

SEBI attempts to ease M&A involving open offer and delisting | AIF norms for investments by an AIF into other AIFs | Mutual fund industry's skin in the game norms postponed to October 1, 2021

Following important changes / proposals have been made by SEBI in the context of open offer under Takeover Code and delisting, AIFs and mutual fund industry:

1. [SEBI proposes review of delisting framework pursuant to open offer to make M&A process rational and convenient](#)
2. [Deferment of rules related to Skin in the Game for mutual fund industry to October 1, 2021](#)
3. [SEBI notifies certain changes for an AIF to invest in units of other AIFs/Investee companies, Code of Conduct and Investment Committee norms](#)

Key changes of the aforesaid are analyzed below:

SEBI proposes review of delisting framework pursuant to open offer to make M&A process rational and convenient

A new framework is being proposed for delisting pursuant to an open offer to address the issue of navigating through three different bodies of law (*takeover, delisting and minimum public shareholding norms*). This is for when an incoming acquirer wishes to acquire control over listed companies and also delist.

The move is intended to remove complexity of the acquisition process and provide a unified single process. The new framework mainly relates to disclosure of intent to attempt delisting upfront, delisting price and takeover price, shareholder and stock exchange approval and delisting attempt after the open offer.

As of now, the proposal is suggested for cases of open offers under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**Takeover Regulations**), for an incoming acquirer that is seeking to acquire sole or joint control under Regulation 3(1) or Regulation 4 (i.e., where there is a change of control because of a new acquirer). The framework and its features are discussed and analysed below.

The consultation paper issued by SEBI on June 25, 2021, dealing with the aforementioned is [available here](#).

Currently, when an open offer is triggered either through direct or indirect acquisition by an incoming acquirer who is acquiring more than 49% from a large exiting shareholder and/or a fresh issue of shares (preferential allotment) by the listed company, the following transactions are applicable under the current laws:

- as per the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**Takeover Code**), the incoming acquirer's holding may go above 75% and may even cross 90%;
- the provisions of the Securities Contract (Regulation) Rules, 1957 (**SCRR**) stipulates a minimum public shareholding of 25% for all listed companies and if this limit is breached, the non-public shareholding has to be brought down to 75% within a year;
- the provisions of the erstwhile SEBI (Delisting of Equity Shares) Regulations, 2009 and current SEBI (Delisting of Equity Shares) Regulations, 2021 (**Delisting Regulations**) do not permit the acquirer to attempt delisting requiring to reach 90%, unless the acquirer holding is brought down to 75%, as it requires compliance with applicable securities laws which include minimum public shareholding of 25%.

The consecutive flow of transactions in accordance with the above laws to delist pursuant to an open offer prove to be contradictory, making the process of takeovers of listed companies to be complex. Therefore, with a view to make acquisition transactions for listed companies a more rational exercise and balancing the interests of all investors involved in the process, SEBI formed a sub-group to examine this discrepancy, which proposed a new framework to align the Takeover Regulations, SCRR and Delisting Regulations.

Key proposals of the aforementioned framework are analysed below:

Proposal	Suggestion / Recommendation
<p>Disclosure of intent to attempt Delisting upfront</p>	<ul style="list-style-type: none"> ▪ In an open offer under the Takeover Regulations, the acquirer must state upfront in the first public announcement triggered by the mandatory tender offer as well as in the detailed public statement, whether delisting is intended or if the acquirer is desirous of retaining listed status for the Target Company. In an indirect acquisition that is not a deemed direct acquisition under Regulation 5(2) of the Takeover Regulations, this intention to delist may be stated initially in the detailed public statement; ▪ If the acquirer states upfront that it opts for remaining listed, and the total stake at the end of the tendering period is above 75%, the acquirer may opt for: <ul style="list-style-type: none"> – either proportionately scaling down purchases under both, the underlying share purchase agreement(s) and purchases of the shares tendered, so as to not cross the 75% threshold; or – by becoming compliant with minimum public shareholding within the time stipulated.
<p>Delisting Price and Takeover Price</p>	<p>If the acquirer is desirous of delisting, acquirer to propose differential pricing – an open offer price no lower than the minimum offer price under the current framework of the Takeover Regulations (Takeover Price) and a higher price with a suitable premium reflecting what the acquirer is willing to pay if delisting were successful (Delisting Price).</p> <ul style="list-style-type: none"> ▪ Delisting Price to be paid to the shareholders who tender their shares, if the delisting threshold of 90% is met. ▪ Takeover Price to be paid to the shareholders who tender their shares, if the delisting threshold of 90% is not met.
<p>Shareholder and Stock Exchange Approval</p>	<p>As provided in the Delisting Regulations:</p> <ul style="list-style-type: none"> ▪ shareholders to have the power to reject a delisting effort, providing for an affirmative vote by a majority of the minority shareholders; ▪ stock exchanges to confirm the compliance of the listed company with listing requirements including payment of dues to exchanges. <p>Aforementioned two conditions may be met at any time after the public announcement is made and before the tendering period starts. If these approvals are not received, the delisting element of the open offer would stand rendered void and the open offer would continue with the Takeover Price</p>
<p>Delisting Attempt after the Open Offer</p>	<ul style="list-style-type: none"> ▪ If a company does not get delisted pursuant to the open offer under this proposed framework, and the acquirer crosses 75% as a result of the open offer, a period of 18 months from the date of completion of the open offer to be provided for further attempts to delist under the Delisting Regulations including the price discovery method to be made. ▪ If delisting during this extended 18-month period is not successful, the acquirer must ensure compliance with minimum public shareholding within a period of 12 months from the end of such period. ▪ If any sale of shares is effected to dilute from the level reached post-open offer, the right to attempt delisting must not be available for the 18-month period. ▪ If a delisting attempt is to be made from a level of above 75% without coming down to 75%, the finishing line for success of such a delisting effort would be the higher of:- 90%; and 50% of the residual public shareholding

Deferment of rules related to Skin in the Game for mutual fund industry to October 1, 2021

Recently on April 28, 2021, in an important change for the mutual fund industry, its managers and key employees, SEBI had notified certain norms requiring skin in the game for the key employees of asset management companies (**AMCs**).

SEBI had introduced these changes having recognized that the management of risk return profile of the schemes rests with the AMCs and the key employees, hence, in order to align the interest of the key employees of the AMCs with the unitholders of the mutual fund schemes, certain changes are required to be made related to compensation and clawback mechanism of the key employees. These changes were scheduled to come into effect from July 1, 2021. Now, the applicability of such norms has been delayed and will come into effect from **October 1, 2021** ([SEBI circular dated June 25, 2021, is available here](#)).

SEBI notifies certain changes for an AIF to invest in units of other AIFs/Investee companies, Code of Conduct and Investment Committee norms

SEBI has provided norms and clarity in relation to the following:

- A. [Framework for AIFs to invest simultaneously in units of other AIFs and directly in securities of investee companies: \(i\) No need to label as fund of AIFs, \(ii\) Disclosures in PPM; and \(iii\) Changes in leverage norms of Category III AIFs:](#)
- B. [Scope of key managerial personnel of AIF and Manager who need to adhere to code of conduct;](#)
- C. [Clarifications with respect to Investment Committee \(IC\) and approval from investors: \(i\) Waiver to IC members from compliance where each investors invests not less than INR 70 Crores and waives the requirement, \(ii\) Investors consent not required for change in ex-officio external members.](#)

Aforementioned changes have been introduced vide SEBI Circular dated June 25, 2021 ([available here](#)) and are analysed below:

A. Framework for AIFs to invest simultaneously in units of other AIFs and directly in securities of investee companies

- (i) **No need to label as fund of AIFs:** AIFs may invest in units of other AIFs without labelling themselves as a Fund of AIFs;
- (ii) **Disclosures in PPM:** Existing AIFs may also invest simultaneously in securities of investee companies and in units of other AIFs, subject to appropriate disclosures in the Private Placement Memorandum (**PPM**) and with the consent of at least two-thirds (2/3rd) of unit holders by value of their investment in the AIF. AIFs which propose to invest in units of other AIFs shall provide, inter-alia, the following information in their PPMs:
 - proposed allocation of investment in units of other AIFs;
 - out of total fees and expenses charged to investors of the AIF, portion of fees and expenses which may be attributed to investment in units of other AIFs;
 - process to be followed by the Manager to ensure compliance with investment conditions as specified in Regulation 15 and Regulation 16, 17 or 18 (as applicable) of the SEBI (Alternative Investment Funds) Regulations, 2012 (**AIF Regulations**);
 - whether any investments are proposed to be made in units of other AIFs managed/ sponsored by the same Manager/ Sponsor or associates of the Manager/ Sponsor and details thereof, including allocation, fees, expenses, etc.
- (iii) **Changes in leverage norms of Category III AIFs:** Earlier, the leverage of a Category III AIF could not have exceeded two (2) times of the net asset value (**NAV**) of the fund. Under the revised norms, Category III AIFs investing in units of other AIFs may undertake leverage not exceeding two (2) times of the NAV after excluding the value of investment in units of other AIFs.

B. Scope of key managerial personnel of AIF and Manager who need to adhere to code of conduct

The key management personnel (**KMP**) of the AIF and the Manager are required to abide by the Code of Conduct as specified in the Fourth Schedule of the AIF Regulations. SEBI has now notified the meaning of 'key management

personnel' hence, providing clarity of personnel which will fall within the scope of KMPs:

- members of key investment team of the Manager, as disclosed in the PPM of the fund;
- employees who are involved in decision making on behalf of the AIF, including but not limited to, members of senior management team at the level of Managing Director, Chief Executive Officer, Chief Investment Officer, Whole Time Directors, or such equivalent role or position;
- any other person whom the AIF (through the Trustee, Board of Directors or Designated Partners, as the case may be) or Manager may declare as a key management personnel.

AIFs shall also disclose the names of all the KMP of the AIF and Manager as specified above, in their PPMs and any change in KMP shall be intimated to the investors and SEBI.

C. Clarifications with respect to Investment Committee (IC) and approval from investors

- (i) **Waiver to IC members from compliance where each investors invests not less than INR 70 Crores and waives the requirement:** The members of the IC are responsible for ensuring that the decisions of the IC are in compliance with the policies and procedures laid down in terms of Regulation 20 (3) of the AIF Regulations. This requirement has been exempted in case of an AIF in which each investor other than the Manager, Sponsor, employees or directors of the AIF or employees or directors of the Manager, has committed to invest not less than INR 70,00,00,000 (Indian rupees seventy crore or an equivalent amount in currency other than Indian rupees) and has furnished a waiver to the AIF in respect of compliance with aforementioned regulation, in the manner as may be specified by SEBI. In this context, SEBI has provided the format of seeking [waiver](#) from the investors. It is important to note that the format provides that notwithstanding the waiver granted, if any contractual responsibility is cast on the members of IC in terms of the provisions of the fund documents, they shall not be absolved from such responsibilities.

Hence, in this context, language in the fund documents will be important to note for the IC members.

- (ii) **Investors consent not required for change in ex-officio external members:** In terms of Regulation 20(10) of the AIF Regulations, the external members of the IC whose names are not disclosed in the PPM or in the agreement made with the investor or any other fund document at the time of on-boarding investors can be appointed to the IC only with the consent of at least seventy five percent (75%) of the investors by the value of their investment in the AIF or scheme. In this context, SEBI has clarified that the aforementioned requirement will not be applicable in case of change in ex-officio external members (who represent the sponsor, sponsor group, manager group or investors, in their official capacity) of the IC.

We hope you have found this information useful. For any queries/clarifications please write to us at insights@elp-in.com or write to our authors:

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