or the credit event, whichever is earlier.” See: Para 2(f), Master Direction – Reserve Bank of India (Credit Derivatives) Directions, 2022 (February 10, 2022, FMRD.DIRD.10/14.03.004/2021-22).

⁵ SEBI/HO/AFD/PoD/CIR/2023/15.

⁶ SEBI circular no. CIR/IMD/DF/10/2013 dated July 29, 2013.

⁷ Regulation 20 (11), AIF Regulations.

⁸ Regulation 20 (11), AIF Regulations.

⁹ Para 7, RBI Master Directions.

¹⁰ Para 7, RBI Master Directions.

¹¹ Para 8, RBI Master Directions.

¹² Para 12, RBI Master Directions.

DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.