The background of the entire page is a close-up photograph of a wood cross-section. It features concentric, wavy growth rings in various shades of brown, from light tan to deep, dark chocolate and near-black tones. The texture is organic and layered, creating a sense of depth and natural growth.

FUND FORMATION  
The Beginning of the Fund Lifecycle

**Touchstone**  
Partners

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## ABOUT US

We are a firm of highly ambitious, deeply collaborative and intensely disciplined lawyers.

With an overwhelming majority of international institutions as our clients, we are rated by Chambers and Partners as one of a handful of 'spotlight' firms in India known for cross-border transactional expertise. Whilst we take pride in being specialists in our core practices of M&A, Private Equity, Structured Finance, Fund Formation and Competition / Antitrust, we also now advise our clients, in conjunction with a roster of counsels on the firm's panel, on high stakes contentious matters including matters arising by way of regulatory investigations.

We have worked very hard to be the preferred counsel in India for Fortune 500 corporations, sovereign wealth funds, institutional investors and financial sponsors, and have advised them on some truly ground-breaking transactions. Several of our partners have worked with top tier global law firms before building their careers at our firm which, therefore, enables us to deliver client service that can be benchmarked to global delivery standards.

Our value proposition lies in our deep understanding of the cross-border transactional ecosystem and our consistent track record in analysing risk for international institutions as they seek to navigate the regulatory and taxation framework that underpins their investments in India. We have a unique ability to staff our matters with the optimum mix of lawyers who through a combination of individual initiative, sound judgement and collective teamwork are able to, time and time again, assist our clients in meeting their objectives.

"Transactionally-focused firm offering sophisticated support in private equity, corporate and competition areas, with an emphasis on international work. It provides specialist, high-quality transactional support to an impressive array of global clients including strategic investors, corporates and private equity sponsors. The firm has a strong reputation for its client service and understanding of international clients' needs, and it is a firm of choice for major international firms to refer transactional mandates."

**Chambers and Partners, 2020**

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## Glossary

Term	Definition
40 Act	The Investment Company Act of 1940 (United States)
Advisers Act	The U.S. Investment Advisers Act of 1940
AIFMD	Alternative Investment Fund Managers Directive
AIF Regulations	SEBI (Alternative Investment Funds) Regulations, 2012
AOP	Association of Persons
ARC	Asset Reconstruction Company
Blended Carry	Refer to section G- Distribution Waterfall
Capital Commitments	Refer to section C – Key concepts of a closed-ended fund
Capital Contributions	Refer to section C – Key concepts of a closed-ended fund
Carried Interest	Refer to section C – Key concepts of a closed-ended fund
Carry Haircut	Refer to section G- No Fault Divorce
CBDT	Central Board of Direct Taxes
CCD	Compulsory Convertible Debenture
CCI	Competition Commission of India
CCPS	Cumulative Convertible Preference Share
Closing	Refer to section C – Key concepts of a closed-ended fund
Commitment Period/ Investment Period	Refer to section C – Key concepts of a closed-ended fund
Competition Act	The Competition Act, 2002
Corpus	The sum total of capital commitments in an alternative investment fund.
'Deal-by-Deal' Sleeve	Refer to section G- Distribution Waterfall
Disclosure Circular	Refer to section D- Analysis of certain regulatory concepts
Distribution Waterfall	Refer to section C – Key concepts of a closed-ended fund
DTAA	Double Taxation Avoidance Agreement
ECI	Effectively Connected Income
ERISA	Employee Retirement Income Security Act
Escrow Reserve	Refer to section G- Types of Clawback Protection
EU	European Union
EU COGC	European Union Code of Conduct Group
FATF	Financial Action Task Force
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act, 1999
FIPB	Foreign Investment Promotion Board
FPI Regulations	SEBI (Foreign Portfolio Investor) Regulations, 2019
FVCI Regulations	SEBI (Foreign Venture Capital Investors) Regulations, 2000

GAAR	General Anti-Avoidance Rules
GDPR	Global Data Protection Regulations
GIFT	Gujarat International Finance Technology City
Graded Carry	Refer to section G- Distribution Waterfall
Haircut	Refer to section G- No Fault Divorce
HNWI	High Net Worth Individual
Honeymoon Period	Refer to section G- No Fault Divorce
ICDR Regulations	SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018
IFSC Guidelines	SEBI (International Financial Services Centre) Guidelines, 2015
Interim Clawback	Refer to section G- Types of Clawback Protection
InvITs	Infrastructure Investment Trusts
Investee Companies	The companies in which the fund invests.
Investible Funds	The fund Corpus net of estimated expenditure for administration and management of the fund.
Investment Manager	Provides investment management services to the fund in consideration of an annual management fee.
IRR	Internal Rate of Return
IPO	Initial Public Offering
IRDA	Insurance Regulatory and Development Authority
LPAC	Limited Partner Advisory Committee
Management Fees	Refer to section C – Key concepts of a closed end fund
MCA	Ministry of Corporate Affairs
MFI	Multilateral Financial Institutions
MFN	Most Favoured Nations
Minimum Fund Corpus	Refer to section D- Analysis of certain regulatory concepts
Minimum Investor Commitment	Refer to section D- Analysis of certain regulatory concepts
Minimum Residual Maturity	Refer to section E- FPI investment into debt instruments
Minimum Sponsor Commitment	Refer to section D- Analysis of certain regulatory concepts
MLI	Multilateral Instrument
MoM	Multiple of Money Invested
NCD	Non-convertible debentures
NDI Rules	Non-Debt Instruments Rules, 2019
NPS	National Pension System
LLP	Limited Liability Partnership
OCD	Optionally Convertible Debentures
OCRPS	Optionally Convertible Redeemable Preference Shares
OECD	Organisation for Economic Co-operation and Development

PE	Permanent Establishment
PFRDA	Pension Fund Regulatory and Development Authority
PN3	Press Note 3 of 2020
PPM	Private Placement Memorandum
PTC	Pass Through Certificate
QIB	Qualified Institutional Buyer
REITs	Real Estate Investment Trusts
RBI	Reserve Bank of India
SEBI	Securities Exchange Board of India
Securities Act	The U.S. Securities Act of 1933
Settlor	Person who settles the trust and appoints the trustee
SMEs	Small and medium-sized enterprises
Sponsor	Sponsor of the fund who sponsors or seeds the fund, as more properly defined in the AIF Regulations
Sponsor Commitment	Refer to section G- No Fault Divorce
Staggered Catch-up	Refer to section G- Distribution Waterfall
SWF	Sovereign Wealth Funds
Target Exemption	Any transaction where the target has assets not exceeding INR 350 crore in India, or has a turnover not exceeding INR 1,000 crore in India, and therefore exempt from the mandatory pre-approval merger filing.
Takeover Code	SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
Tax Act	Income Tax Act, 1961
Term	Refer to section C – Key concepts of a closed-ended fund
Trustee	Person appointed by the Settlor responsible for the overall supervision and management of the fund for which it is usually entitled to receive a trusteeship fee
UBTI	Unrelated business taxable income
USD	United States Dollar
VCC	Variable Class Company
VCOC	Venture Capital Operating Company
VCF Regulations	SEBI (Venture Capital Funds) Regulations, 1996
VRR	Voluntary Retention Route

## A. Touchstone Fund Formation Capability

We view fundraising as the foundation of the lifecycle of an investment fund and as a critical piece that informs various aspects of its operations and investment programme. In light of its central importance, we apply a rigorous process to our fund formation projects which involves a study of the outcome of prior investor negotiations and the approaches adopted by peer funds in the market, a thorough deliberation of proposed fund terms and ultimately a structuring and documentation exercise geared towards minimising inefficiencies from a legal, tax and regulatory perspective.

Our funds practice benefits from our team's first-hand experience with fundraising on behalf of some of the largest fund houses in India, Europe and the United States. Our team has acted on products offerings across various asset classes ranging from vanilla venture capital and private equity funds to more bespoke products in the real estate, infrastructure, debt, fintech and impact investment spaces. We take pride in having been at the forefront of developing creative structures to address client requirements during challenging fundraising cycles.

We closely follow judicial developments and market trends on governance issues and fiduciary responsibilities. As these continue to assume greater importance in LP-GP negotiations as well as during the course of fund operations, we are committed to identifying and defending the most efficient protections in terms of key person obligations, change of control and GP removal triggers and indemnification provisions.

As the Indian funds industry continues to mature, we have seen a proliferation of co-investment arrangements, which are the subject of intense negotiations usually guided by the profile of the underlying deal. We believe we are uniquely equipped to drive these negotiations given our ability to tap the expertise of our deal lawyers.

As lawyers advising an industry that has directly benefitted from the liberalisation of the Indian economy, we believe it is important to shape conversations relating to legal reform. With this in mind, our team has been actively involved with policy advocacy for FPI investments and developing the regulatory framework for REITs and InvITs, to take a few examples.

Whilst the mainstay of our practice is focused on representation of sponsors, our team has from time to time been retained to act for LPs in special situations such as where the LP is

the cornerstone investor or where the LP is participating in a managed account arrangement or investing in a single-asset fund. Members of the team have been engaged repeatedly by sovereign wealth funds, pension programs and large institutional investors. In such circumstances, we find that clients value our capabilities as a holistic funds practice and are eager to draw on our fund formation expertise as well as our specific knowledge across various target industries.

## B. Background – The Private Funds Market in India

Reports suggest that India saw private equity investments aggregating to USD 45 billion in 2019 spread across 1,053 deals in 2019 alone. 2020 was, however, relatively dampened from a fundraising perspective owing to COVID 19, which had a major impact on global economies. The stock market dip in early 2020 was coupled with LP-GP relationships coming under severe stress. Denominator effect had its share of contribution as LPs pulled the plug on fresh investments and 'requested' GPs not to draw down capital. COVID 19 was a death-knell for first time fund managers, particularly for Indian fund managers not having a long-standing track record.

While most public markets managed some form of recovery on the back of stimulus offered by governments, LPs have remained cautious and have in fact renewed their focus on portfolio valuations, fund governance and reporting at both the fund and portfolio levels. LPs are now increasingly requiring GPs to focus on their core strengths and identify their niche.

Guided by global experiences, some large institutional LPs appear to be moving away from the blind pool model towards direct investment. A number of seasoned institutional LPs increased their direct exposures to India with bolstered on-the-ground presence enhancing their deal sourcing and asset management capabilities. Considering their successful track record, LPs like GIC, CPPIB, CDPQ were seen engaging in, and exploring, more direct partnerships, minimising the role of financial sponsors and attendant costs. Not just institutional LPs, but even financial sponsors were keenly looking at setting up investment platforms with reputed operating partners, particularly in asset heavy asset classes.

Buyouts were on the rise, until Covid-19 disturbed the 'normative' financial benchmarks forming the very basis of deal making. The bid-ask gap became huge, making exits difficult, which in turn impacted fresh fundraising. Offshore leverage for fund investments in India was also subdued. Growth, credit and special opportunity deals therefore appeared more conducive. The high-yield Indian debt market attracted an unprecedented amount of global interest, even though deal completion was somewhat muted. Other than primary structured debt deals, global credit and special funds were keenly looking at acquiring standard credit portfolios, both retail and corporate, at substantial discounts through securitisation trusts. Offshore funds, restricted until recently, were recently permitted to acquire an interest in such loans portfolio by subscribing to pass through certificates (PTCs)

under the FPI Route. Distress funds also showed interest in the Indian NPA story and some of them looked to acquire interests in sub-standard debt through security receipts issued by asset reconstruction companies (ARCs), though the interest in standard assets outstripped interest in sub-standard assets. This was largely due to the overstated role of ARCs and regulations requiring a form of forced and rather unnecessary partnership between foreign investors (or PTC holders) and the ARC.

As a sign of growing maturity of the private fund industry in India, the years 2018-2019 saw an uptick in secondaries activity. For instance, Investcorp and Global Infrastructure Partners acquired the private equity, real estate and infrastructure investment management arms of IDFC. Several other financial sponsors set shop or were trying to set shop in India. Secondaries funds were actively looking for opportunities to acquire discounted LP interests, fledgling and struggling GPs and portfolio buy-outs at substantial discounts.

Infrastructure was the show-stealer in 2019 and InvITs were the highlight of the year. Sovereign wealth funds and pension funds were given blanket tax exemptions for investing in infrastructure. Tax incentives for unlisted InvITs were another big driver and they clearly will be the flavour until retail interest picks up on the back of shrinking credit rates.

Another interesting development that impacted global investment funds was the introduction of Press Note 3 of 2020 (PN3). PN3 required that any foreign investment with Chinese beneficial ownership should require prior approval of the government of India, without actually clarifying what the term 'beneficial ownership' meant. This restriction seemed to apply irrespective of the fund being a listed or an unlisted vehicle. PN3 caused a flurry as large global fund investors could also be caught within its reach and be subjected to the approval process due to the presence of Chinese investors. PN3 galvanised financial sponsors to think of creating India focused vehicles without any Chinese investors to preclude the need of seeking regulatory approval.

While a majority of the global financial sponsors still choose to invest in India out of their global funds with limited or no specific allocation for India, there has been an increasing trend in the past few years to raise India focused funds. These India focused funds can either be in the nature of funds or quasi-fund structures such as investment platforms or managed accounts with financial sponsors (or increasingly with developers) investing in private equity, private debt, public equity and public debt.

On the home front, the Government of India gave a shot in the arm to its offshore financial services centre, the IFSC (or GIFT City), by rejigging its management structure. Tax exemptions and single window clearance has indeed driven some of the domestic financial sponsors to set base in the IFSC.

Fundraising activity in India generally falls into one of the following broad categories:

1. Domestic financial sponsors raising funds from domestic investors.
2. Domestic financial sponsors raising funds from global investors.
3. Global financial sponsors raising funds from global investors for global investments, with or without an allocation for India.
4. Global financial sponsors raising funds from global investors for investments primarily in India.
5. Managed accounts or separate accounts, where institutional LPs require the financial sponsor to invest in India on a deal by deal basis, or which are created for targeted assets.
6. Investment platforms with Indian operating partners, where financial sponsors or institutional LPs directly partner with an operating partner.
7. Quasi-fund structures such as Infrastructure Investment Trust in (InvITs) and Real Estate Investment Trusts (REITs).

Categories 2, 4, 5, 6 and 7 have shown a stable increase, and these trends are likely to continue.

The legal, tax and regulatory framework for investment funds is being driven not just by the letter of the law, but also by unwritten and commonly understood regulatory and tax customs. SEBI's approach continues to move away from *laissez faire* to one that is distinctively hands-on. Amongst other things, this is manifest in the prescriptive nature of rules and regulations laid down by SEBI in recent times. For instance, SEBI prescribed the form of private placement memorandum to be used by alternative investment funds in early 2020. More recently, SEBI has prescribed minimum experience standards for key personnel. The tax authorities, on the other hand, are becoming more aware of complex fund structures and armed with tools of MLI, GAAR and indirect transfer tax are looking at 'innovative' fund structures more carefully.

This paper aims to assist global fund counsel and fund managers on India focused fund formation from a legal, tax, regulatory, commercial and strategic perspective.

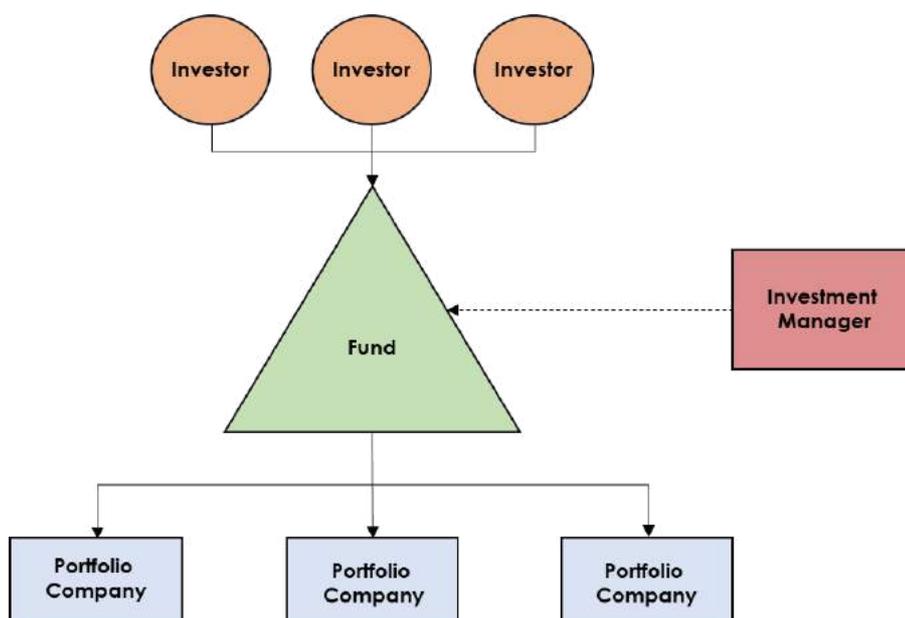
## C. Key Features of a Fund

A fund is a vehicle that pools capital from investors with a view to investing such capital in accordance with a defined investment policy. Historically, investment funds were set up as limited partnerships under which the liability of investors (or limited partners) was structurally limited to the extent of their capital contribution to the fund vehicle whereas the fund manager (or the general partner) was responsible for the management of the fund and assumed unlimited liability for the debts and obligations of the fund.

Whilst limited partnerships remain the predominant choice of fund vehicle globally, a number of other structures such as trusts, limited liability partnerships, limited liability corporations, co-operatives and corporations have been used in various jurisdictions depending on the legal, tax and regulatory context. For instance, the vast majority of domestic funds in India are set up as trusts (with a small portion being set up as limited liability partnerships and a miniscule number being set up as companies). Similarly, most offshore funds investing in India are set up as corporations.

### How does a fund work?

A fund is raised with the object of deploying capital in investment opportunities over a period of time, nurturing these investments and ultimately exiting the investments. The diagram below shows a simplified fund structure with investors, the manager and the portfolio companies that the fund invests in.



Some of the key concepts associated with a private close-ended fund structure may be illustrated with the help of the above diagram.

### Key concepts of a close-ended fund

**Capital Commitments:** The fund raises capital commitments from investors. As the name suggests, a capital commitment is a commitment by the investor to contribute (or invest) capital when called by the Investment Manager.

**Capital Contributions:** The portion of an investor's capital commitment that is actually contributed by the investor when called by the Investment Manager is known as such investor's capital contribution.

**Closing:** A closing occurs when an investor's offer to make a capital commitment to the fund is formally accepted by the Investment Manager. The last date on which such offers are accepted is known as the final closing date.

**Commitment Period / Investment Period:** The commitment period / investment period of a fund is the period during which the Investment Manager can call down capital commitment for the purpose of making investments in portfolio companies. Following the end of the commitment period, the purposes for which capital can be called are restricted.

**Term:** A close-ended private fund has a defined term (which is determined on the basis of a number of factors including the target asset class) during which investors will remain invested (i.e. they cannot exit except in extremely rare circumstances). The fund is expected to make investments and dispose of them prior to the end of the term. The term of the fund may be extended but such extensions usually require investor approval.

**Management Fees:** The Investment Manager is responsible for management of the affairs and investment programme of the fund. In consideration of its services, the Investment Manager is entitled to receive a periodic management fee. This fee is generally calculated with reference to capital commitments during the commitment period and subsequently with reference to capital invested.

**Distribution Waterfall:** Proceeds arising from the disposal of investments are distributed in accordance with a distribution waterfall. The waterfall sets out the sequence, extent and proportions in which distributions are to be made.

**Carried Interest:** In addition to the management fee, the Investment Manager will be entitled to a percentage share in the profits accrued upon realisation of the fund's investments. This share in profits is known as carried interest and is typically paid out only after investors have been returned their capital contributions, together with a preferred return.

### Tax Neutrality and Pass-Through Status

From a structuring perspective, the foremost consideration when choosing a fund vehicle is tax neutrality. What this means is that investors in a fund should be taxed no differently than they would have been taxed had such investors participated directly in the same investments that are made by the fund. To achieve this, funds are established as 'pass-through' or 'tax transparent' vehicles. In very simple terms, this means that money passes through the fund and is taxed at the level of the investor i.e. the fund itself does not pay tax. This makes sense since funds are merely pooling vehicles that collect capital from investors with a view to deploying it in accordance with an investment policy. However, the taxation mechanics tend to be more complex in practice.

Some vehicles are inherently tax transparent (e.g. partnerships, trusts, etc.) whereas others (such as corporations and Indian limited liability partnerships) are not. In the ultimate analysis, the tax treatment of fund vehicles will depend on the tax regimes in force. For instance, under Indian domestic tax law, venture capital funds and private equity funds are accorded pass-through status irrespective of whether they are set up as trusts, limited liability partnerships or companies.

## D. Domestic Funds

The private fund regime in India was formally introduced with the rollout of the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996 (the “**VCF Regulations**”). The VCF Regulations permitted sponsors to set up venture capital funds, which were defined primarily in terms of a specific investment criteria. As the private funds ecosystem matured, it became apparent that capital pools had deepened and investor appetite for more bespoke investment strategies had grown. In response to these trends, SEBI introduced the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 (the “**AIF Regulations**”).

The regulatory framework applicable to domestic funds (and the AIF Regulations in particular) are discussed in detail in the sections below.

### Choice of Vehicle

Under the AIF Regulations, alternative investment funds may be set up as trusts, limited liability partnerships or companies. However, as mentioned in previous sections, the overwhelming majority of alternative investment funds are set up as trusts.

Whilst the top consideration when choosing a fund vehicle is tax transparency, various other factors also come into play. One such factor is ‘familiarity’ – the trust structure has been around for decades and both investors and sponsors are familiar with the structure. Another key factor is operational flexibility – it should be possible to extract fee / carried interest and / or admit new investors without elaborate, time-consuming procedures.

The chart below provides a rudimentary comparison between trusts, LLPs and companies from an investment funds perspective.

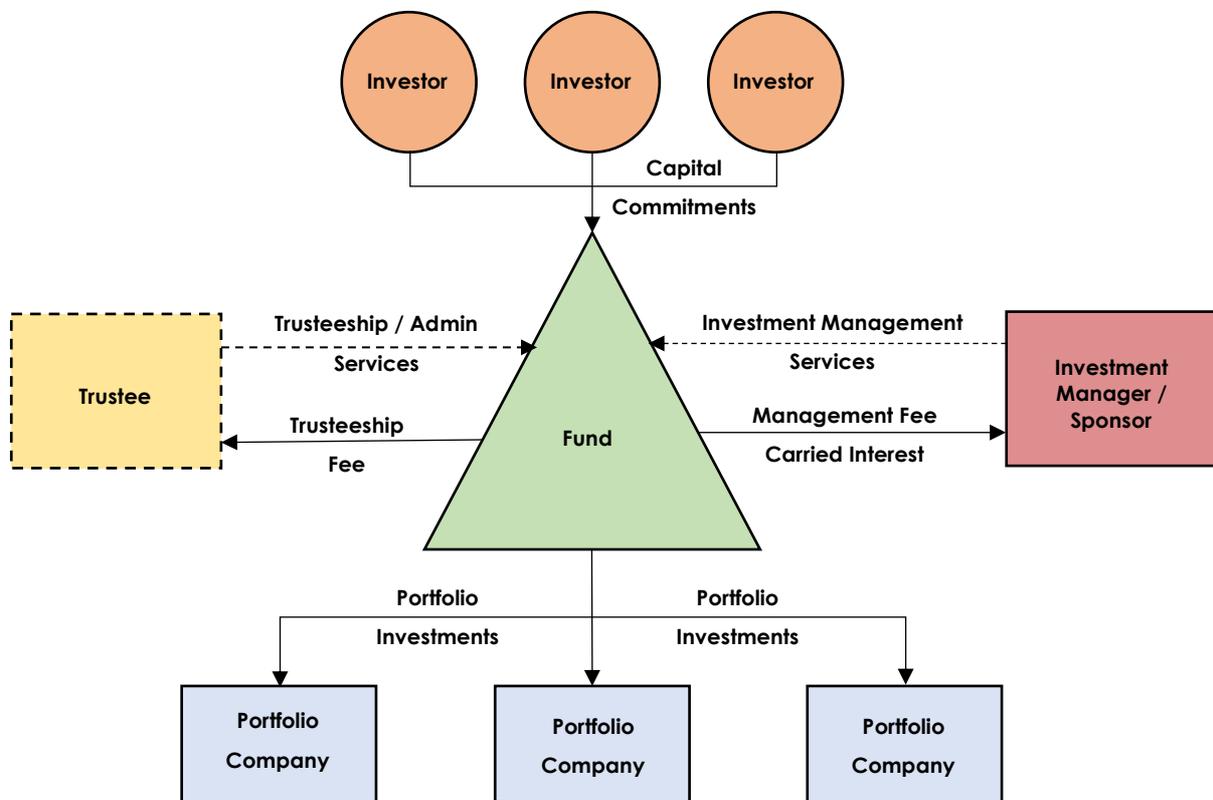
	Trusts	LLPs	Companies
<b>Relevant Parties</b>	A trust consists of a settlor, a trustee and one or more beneficiaries. A trust is formed when the settlor transfers	A limited liability partnership consists of two or more partners (with at least two designated partners). The	A company is constituted by shareholders and is managed by a board of directors. The relationship between

	property to the trustee to be held and managed for the benefit of the beneficiaries.	relationship between partners is typically governed by the terms of a limited liability partnership agreement.	the company, the directors and the shareholders is set out in the articles of association and may be more specifically described in a shareholders agreement.
<b>Management</b>	General management powers are conferred upon the trustee under the instrument of trust. In practice, the trustee delegates management powers and responsibilities to an investment manager (to be discharged under the overall supervision of the trustee).	The designated partners are responsible for the overall management and compliance obligations of the LLP. In practice, management powers may be delegated to an independent investment manager.	A company is managed by its board of directors. However, management powers may be delegated to an investment manager (to be discharged under the overall supervision of the board of the company).
<b>Product Familiarity</b>	Trusts are the predominant vehicle through which alternative investment funds are established in India.	Few funds are established as LLPs (although the Ministry of Corporate Affairs ("MCA") has historically not been enthusiastic about approving investment LLPs).	Companies are not used to establish alternative investment funds.
<b>Operational Flexibility</b>	Wide operational flexibility in terms of extraction of economics and	Flexibility available although certain operational aspects will be subject to the	Low flexibility with respect to extraction of economics. Mechanisms to cater to

	running the day-to-day affairs of the fund.	Limited Liability Partnerships Act, 2008 and related delegated legislation.	day-to-day operational requirements remain subject to the Companies Act, 2013 and related delegated legislation.
<b>Confidentiality</b>	Limited disclosures	Extensive disclosures with online access	Extensive disclosures with online access
<b>Compliance</b>	Limited compliances	Extensive regulatory compliances and reporting to MCA in addition to AIF Regulations	Extensive regulatory compliances and reporting to MCA in addition to AIF Regulations

### Anatomy of a domestic fund

The following diagram illustrates a simplified domestic fund structure, where the fund is set up as a trust.



For tax reasons, the trust is settled by an independent **settlor**, who appoints the trustee and who makes an irrevocable settlement into the trust.

The **trustee** is responsible for the overall supervision and management of the fund for which it is usually entitled to receive a trusteeship fee. In practice, the primary management powers in relation to the fund are delegated to an investment manager under the terms of an investment management agreement.

The **investment manager** provides investment management services to the fund in consideration of an annual **management fee**.

The investment manager also doubles up as the **sponsor**. To demonstrate skin-in-the-game, investors usually require the management team (i.e. the sponsor) to make, and maintain, a minimum **sponsor commitment** to the fund.

The fund raises **capital commitments** from investors. During the life of the fund, the investment manager will call down such capital commitments for the purposes of making **portfolio investments** (as well as for other purposes e.g. paying management fees and other expenses).

In almost all respects, the sponsor commitment is treated at par with capital commitments made by other investors. However, there may be some differences: for example, the investment manager will not charge a management fee on the sponsor commitment.

The sum total of capital commitments in an alternative investment fund is known as the **corpus** of the fund. The fund corpus net of estimated expenditure for administration and management of the fund is referred to as **investible funds**.

The investment manager will make portfolio investments in **portfolio companies** (which are also referred to as **investee companies**).

Proceeds arising on the sale / realisation of portfolio investments are available to pay any outstanding expenses following which, such proceeds will be available for distribution in accordance with the distribution waterfall.

For the purposes of the waterfall, the sponsor commitment is placed on the same footing as other capital commitments. However, the investment manager will usually be entitled to

a percentage share in the post-capital profits earned by the fund – this profit share is called **carried interest**.

### Sources of Capital

As a general comment, the sources of capital for domestic funds are not different from the sources of capital for funds in general albeit the relative concentration of different kinds of investors may differ from global standards. There are a number of factors that affect the investor profile of a fund – these include fund size, asset class, investment strategy, quality of existing investors, prudential norms, etc. A brief summary of the principal sources of capital for a domestic fund is set out below.

#### *High Net Worth Individuals (HNWIs)*

Depending on the size of the fund, HNWIs could constitute a sizeable chunk of the fund corpus. It is not uncommon for top executives at large financial institutions to allocate a portion of their personal wealth to alternative investment funds.

#### *Family Offices*

The rollout of the AIF Regulations in 2012 heralded greater participation by family offices in alternative investment funds. Management of family office wealth has become increasingly specialised and most Indian family offices make routine allocations to alternative investments.

#### *Corporations*

Some corporations may find it useful for business and / or strategic reasons to invest in alternative investment funds. However, such investments are largely made on a discretionary basis and tend to form a small portion of the overall corpus.

#### *Banks*

Participation by banks in alternative investments has been fairly brisk. However, given their critical importance to the economy, the Reserve Bank of India (the “**RBI**”) has introduced prudential norms applicable to investments made by banks.<sup>1</sup> Pursuant to these prudential norms, no bank is permitted to invest more than 10% of the capital in a Category I or Category II AIF without prior RBI approval. Further, the total direct investment that can be made by a bank in REITs, InVITS, shares, convertible bonds, debentures, mutual funds and alternative investment funds is subject to an overall ceiling of 20% of its net worth.

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<sup>1</sup> Reserve Bank of India (Financial Services provided by Banks) Directions, 2016. RBI/DBR/2015-16/25. Updated as on 25.09.2017.

## *Insurance Companies*

Insurance companies were among the earliest institutional investors in domestic funds. The Insurance Regulatory and Development Authority ("IRDA") issued a circular permitting insurers to invest in Category I AIFs and those Category II AIFs that have a mandate to invest at least 51% of their investible funds in entities that are venture capital undertakings, small and medium enterprises or which are engaged in the social venture or infrastructure sectors.<sup>2</sup> As per the IRDA circular, the individual exposure limit applicable to insurance companies is the lower of 10% of the fund corpus and 20% of the overall exposure cap. The overall exposure cap for life insurance companies is 3% of the fund value whereas the same for general insurance companies is 5% of investment assets.

## *Pension Funds*

Subject to certain exposure limits, pension funds falling under the National Pension System (NPS) Schemes are permitted to invest in Category I AIFs and Category II AIFs that have a mandate to invest at least 51% of their investible funds in entities that are venture capital undertakings, small and medium enterprises or which are engaged in the social welfare or infrastructure sectors.<sup>3</sup> The Pension Fund Regulatory and Development Authority ("PFRDA") has set out the following principal safeguards in respect of pension fund investments in AIFs: (i) an overall investment ceiling of 2% of the pension fund corpus; (ii) investments permitted only in funds with a corpus of INR 100 crores or more; and (iii) exposure to a single fund to not exceed 10% of the corpus.

## *Sovereign Wealth Funds (SWFs)*

SWFs are investment entities that are owned and controlled by a national, state or local government. Given their size and backing, they tend to make large capital commitments (and are often the cornerstone investor in alternative investment funds) in exchange for preferred terms.

### An overview of the regulatory framework

As mentioned earlier on, SEBI rolled out the AIF Regulations to cater to the evolving risk appetite among investors. The AIF Regulations subsumed the concept of venture capital

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<sup>2</sup> IRDA Circular No. IRDA/F&I/INV/CIR/172/08/2013 dated 23.08.2013.

<sup>3</sup> PFRDA Circular No. PFRDA/2016/8/PFM/02 dated 08.04.2016

funds within its scope and significantly downgraded the status of the VCF Regulations.<sup>4</sup> The most important development was the introduction of different categories of alternative investment funds. A number of theories have been suggested as to the basis for the categorisation of alternative investment funds but from a perusal of the AIF Regulations, it would appear that SEBI saw fit to create three broad categories to cover a broad range of asset classes and investment strategies. For foreign investments in AIF, please refer to Section E of this paper.

The table below summarises the three different categories of alternative investment funds under the AIF Regulations.

Category I AIF	Category II AIF	Category III AIF
Investments in start-up, early stage ventures, social ventures, SMEs and infrastructure.	AIFs that are not covered by Category I or Category III AIFs.	Employs diverse trading strategies, and includes hedge funds and funds that trade to make short term returns.
Investments in sectors having positive spillover effects on the economy and for which the sector might receive benefits or concessions from the Government.	Does not employ debt at the Fund level (debt taken for day to day operations allowed under the Regulations).	Can undertake leverage at the Fund level.
	Includes private equity funds and debt funds for which the fund does not receive any specific benefits or concessions from the Government.	Includes funds which do not receive any specific benefits or concessions from the Government.

The AIF Regulations prescribe specific investment conditions and restrictions to alternative investment funds depending on their categorisation. Below is a snapshot of these conditions and restrictions.

<sup>4</sup> See Regulation 39 (*'Repeal and Saving'*) of the AIF Regulations.

<p>Category I AIFs</p>	<ul style="list-style-type: none"> <li>– No more than 25% of investible funds may be invested in a single investee company.</li> <li>– Category I AIFs must invest in investee companies or venture capital undertakings or special purpose vehicles or LLPs or units of other AIFs in accordance with the AIF Regulations.</li> <li>– Category I AIFs of a given sub-category may invest in units of a Category I AIF belonging to the same sub-category.</li> <li>– Borrowing not permitted except to meet temporary funding requirements for no more than 30 days and not more than 4 occasions annually. Borrowing should not exceed 10% of investible funds.</li> </ul> <p>Each sub-category of Category I AIFs are subject to further conditions and restrictions.</p>
<p>Category II AIFs</p>	<ul style="list-style-type: none"> <li>– No more than 25% of investible funds may be invested in a single investee company.</li> <li>– Category II AIFs must invest primarily in unlisted investee companies or in units of other alternative investment funds.</li> <li>– Category II AIFs may invest in the units of Category I and other Category II AIFs.</li> <li>– Borrowing not permitted except to meet temporary funding requirements for no more than 30 days and not more than 4 occasions annually. Borrowing should not exceed 10% of investible funds.</li> <li>– Category II AIFs may engage in hedging subject to guidelines specified by SEBI from time to time.</li> <li>– Category II AIFs may enter into an agreement with a merchant banker to subscribe to the unsubscribed portion of the issue or to receive or deliver securities in the process of market making under Chapter XB of the ICDR Regulations.</li> <li>– Category II AIFs shall be exempt from regulation 3 and 3A of Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 in respect of investment in companies listed on the SME Exchange or the SME segment of an exchange pursuant to due diligence of such companies. However, to be eligible for this exemption, a Category II AIF</li> </ul>

	<p>must disclose to the stock exchange in which the relevant investee company is listed any acquisition or dealing in securities pursuant to such due diligence within two working days. Moreover, the investment must be locked in for a period of 1 year from the date of investment.</p>
<p>Category III AIFs</p>	<ul style="list-style-type: none"> <li>– No more than 10% of investible funds may be invested in a single investee company.</li> <li>– Category III AIFs may invest in securities of listed or unlisted investee companies or derivatives or complex or structured products.</li> <li>– Category III AIFs may deal in goods received in delivery against physical settlement of commodity derivatives.</li> <li>– Category III AIFs may invest in the units of Category I and II AIFs. However, they cannot invest in the units of fund of funds.</li> <li>– Category III AIFs may engage in leverage or borrow subject to investor approval and subject to a maximum limit as may be specified by SEBI.</li> </ul>

### Analysis of certain regulatory concepts

Whilst most jurisdictions have been reluctant to lay down specific rules and standards for private funds (taking the view, perhaps, that such matters are best left to negotiations between investors and fund manager), the AIF Regulations legislate for various operational and governance aspects. Some of these are described below.

#### *Participation Threshold – Minimum Investor Commitment*

No person making a capital commitment of less than INR 1 crore may be admitted as an investor in an alternative investment fund.<sup>5</sup> This threshold is relaxed to INR 25 lakhs for employees or directors of the fund and / or the fund manager.<sup>6</sup> While the AIF Regulations set the minimum commitment level, fund managers are free to set a higher threshold. In certain other jurisdictions, investors are required to establish that they have sufficient funds

<sup>5</sup> Regulation 10(c) of the AIF Regulations.

<sup>6</sup> Proviso to Regulation 10(c) of the AIF Regulations.

/ an adequate net worth. It would seem that the AIF Regulations pre-empt this issue by setting a minimum commitment.

### *Alignment of Interests – Minimum Sponsor Commitment*

With a view to facilitating better alignment of interests between investors and the sponsor, the AIF Regulations require sponsors to maintain a minimum 'continuing interest' in alternative investment funds. For Category I and Category II AIFs (which together cover the entire spectrum of venture capital, private equity and debt funds), the minimum continuing interest is the lower of: (i) 2.5% of the fund corpus; and (ii) INR 5 crores.<sup>7</sup> Whilst this is the bare minimum, investors may contractually negotiate a larger sponsor commitment.

### *Minimum Fund Corpus*

The AIF Regulations prescribe a minimum fund size of INR 20 crores.<sup>8</sup> For close-ended funds, it is generally accepted that the minimum corpus requirement needs to be satisfied at final closing. A fund with a corpus smaller than INR 20 crores would be in breach of law and although the AIF Regulations do not clearly specify the consequence of such a breach in the case of a close-ended fund<sup>9</sup>, SEBI may well exercise its power under Regulation 29(1)(d) and direct the fund to wind up.

Whilst the AIF Regulations set a minimum corpus requirement, investors frequently request a cap on the total commitments that can be raised by a fund – this is popularly known as a hard cap.

### *Tenure*

The AIF Regulations have legislated extensively as to the tenure of close-ended alternative investment funds. Category I and II AIFs are required to have a minimum term of 3 years.<sup>10</sup> This is a fairly low threshold for most illiquid fund strategies. The term of an alternative investment fund may be extended by up to 2 years with the approval of investors representing at least two-thirds of the total investment in the fund. Where investor

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<sup>7</sup> Regulation 10(d) of the AIF Regulations. As per the proviso to Regulation 10(d), the minimum continuing interest for Category III AIFs (which would include hedge funds) is the lower of 5% and INR 10 crores.

<sup>8</sup> Regulation 10(b) of the AIF Regulations.

<sup>9</sup> The consequences of such a breach for open-ended schemes is set out in paragraph 3 of SEBI Circular CIR/IMD/DF/14/2014 dated 19.06.2014. As per this circular, the AIF has a period of 3 months to restore the minimum corpus, failing which it is required to redeem the units of all investors.

<sup>10</sup> Regulation 13(2) of the AIF Regulations.

approval is not obtained, the fund is required to liquidate within 1 year following expiry of the fund's term (or extended term as the case may be).

Whilst the voting threshold under the AIF Regulations is not per se unreasonable, it does foreclose an element of operational flexibility. For instance, there may be circumstances where it is in everyone's best interests for an initial extension to be sanctioned by the fund's advisory board. Providing for this may not be straightforward under the existing regime.

### *Overseas Investment*

Alternative investment funds are permitted to invest in equity and equity linked instruments only of offshore venture capital undertakings, subject to the overall limit of USD 500 million (which applies on an aggregate basis to AIFs and VCFs registered under the VCF Regulations and which is allocated on a 'first come first serve' basis depending on availability). An "offshore venture capital undertaking" is a foreign company whose shares are not listed on any recognised stock exchange in India or abroad. Investments are only permitted in those offshore companies which have an Indian connection i.e. the company has a front office overseas whilst back office operations are in India. No more than 25% of the investible funds of an alternative investment fund may be deployed in overseas investments.

### *Governance Considerations*

The AIF Regulations have adopted a fairly proactive stance in terms of governance. One example of this has been cited above in the discussion around term extensions. In addition, the AIF Regulations have empowered investors by requiring their consent to be taken before performing certain actions (e.g. making material alterations to the fund strategy, making investments in associates, etc.) and authorising them to initiate certain actions (e.g. passing a resolution to wind up the alternative investment fund).

Moreover, the AIF Regulations specifically provide that the sponsor and manager (which may ultimately be the same entity) are required to act in a fiduciary capacity towards their investors and that they must disclose all conflicts of interests as and when they arise or are likely to arise.

### *Disclosure Obligations*

In light of developments in the financial sector in India and across the world, SEBI has begun to place significant emphasis on disclosure and transparency. The AIF Regulations set out a

non-exhaustive list of items that must be included in a fund's private placement memorandum (PPM) during the fundraising process. This includes information such as targeted investors, fees and all other expenses proposed to be charged, risk management tools, disciplinary history, conflicts of interests and procedures to identify and address these, etc. Separately, the AIF Regulations also contain a list of items to be disclosed to investors on an ongoing basis.

In June 2014, SEBI issued a circular setting out a number of disclosure guidelines (the "**2014 Disclosure Circular**").<sup>11</sup> Pursuant to this circular, sponsors were required to annex a tabular example of the distribution waterfall as well as the manner in which fees and expenses would be charged.

Subsequently, with a view to streamlining disclosure standards for alternative investment funds, SEBI released a circular in February, 2020 (which was followed by a clarificatory circular in June, 2020) containing a template of a private placement memorandum with a section for minimum disclosures. Pursuant to the same circular, SEBI also made it mandatory for AIFs to conduct an annual audit to ensure compliance with the terms of the PPM.

### *Exit Rights*

As a reflection of the seriousness with which SEBI views disclosure issues, the 2014 Disclosure Circular also provided that where material changes significantly influencing the decision of investors to remain invested in an alternative investment fund are made to the PPM, investors who do not wish to remain invested would be provided with the option to exit. For close-ended funds, such exit would be given effect by buying out, or facilitating the purchase of, units held by the dissenting investor(s) at a value that is greater than or equal to the average of the valuations determined by two independent valuers.

The most common scenario in which such an exit facility would be triggered is upon the replacement of the existing sponsor / manager. It is critical that the larger investor body is taken into confidence when such decisions are taken since the exit option would allow dissenting investors to withdraw themselves from the fund and leave a smaller corpus for new management. The exit option would also be implicated in circumstances in which fund management businesses are acquired. Such acquisitions typically result in a change of control at the level of the manager and sponsor.

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<sup>11</sup> SEBI Circular CIR/IMD/DF/14/2014 dated 19.06.2014.

SEBI has prescribed in a circular dated July 18, 2014 that certain changes such as (a) change in sponsor/manager (not including an internal restructuring within the group); (b) change in control of sponsor/manager; or (c) change in fee structure or hurdle rate which may result in higher fees being charged to the unit holders are to be construed as 'material' changes. These are only indicative in nature and other changes that impact the fundamental attributes of the fund/scheme should also be seen as 'material' changes. For such material changes, approval of 75% of unit holders by value of their investment in the AIF should be sought. If not, then dissenting existing unit holders who do not wish to continue post the change shall be provided an exit option at fair value, and such exit should be consummated in 3 months' time. For other matters, intimation to the SEBI should be fine.

### AIFs in the International Financial Services Centre (IFSC)

Following the rollout of the Securities and Exchange Board of India (International Financial Services Centre) Guidelines, 2015 (the "IFSC Guidelines"), SEBI issued a set of operating guidelines providing for the formation of alternative investment funds in the International Financial Services Centre (the "SEBI IFSC Guidelines").

Under the IFSC Guidelines, alternative investment funds may only accept money in foreign currency. The SEBI IFSC Guidelines therefore set USD thresholds for items such as minimum corpus, minimum commitment, continuing interest, etc. – these thresholds roughly correspond to their INR equivalents under the AIF Regulations. In addition, the SEBI IFSC Guidelines clarify that an alternative investment fund set up in IFSC is permitted to invest in units of other AIFs set up in IFSC.

Investors in alternative investment funds set up in IFSC must be one of the following: (i) a person resident outside India; (ii) a non-resident Indian; (iii) an institutional investor resident in India who is eligible under the Foreign Exchange Management Act, 1999 ("FEMA") and the rules and regulations made thereunder to invest funds offshore; or (iv) a person resident in India having a minimum net worth of USD 1 million and who is eligible to invest offshore in accordance with the RBI's Liberalised Remittance Scheme.

Aside from investments in securities listed in IFSC or in companies that are incorporated in IFSC or in companies set up in foreign jurisdictions, alternative investment funds are also permitted to invest in India. SEBI recently clarified that with a view to harmonize the provisions governing investments by alternative investment funds set up in IFSC with those

applicable to domestic funds, AIFs set up in IFSC are permitted to make investments as per the provisions of the AIF Regulations and the guidelines and circulars issued thereunder.

### Operational challenges relating to the AIF Regulations

The AIF Regulations have incorporated various measures to protect investors. Few mature jurisdictions (if any) have legislated so proactively to safeguard the interest of investors in private funds. In taking such a stance, SEBI may have limited the ability of the relevant parties to negotiate innovative structures and solutions in the larger interest of the fund and the investors as a whole.

Below are a few examples of operational challenges that arise on account of the framework of the AIF Regulations.

#### *Rigid Investment Limits*

As discussed earlier on, Category I and II AIFs are not permitted to invest more than 25% of investible funds in a single investee company. As a starting point, this is not an unfair threshold. However, there is no mechanism under the AIF Regulations by which this ceiling can be increased even if such an increase is in the larger interest of investors. Usually, fund documents set concentration limits but permit such limits to be exceeded with investor approval. This is a reasonable approach but one that cannot be implemented under the scheme of the AIF Regulations.

#### *Restriction on Co-Investment Vehicles*

It is increasingly common for sponsors to invite certain investors (as well as strategic third parties) to participate in a portion of the underlying portfolio investment on a no-fee / no-carry basis by setting up a co-investment vehicle to invest alongside the main fund. However, the 25% investment limit under the AIF Regulations may render such an arrangement unworkable in the Indian context. It could be argued that a co-investment vehicle is not a fund in the true sense and should therefore be kept out of the purview of the AIF Regulations (and that, by extension, the 25% limit should not apply) but SEBI's mandate under the AIF Regulations is to regulate 'privately pooled investment vehicles', which would likely cover co-investment vehicles as well.

### *Rigid Borrowing Restrictions*

For Category I and Category II AIFs, fund-level borrowing is restricted to 10% of investible funds and to a period not exceeding 30 days. Alternative investment funds in India are therefore unable to follow the popular international practice of using credit facilities to fund investments. Whilst the current cost of credit in India is commercially unattractive, this issue may resurface in the future should interest rates fall.

### *Restriction on Tracking Interests*

Under the AIF Regulations, it is not open for a sponsor to exclusively offer tracking interests to certain investors. Therefore, a bespoke arrangement where a specific investor only tracks a specific investment may not be possible under the scheme of the AIF Regulations.

### Taxation of Alternative Investment Funds

As mentioned in the section on 'Key Features of a Fund', the foremost consideration when choosing a fund vehicle is tax transparency or pass-through status.

Venture capital funds had been in operation even before the AIF Regulations and their pass-through status had historically been recognised under section 10(23F) of the Income Tax Act, 1961 (the "Tax Act").

The Finance Act that followed immediately after the coming into force of the AIF Regulations amended the Tax Act to include section 10(23FB), which made clear that pass-through status would extend to venture capital funds registered under the AIF Regulations. As no effort was made to provide the same clarity in respect of Category II or Category III AIFs (or for that matter other sub-categories of Category I AIFs), fund managers looked to other methods to preserve pass-through treatment.

Some fund managers tried to register private equity funds as Category I AIFs under the venture capital fund sub-category. Such funds should have properly been registered as Category II AIFs and such attempts encountered stiff resistance from SEBI's Investment Management Division. There was a reason that the AIF Regulations had created separate categories for venture capital funds and private equity funds and the regulator correctly took the view that fund managers could not overlook the categorisation under securities law to avail of a benefit under tax law.

There were a couple of more scrupulous options available and most fund managers combined these with a view to minimise the risk of litigation:

- First, managers could make the case that the contributions made by investors to the fund were essentially “revocable transfers” under section 61 of the Tax Act and that any returns on investment should be taxed in the hands of the investors. This analysis is inherently supported by the very purpose of a fund, which is to deliver returns to investors on the capital that they invest.
- Second, managers would ensure that funds were established as determinate trusts. This required two conditions to be fulfilled: (i) the beneficiaries of income (i.e. the investors) arising to the trust needed to be identifiable on the date of the trust instrument; and (ii) the beneficial interests of the investors needed to be ascertainable on the date of trust instrument. If both conditions were satisfied, then a trustee would be taxed as a ‘representative assessee’ in like manner and to the same extent as the investors represented by it.

The ‘determinate trust’ analysis is not as unambiguous as the pass-through status afforded by section 10(23FB) but it at least clarifies the extent to which a trustee could be taxed on behalf of investors in a fund.

In July 2014, the Central Board of Direct Taxes (CBDT) issued a circular to clarify the principles of taxation of domestic funds. The circular said nothing about the applicability of section 61 but caused a fair amount of disquiet because it shifted the goalpost for what would constitute a determinate trust. The most controversial aspect was the requirement under the circular for the precise names of the beneficiaries to be written into the trust deed on the date of its execution (whereas it was previously sufficient for the beneficiaries to merely be capable of identification).

The circular could have seriously upended the still nascent domestic private funds industry if relief had not been forthcoming in the following budget. Among other things, the circular could have jeopardised the ability of a fund to hold multiple closings, which would have materially impaired fundraising efforts. Also, the circular would have undermined the ability of investors to transfer their interests in the fund and thereby impacted an investor’s liquidity matrix.

The Finance Act, 2015 solved a part of the problem by introducing section 10(23FBA) in the Tax Act together with a number of associated provisions. Under the amended Tax Act, any income of a Category I or Category II AIF other than income in the nature of ‘profits and gains

of business or profession' would not be taxed at the level of the fund i.e. such income would pass through and be taxed in the hands of the investor.<sup>12</sup> Income chargeable under the head 'Profits and gains of business and profession' will be taxed at the fund level and will not pass through to the unit-holders.<sup>13</sup>

The CBDT has also clarified that income received by investment funds would be exempted from TDS by portfolio companies. This would be particularly helpful with respect to coupon payments made by portfolio companies to investment funds as it was previously burdensome from an administrative perspective for investors to avail of credit of TDS withheld by portfolio companies.

One of the key features of the new pass-through regime is the requirement to deduct tax at 10% (or in accordance with the provisions of an applicable tax treaty) on income payable to an investor of an alternative investment fund in the manner set out in section 194LBB of the Tax Act. In view of the rule mandating the deemed credit of income to the accounts of unit-holders, the Finance Act, 2015 extended the requirement to deduct tax to scenarios where income is not actually paid or credited but only deemed to be credited.

With respect to the losses incurred by alternative investment funds, whether in the nature of business losses or otherwise, section 115UB had originally provided that the same could only be set off or carried forward by the fund and not by its investors. Accordingly, losses (other than business losses) arising to an alternative investment fund could not be passed through to its investors. The Finance Act, 2019 amended section 115UB to permit losses (other than business losses) to be passed through to investors. In order to avail of pass-through treatment in respect of non-business losses, investors should have been invested in the fund for at least 12 months. Business losses would be retained at the fund level and can only be set off against business income.

As per section 10(23FE) of the Tax Act (which was introduced by the Finance Act, 2015), income in the nature of dividend, interest or long-term capital gains arising from an investment made in a Category I or Category II AIF by: (i) a wholly owned subsidiary of ADIA that is resident in the UAE; (ii) a foreign sovereign wealth fund; or (iii) a foreign pension fund, is exempt from tax in India provided such investment is made on or after 1 April 2020 but before 31 March 2024 and is held for at least 3 years.

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<sup>12</sup> See section 10(23FBA) of the Tax Act together with Explanation 1(a) to section 115UB of the Tax Act.

<sup>13</sup> See sections 10(23FBA) and 10(23FBB) of the Tax Act.

## E. An Overview of Foreign Investment Regimes

Foreign investment transactions are primarily governed by the Foreign Exchange Management Act, 1999 (“**FEMA**”), and the rules and regulations issued thereunder. Specifically, inbound equity investments are regulated by the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (“**NDI Rules**”).

Foreign equity investment primarily flows through the following investment routes/regimes:

- I. Foreign Direct Investment
- II. Foreign Venture Capital Investment
- III. Foreign Portfolio Investment
- IV. Non-Resident Investment in an Investment Vehicle

These particular investment regimes have been discussed in this section.

### Foreign Direct Investment

The Foreign Direct Investment (“**FDI**”) route is the most common entry-route used by non-residents to invest in equity and equity-like instruments of an Indian company. At the threshold, under the FDI route, a non-resident is permitted to invest in all categories of companies – viz. private, public unlisted and public listed companies. However, FDI investors are not permitted to buy and sell shares on the stock exchanges, unless such investors are already in control of the underlying target company.

### *Entry Approvals and Negative List of Sectors*

From a sector specific perspective, foreign investment can be categorized as falling in one of 3 categories, which are as follows: (i) prohibited sectors; (ii) permitted sectors (government approval route); and (iii) permitted sectors (automatic route).

Prohibited sectors – negative list of sectors	Permitted sector (Government approval route)	Permitted sectors (automatic route)
<p>FDI is prohibited in companies operating in the following sectors:</p> <ol style="list-style-type: none"> <li>a. Lottery business including Government or private lottery, online lotteries,</li> <li>b. Gambling and betting including casinos,</li> <li>c. Chit funds,</li> <li>d. Nidhi company,</li> <li>e. Trading in Transferable Development Rights,</li> <li>f. Real estate business (<i>not inclusive of development of townships, construction of residential or commercial premises, roads or bridges and REITs</i>) or construction of farmhouses,</li> <li>g. Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes, and</li> <li>h. Atomic energy and railway operations (<i>other than permitted activities given in Schedule I of the NDI Rules</i>).</li> </ol>	<p>Some sectors are sensitive (given India's overall economic position), and foreign investment in excess of a certain percentage into these sectors is regulated either through government approval requirements or attached conditionalities. For instance, foreign investment into defence in excess of 74% requires government approval, and also requires adherence to certain conditions. Similarly, investment into a private bank in excess of 49% and up to 74% requires government approval.</p>	<p>Unless a sector is specifically regulated under the two categories given above, foreign investment into all other sectors is permitted up to 100% without a requirement of approval from either the RBI or the Central Government.</p>

## *PN3 and China Perspective*

Apart from the sector specific entry route to be followed by non-neighbouring countries, the Government vide Press Note 3 of 2020 dated 17.04.2020 has made it mandatory for an entity of a country sharing land border with India to take prior Government approval for investing in any of the permitted sectors. This requirement is also applicable where the beneficial owner of an investment into India is situated in or is a citizen of any such countries.

### *Instruments*

FDI investors are permitted to invest only in equity or equity-like instruments – i.e. equity shares, compulsorily convertible preference shares, compulsorily convertible debentures and compulsorily convertible share warrants. In other words, under the FDI route, investors are expected to assume the equity risk fully, and not acquire hybrid-equity or debt like instruments which provide price protection. An analytical comparison of these instruments has been given in the table below.

Particulars	Shares	CCPS	CCD
Character	High risk – high returns	Fixed rate of dividend only in case of profits	Assured interest payments irrespective of profits
Voting Rights	Allowed	Available post conversion to equity. CCPS holders can also vote on an 'as if converted' basis, if given in the SHA.	Available post conversion to equity
Convertibility	-	Converted to equity on maturity (mandatory)	Converted to equity on maturity (mandatory)
Dividend / Interest Payments	Discretionary dividend only in case of profits	Fixed dividend (in preference to equity dividend) only in case of profits	Fixed interest payment irrespective of profit/loss

Deductibility	Dividend not deductible	Dividend not deductible	Interest paid is deductible in the books of the target
Taxation	Dividend taxable in the hands of the dividend holder as per individual tax slabs		Withholding tax, ranging between 10% - 40%, depending on the jurisdiction of the investor
Liquidation Preference	Residual preference in case of liquidation	Preference over equity shareholders for repayment of capital	-
Pricing	Investments permitted only above fair value, to be determined at the stage of issuance as per the NDI Rules		

The NDI Rules specify certain pricing guidelines for acquiring and transferring equity instruments of an Indian investee company (except where the pricing is already regulated by SEBI).

Accordingly, the price of an equity instrument issued/transferred by an unlisted Indian company to a Non-Resident cannot be lower than the price of such instruments valued as per an internationally accepted pricing methodology.

Likewise, at the exit stage, a Non-Resident is not permitted to transfer an equity instrument to a Resident at a value exceeding the price of such instrument calculated as per an internationally accepted pricing methodology.

These pricing norms are based on the guiding principle that a Non-Resident cannot be guaranteed a pre-determined exit price at the time of making an investment and can only exit the investment at the prevailing market price.

### *Other Considerations*

The Indian investee company needs to ensure compliance of the sectoral/statutory caps and attendant conditions for receiving any foreign investment.

The recently introduced Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 set out the reporting requirements that need to be complied with for any investment to be made in India by a person resident outside India.

### Foreign Venture Capital Investment

A Foreign Venture Capital Investor (“FVCI”) is an investor incorporated and established outside India and registered with SEBI under the Securities and Exchange Board of India (Foreign Venture Capital Investors) Regulations, 2000 (“FVCI Regulations”). In addition to the NDI Rules, every FVCI will have to comply with the provisions of the FVCI Regulations for its investments.

Even though foreign investment is generally regulated from an entry and exit perspective, the government identified certain sectors which are capital intensive or require risk capital. In order to attract investment into these sectors, the government came up with a special route called the FVCI route. Under this route, investment is permitted only in select sectors such as infrastructure, information technology, biotechnology etc. (Detailed list of sectors given in **Annexure 1**)

Investing through the FVCI route has some benefits in comparison to the FDI route, such as:

#### *Flexibility around hybrid instruments*

While FDI investors are usually permitted to invest in the equity and equity linked instruments (*as explained above*), FVCI investors are given full discretion to structure their investment instruments in any manner, including hybrid instruments such as OCDs, OCRPS, NCPS, etc.

However, this is subject to the FVCI Regulations that mandates a minimum investment of 2/3rds of the investible funds in unlisted equity shares or equity linked instruments of a venture capital undertaking/investee companies, and a maximum investment of 1/3rds of the investible funds in the debt instruments of a venture capital undertaking/investee company (where the FVCI has already invested in the equity of such an entity) or shares offered at an IPO of the venture capital undertaking/investee company. Under the FVCI regime, OCDs, OCRPS qualify as equity linked instruments, and not debt.

### *Pricing Freedom*

The pricing guidelines in the NDI Rules do not apply to any transaction undertaken by an FVCI, thereby allowing the FVCI to enter and exit (put option/buyback) an investment at a mutually agreed price between the FVCI and the investee company. This is beneficial for an FVCI while negotiating default consequences such as put options and buy backs, which under the FDI regime can only be effected at fair value (and not agreed value).

### *QIB Status*

FVCIs registered with SEBI have been accorded the status of a Qualified Institutional Buyer ("QIB") that makes them eligible to subscribe to securities at an initial public offer ("IPO") or a Qualified Institutional Placement, a short form fund-raising route for listed companies to raise money from institutional investors..

### *Lock-in Exemption*

The SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("**ICDR Regulations**") exempt an FVCI from being locked in the pre-issued capital for a period of 1 year (from the date of allotment from the IPO), in case the equity shares held by an FVCI are locked in for a period of at least 1 year from the date of purchase of such shares. This allows the FVCI to exit the investment immediately post the listing of the investee company.

Also, the promoters are exempted from complying with the open offer provisions as given in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**Takeover Code**") in case of a transfer of shares by the FVCIs to the promoters based on an agreement between the FVCI and the promoter.

### Foreign Portfolio Investment

Foreign Portfolio Investors ("**FPIs**") are a special class of investors that are governed by the Securities and Exchange Board of India (Foreign Portfolio Investor) Regulations, 2019 ("**FPI Regulations**"). Pursuant to the FPI Regulations, an FPI is required to register with SEBI and each registered FPI is deemed to be an intermediary. In addition to equity instruments of a listed Indian company, FPIs may invest in equity linked instruments or debt instruments of Indian companies as per the terms and conditions given in **Schedule II** to the NDI Rules.

The erstwhile 2014 FPI Regulations provided for three categories of FPIs that have been now consolidated into two categories under the updated FPI Regulations. The principle guiding the division of categories is that well-regulated entities such as Government and government-related investors such as central banks, sovereign wealth funds, international or multilateral organizations, pension funds, university funds fall under Category I FPIs. The rest not being in the earlier category (majorly endowments and foundations, charitable organisations, corporate bodies, family offices and individuals) are Category II FPIs.

Under the FPI route, investment is divided into 2 broad spheres: (1) equity; and (2) debt. These spheres and the conditions to be considered in respect of each are discussed below.

FPI investment into equity instruments	
Instruments	FPI's are mainly permitted to trade in equity of listed stock under the FPI route. This means that FPIs are not permitted to undertake off-market transactions (with the exception of private placement transactions) like FDI investors. In addition, FPIs are permitted to invest in other instruments such as units of a REIT and an InvIT, though a foreign investor can invest in REITs and InvITs without being an FPI as well under Schedule VIII.
Investment limits and conditions	<p>The total holding by each FPI or an investor group must be less than 10 percent of the total paid-up equity capital on a fully diluted basis or less than 10 percent (<i>individual limit</i>) of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company. Further, the total holdings of all FPIs put together (including any other direct and indirect foreign investments in the Indian company permitted under the NDI rules) must not exceed 24 per cent (<i>aggregate limit</i>) of paid-up equity capital on a fully diluted basis or paid up value of each series of debentures or preference shares or share warrants.</p> <p>With effect from 01.04.2020, the aggregate limit has been brought in line with the FDI sectoral caps applicable to Indian companies with respect to their paid-up equity capital on a fully</p>

	<p>diluted basis (or such same sectoral cap percentage of paid up value of each series of debentures or preference shares or share warrants). This aggregate limit may be decreased to lower threshold limits of 24% or 49% or 74%, or may be increased to 49% or 74% or the sectoral cap ceiling, by passing the relevant corporate resolutions.</p> <p>However, the Indian company cannot decrease the aggregate limit to a lower threshold once the same has been increased to a higher limit. Further, the aggregate limit for investing in a prohibited sector shall be 24 per cent.</p> <p>Lastly, in case the prescribed investment limit is breached, the FPI will have the option of divesting their holdings within 5 trading days from the date of settlement of the trades causing the breach. If the FPI chooses not to divest, then the entire investment in the company by such FPI and its investor group shall be considered as FDI and the FPI and its investor group shall not be allowed to further invest in the company through the FPI route.</p>
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FPI investment into debt instruments	
General	<p>Investment by an FPI in debt instruments is regulated by the Debt Regulations pursuant to which FPIs have been permitted to invest in various debt instruments such as government securities, treasury bills, state development loans and corporate bonds/non-convertible debentures ("NCDs") subject to certain limits and restrictions imposed by the RBI. However, the most commonly used instrument in the offshore structured debt space is a corporate bond or an NCD. For investing in a corporate bond/NCD, the FPI has to adhere to certain conditions, which are summarised below.</p>
Investment Limits	<p>Investment by any FPI (together with investments by related FPIs) shall not exceed 50% of any issue of a corporate bond,</p>

	<p>unless investment is made under the FPI – VRR route. In case an FPI (together with related FPIs) has invested in more than 50% of a single issue, it shall not make further investments in such issue. However, this requirement is not applicable to investments by Multilateral Financial Institutions (“MFI”) and investments by FPIs in certain exempted securities (which includes security receipts and debt instruments issued by ARCs and debt instruments issued by an entity pursuant to an approved resolution plan under the Insolvency and Bankruptcy Code, 2016).</p>
Minimum residual maturity	<p>FPIs are permitted to invest in corporate bonds with minimum residual maturity of above one year, subject to the condition that short-term investments in corporate bonds by an FPI shall not exceed 30% of the total investment made by such FPI in corporate bonds. These stipulations would not apply to investments in exempted securities.</p>
End-use restrictions	<p>FPIs are restricted to invest in unlisted corporate bonds in the real estate business (<i>as defined under the NDI Rules</i>), capital market and for the purchase of land. However, FPI investment in listed NCDs are not hit by these end-use restrictions.</p>

To attract long-term and stable FPI investments into the debt markets, the RBI proposed a separate channel called the ‘Voluntary Retention Route’ (“VRR”) besides providing FPIs with operational flexibility to manage their investments.

FPI–VRR provides freedom from macro-prudential and other regulatory prescriptions such as minimum residual maturity requirement or single/group investor-wise limits applicable to FPI investments in debt markets, provided FPIs voluntarily commit to retain 75% of their investments (committed portfolio size) in India for a minimum period of 3 years. FPIs therefore have the option to redeem 25% of their investment prior to the completion of the minimum retention period under the VRR.

An FPI participating under VRR is given the option to either remain invested under this route for an identical retention period or, at the end of the retention period, to either liquidate its portfolio and exit or shift its investment to the general investment limits permitted under the FPI route. Further, if the FPI wishes to exit its investments prior to the end of the retention period, it can only do so by selling its investments to one or more other FPIs.

### Non-Resident Investment in an Investment Vehicle

Schedule VIII to the NDI Rules allows a Non-Resident, or an entity incorporated outside India to invest in units of an Investment Vehicle. A foreign investor may take the following advantages by participating through this investment route:

#### *No Pricing Restriction*

Normally, foreign investors (other than FVCIs) are subject to certain pricing guidelines while purchasing securities or selling/transferring such securities. However, a Non-Resident who has purchased units of Investment Vehicles in accordance with Schedule VIII is not bound by such guidelines and is allowed to sell or transfer the units to any Resident or Non-Resident at a price that is mutually agreed between the parties.

It should however be noted that redemption of units in Investment Vehicles needs to be in accordance with the regulations framed by SEBI and directions issued by the RBI.

#### *Deemed domestic investment*

Investment made by an Investment Vehicle into an Indian entity shall be reckoned as domestic investment and not downstream investment for the investee Indian company if the Sponsor or Investment Manager is owned and controlled by resident Indian citizens, or is owned and controlled by an Indian Resident.

As a result, the Indian company receiving investment from such a Vehicle shall not be required to comply with the entry routes, sectoral caps, pricing guidelines and other attendant conditions applicable to foreign investment (including downstream investments).

As a corollary, therefore, if a non-resident, either owns or controls the Sponsor or the Investment Manager, the investments made by the AIF will qualify as downstream investments and be subject to thresholds applicable for foreign investments.

## *Registration*

As otherwise required under the FVCI and FPI investment regimes, registration of an FVCI or an FPI is not required when investing in the units of an Investment Vehicle, thereby freeing the foreign investor of regulatory conditions imposed by SEBI and RBI.

## F. Offshore Pooling Vehicles

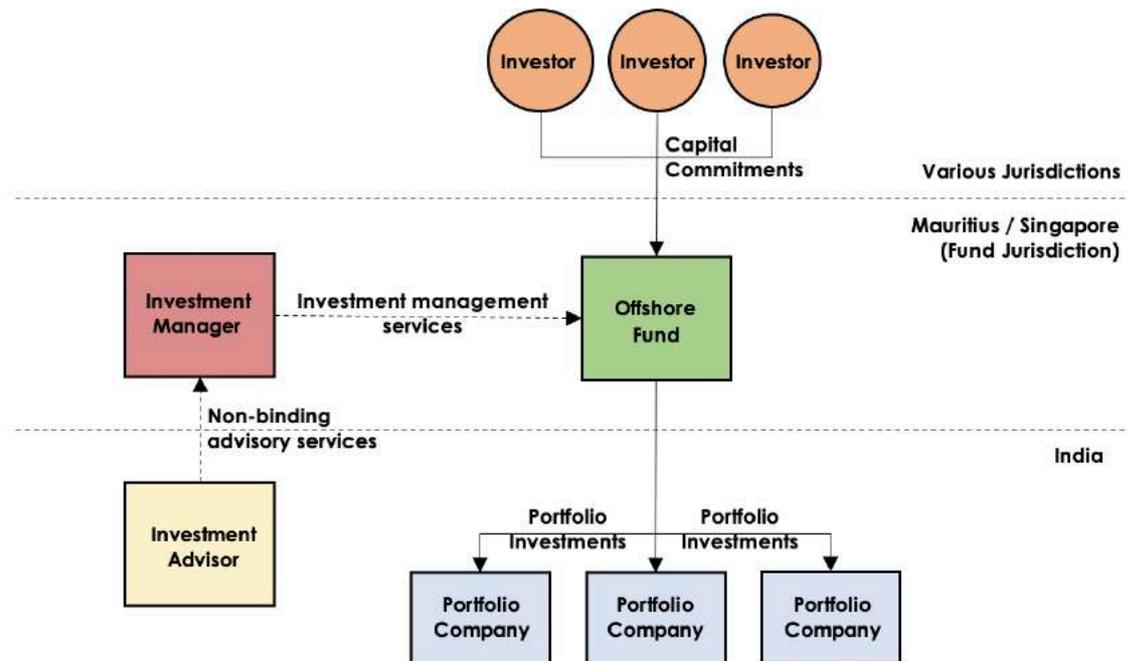
The liberalisation of the Indian economy in the early 90s helped generate momentum among foreign investors looking to allocate capital in India. India continues to be an attractive investment geography and capital allocations have remained largely stable. Further, the investment funds industry (which was still nascent in the early 90s) has experienced a few cycles of fundraising, investing and exits and has matured over the years.

As in the case of domestic funds, tax transparency is a key structural driver for offshore funds particularly in light of the fact that India follows source-based taxation. Credit for taxes suffered in India may not be easily available in the various jurisdictions in which investors are resident for tax purposes. Another important factor from a choice of jurisdiction perspective is investment protection – investors are increasingly focused on protection against expropriation, dispute resolution mechanisms, etc.

These and certain other aspects in relation to offshore pooling structures focused on investments in India are discussed below.

## Anatomy of a simplified offshore fund

The following diagram illustrates a simplified offshore fund structure.



To avail itself of benefits under a tax treaty, an offshore fund focused on investments in India is ordinarily established as a **corporation**.

An offshore fund may be **externally managed** by an independent **investment manager** (as show in the diagram above) or **self-managed**, in which case the investment decisions will be taken by the **board of directors** of the fund.

Most offshore funds retain an India-based **investment advisor**. The role of the investment advisor is to provide **non-binding advice / investment recommendations** to the investment manager (in the case of an externally managed fund) or to the board of directors (where the fund is self-managed).

The investment decision-making process is designed in this manner is to avoid any inference that the decision-making in relation to the fund is taken in India (which in turn may result in the fund being taxed in India).

Investors in an offshore fund may be spread across various jurisdictions. Depending on where investors are based, the sponsor will need to comply with applicable private placement / marketing rules.

Investors make capital commitments to the fund, which are deployed in accordance with the stated investment policy. As the offshore fund would be a 'foreign investor', it will need to comply with the foreign investment regimes applicable to it.

### Choice of Jurisdiction

Choice of jurisdiction is a central question to be considered when setting up India focussed funds. From a tax perspective, the choice should be made keeping in mind the following considerations:

#### *Commercial Substance and GAAR*

With the introduction of a statutory general anti-avoidance rule (GAAR) regime in India, the focus of structuring exercises has shifted to ensuring that the various entities in the structure (including the fund vehicle) have 'commercial substance'. The question of what constitutes commercial substance has always been tricky with evolving case law and arguments. The consequences of the application of GAAR can be severe. Simply put, the provisions of a tax treaty may be overridden if it can be established that the choice of jurisdiction was driven purely (or even primarily) by tax considerations rather than by non-tax commercial reasons.

As a corollary, a strong case for why GAAR should not apply can be made if there are adequate non-tax reasons to choose a jurisdiction. In this regard, the following three principal factors are relevant:

**Purpose:** what is the real purpose of setting up an entity in a certain jurisdiction. While tax may be one of the considerations, there may be other non-tax reasons why investments into India are made from a certain jurisdiction. These could range from close cultural ties with India, a better and more flexible corporate law regime, existence of a bilateral investment treaty which protects investments, etc. The purpose test should be applied not just with respect to jurisdiction but also for each entity in the structure.

**Pooling:** The risk of GAAR applying is higher for mere investment holding companies as against pooled investment vehicles. Since investors may pool funds from multiple

jurisdictions, pooling of funds in a certain jurisdiction can sometimes be a good defence against the application of GAAR.

**People:** The presence of people in the jurisdiction to actually manage, and engage in, the business of the entity being set up lends significant legitimacy to the structure and corroborates the commercial substance argument. These people should be actual employees and not merely professional administrators acting for hundreds of similar companies. Singapore sometimes scores over Mauritius on this count as it is viewed as a more attractive business destination by people.

#### *Taxation under a Double Taxation Avoidance Agreement (DTAA)*

The table below sets out the tax treatment for certain heads of income under the double taxation avoidance agreements (“DTAAs”) with Mauritius, Singapore and the Netherlands. Care must be taken to consider the provisions of such DTAAs in the whole. For instance, the concept of ‘beneficial owner’ is relevant for the purposes of claiming treaty exemptions (largely for interest but also for dividends in Mauritius).

Beneficial ownership has been a rather obscure subject in the Indian context. Most recently, in *M/s Golden Bella Holdings Ltd v Deputy Commissioner of Income Tax (International Taxation)* the term ‘beneficial ownership’ was broadly defined by the following key determinants (i) exclusive possession and control over the interest income received; (ii) no requirement for the recipient to seek approval or obtain consent from another person for making investments; and (iii) absolute freedom for the recipient to utilize interest income received, unconstrained by any contractual, legal, or economic arrangements with any other third party. Leaving a spread while making further distributions can also help allay the risk of beneficial ownership.

Parameter	Mauritius	Singapore	The Netherlands
Dividends	<ul style="list-style-type: none"> <li>– 5% tax withholding if the Mauritian entity is a 10% or more shareholder, and beneficial owner;</li> <li>– 15% tax withholding otherwise</li> </ul>	<ul style="list-style-type: none"> <li>– 10% tax withholding if Singaporean resident holds more than 25% shares;</li> <li>– 15% tax withholding otherwise</li> </ul>	<ul style="list-style-type: none"> <li>– 15% under India – Netherlands DTAA</li> <li>– MFN – reduces rate to as low as 5% basis India – Slovenia DTAA</li> </ul>

	<ul style="list-style-type: none"> <li>– Locally: Mauritius will tax dividends at effective rate of 3%, subject to credits / tax exemptions.</li> </ul>	<ul style="list-style-type: none"> <li>– Locally: Singapore does not tax dividends received from jurisdictions like India, where the headline tax is more than 15%</li> </ul>	
Capital Gains	<ul style="list-style-type: none"> <li>– Effective, April 1, 2017, India has the right to tax capital gains only on transfer of 'shares'</li> <li>– Capital gains on instruments other than 'shares' not subjected to Indian tax (For instance, debentures etc.)</li> <li>– Locally: Mauritius does not tax capital gains</li> </ul>	<ul style="list-style-type: none"> <li>– Effective, April 1, 2017, India has the right to tax capital gains only on transfer of 'shares'</li> <li>– Capital gains on instruments other than 'shares' not subjected to Indian tax (For instance, debentures etc.)</li> <li>– Locally: Singapore does not tax capital gains</li> </ul>	<ul style="list-style-type: none"> <li>– India can tax capital gains (on all instruments and not merely shares) if such gains arise on a sale of 10% or more securities to an Indian resident, and if if such sale does not qualify as 'restructuring'.</li> <li>– All other cases, capital gains to be taxed in Netherlands.</li> <li>– Locally: Netherlands does not tax capital gains, subject to participation exemption.<sup>14</sup></li> </ul>

<sup>14</sup> Participation exemption requires that the parent company holds a participation of at least 5% of, generally, the nominal paid-up share capital (or, in certain circumstances, 5% of the voting rights) of a company, AND satisfies one of the following three tests (a) the parent company's objective with respect to its participation is to obtain a return that is higher than a return that may be expected from portfolio asset management (the 'Motive Test'); (b) the direct and indirect assets of the subsidiary generally consist of less than 50% of 'low-taxed free passive assets' (the 'Asset Test'); or (c) the subsidiary is subject to an adequate levy according to Dutch tax standards (the 'Subject-to-Tax Test'); and the payment received from the subsidiary is not tax deductible for the subsidiary.

Interest	<ul style="list-style-type: none"> <li>– Subject to a withholding tax of 7.5%</li> <li>– Locally: Interest income effectively taxed at 15% with 80% tax exemption for foreign sourced dividends under the Partial Exemption Regime.<sup>15</sup></li> </ul>	<ul style="list-style-type: none"> <li>– Subject to a withholding tax of 15%</li> <li>– Locally: Interest income taxed at 17%, though credit for 15% tax paid in India reduces the effective tax rate to only a further 2% in Singapore.</li> </ul>	<ul style="list-style-type: none"> <li>– Subject to a withholding tax of 10%</li> <li>– Locally: Interest income taxed at 25% though credit for 10% tax paid in India reduces the effective tax rate to only a further 15% in the Netherlands.<sup>16</sup></li> </ul>
Local Tax Exemptions	Partial exemption regime	Full tax exemptions under 13X and 13R of Singapore Income tax for investment funds and SPVs held by qualifying funds.	Participation Exemption
FATF	Grey List <sup>17</sup>	White List	White List

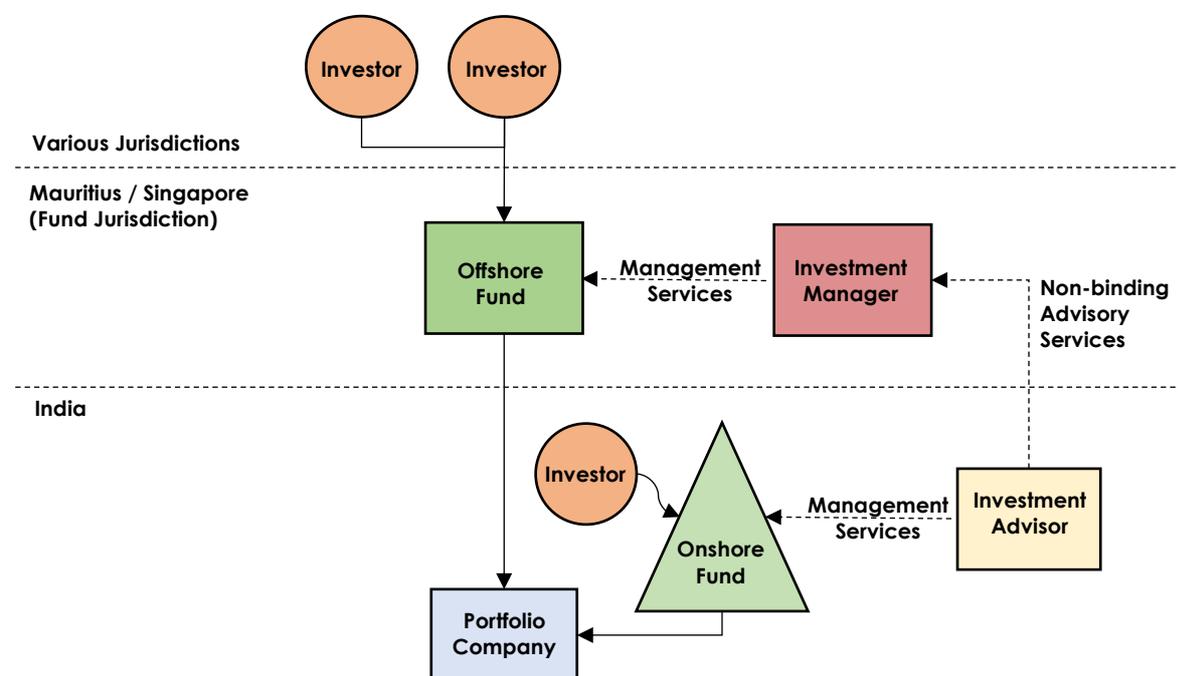
<sup>15</sup> Mauritius abolished the global business license regimes in 2018, the concept of deemed foreign tax credits and introduced the Partial Exemption Regime, which is similar to the erstwhile regime and provides for an 80% tax exemption. OECD has now declared the Mauritian Partial Exemption Regime as not harmful as the regime complies with the OECD's standards. The conditions to be satisfied to avail of the Partial Exemption Regime include the following: (1) a GBC must, at all times, carry out its core income generating activities in, or from Mauritius by employing (either directly or indirectly) a reasonable number of suitably qualified persons to carry out the core activities; and (2) a GBC is expected to have a minimum level of expenditure proportionate to its level of activities. However, despite the positive reviews of the OECD, the European Union Code of Conduct Group (EU COCG) had flagged the Mauritian Partial Exemption Regime as harmful in February 2019. According to the EU COCG, the Mauritian Partial Exemption Regime does not have adequate substance requirements in terms of treatment of outsourcing activities. In response to the EU, the Mauritian Prime Minister recently announced that the Mauritian tax laws would be amended to stipulate conditions that must be satisfied where a company seeking to enjoy the Partial Exemption Regime outsources its core income generating activities. These conditions include the following: (i) the company must demonstrate adequate monitoring of outsourced activities; (ii) the outsourced activities must be conducted in Mauritius; and (iii) the economic substance of service providers must not be counted multiple times by different companies when evidencing their own substance in Mauritius. However, these changes have not been passed into law yet.

<sup>16</sup> The standard rate will decrease from 25% in 2020 to 21.7% in 2021. The lower rate will further decrease from 16.5% in 2020 to 15% in 2021.

<sup>17</sup> RBI recently expressed discomfort at granting NBFC licenses to entities under the FATF Grey List, noting that such entities may not qualify the fit and proper criterion. Jurisdictions under increased monitoring are actively

## Parallel Investment Structure

Below is a diagram that illustrates a parallel investment structure.



In a parallel investment structure, the onshore fund (i.e. the domestic fund) and the offshore fund are raised in parallel. The offshore fund raises capital from investors outside India whereas the onshore fund raises capital from domestic investors.

The onshore fund is managed by the investment advisor, which also provides non-binding investment advice / recommendations to the external investment manager or the board of the offshore fund.

Once the separate pools of capital have been raised, the onshore fund and offshore fund will invest in parallel with each other i.e. the intention is that both funds will invest in the same portfolio companies.

The terms on which the two funds will participate together will typically be set out in a separate parallel investment agreement. Among other things, this agreement will set out

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working with the FATF to address strategic deficiencies in their regimes to counter money laundering, terrorist financing, and proliferation financing. When the FATF places a jurisdiction under increased monitoring, it means the country has committed to resolve swiftly the identified strategic deficiencies within agreed timeframes and is subject to increased monitoring. This list is often externally referred to as the 'grey list'.

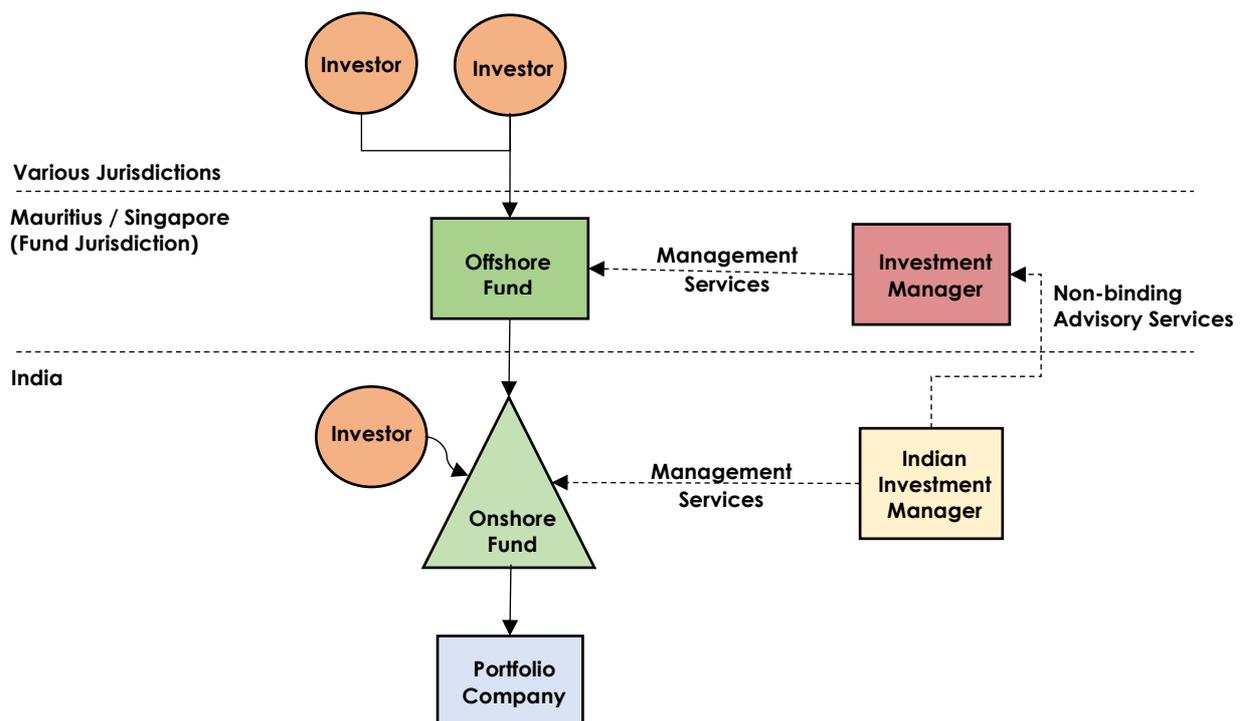
the basis on which costs are to be apportioned between the funds as well as the ratio in which the two funds will take up investment allocations.

From a management and administration perspective, it is also important to note that the onshore fund will be treated as standard domestic investor whereas the offshore fund will be treated as a foreign investor (and may be subject to additional conditions if it has obtained an FVCI / FPI licence).

Historically, investment by a foreign investor into a domestic trust required approval from the FIPB. There was no defined timeline for this and the approval process would often take several months. It was in this context that many sponsors turned to the parallel investment structure as a way to kickstart their investment operations.

### Master-Feeder Investment Structure

Below is a diagram that illustrates a master-feeder structure.



In a master-feeder investment structure, the offshore fund pools capital from investors outside India and then makes a capital commitment to the onshore fund. The onshore fund separately also pools capital from domestic investors and forms a combined pool of capital.

The offshore fund may be externally managed or self-managed. In either event, an Indian investment manager may be retained to provide non-binding investment advice. In practice, the offshore fund is only required to take one investment decision i.e. to make a capital commitment to the onshore fund.

The onshore fund will be managed by the Indian investment manager under a standard investment management agreement.

In the last few cycles of fundraising, offshore investors have requested (and have generally been given) a preferred return calculated in foreign currency terms. Owing to currency fluctuations, this may mean that the sponsor is in the carry with respect to domestic commitments but not with respect to the offshore piece. This and various other currency-related issues need to be carefully addressed.

The master-feeder structure is the preferred structure for a number of reasons.

From a fundraising perspective, it provides a single, enlarged pool of assets. A number of domestic institutions cap their commitments at a percentage of the fund corpus. The inclusion of offshore commitments within the onshore fund corpus means that domestic institutions can make larger commitments.

From an investment perspective, the master-feeder structure offers the following advantages:

- Downstream investment by the onshore fund is considered domestic (notwithstanding participation by the offshore fund) as long as the investment manager is owned and controlled by Indians.
- The onshore fund is free to choose from a much wider universe of instruments.
- Sectoral caps are not applicable to investment made by the onshore fund (which can be contrasted with the parallel investment structure under which sectoral caps would apply to the offshore fund).
- The sponsor will be free to leverage the underlying portfolio investment (which would be restricted in respect of the offshore pool in a parallel investment structure).

## Bespoke Investment Platforms

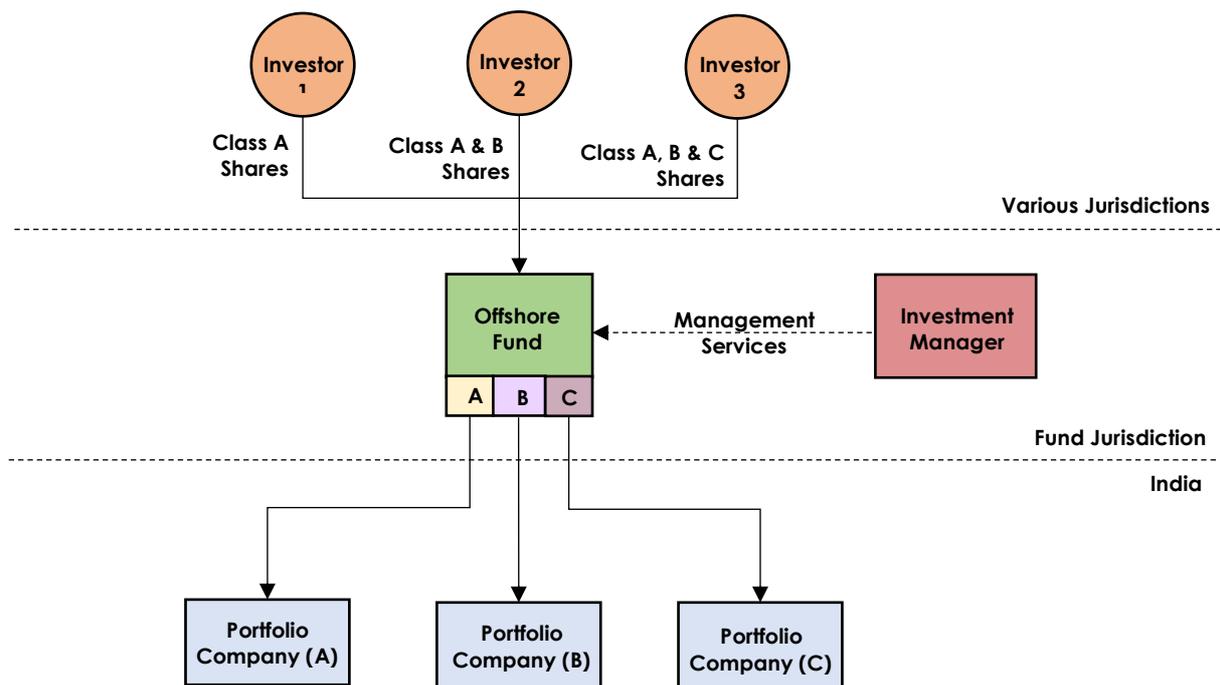
There has been a steady increase in the formation of bespoke investment platforms in connection with investments in India. Such platforms may be established to cater to a number of scenarios. These include: (i) pooling structures for the purposes of investing in a single company / project; (ii) managed accounts with enhanced rights tailored for a specific investor; and (iii) pooling structures to track economics with respect to one or more specific deals. Whilst investment platforms are now common across the board, they appear to feature most frequently in the real estate sector.

Whilst investment platforms cannot be painted with the same brush (and they are, after all, bespoke to the specific facts and circumstances in which they are used), there are some features that are common to platforms in general. One, the traditional blind pool format is abandoned in varying degrees. Two, the shift away from the blind pool means that LPs are more focused on individual deals and expect to receive more information from a diligence and monitoring perspective. Three, in light of the sponsor's relatively more hands-off role, LPs are better placed to demand fee and carry breaks.

## Multi-class Structures

Sponsors use structures with multiple classes for various purposes. Sponsors may embed different economic terms in different classes (e.g. Class A Shares may carry a 2% management fee and 20% carried interest; Class B Shares may carry a 1% management fee and 15% carried interest, etc.) and offer the various classes for subscription by potential investors.

Another popular use of class structures is to track different investments. This can be illustrated with the help of the diagram below.



In this structure, when an investment opportunity arises, the sponsor will gauge investor interest and issue interests (i.e. shares) to those investors that wish to take exposure to the investment opportunity.

In this structure, Class A Shares track Portfolio Company (A), Class B Shares track Portfolio Company (B) and Class C Shares track Portfolio Company (C).

Any profits and losses arising in respect of a portfolio company are shared only amongst investors who hold shares that track such portfolio company.

The above diagram shows that Class A Shares are issued to all investors that wish to track economics in Portfolio Company (A) viz. Investors 1, 2 and 3. Class B Shares are issued to Investors 2 and 3 and Class C Shares are issued solely to Investor 3.

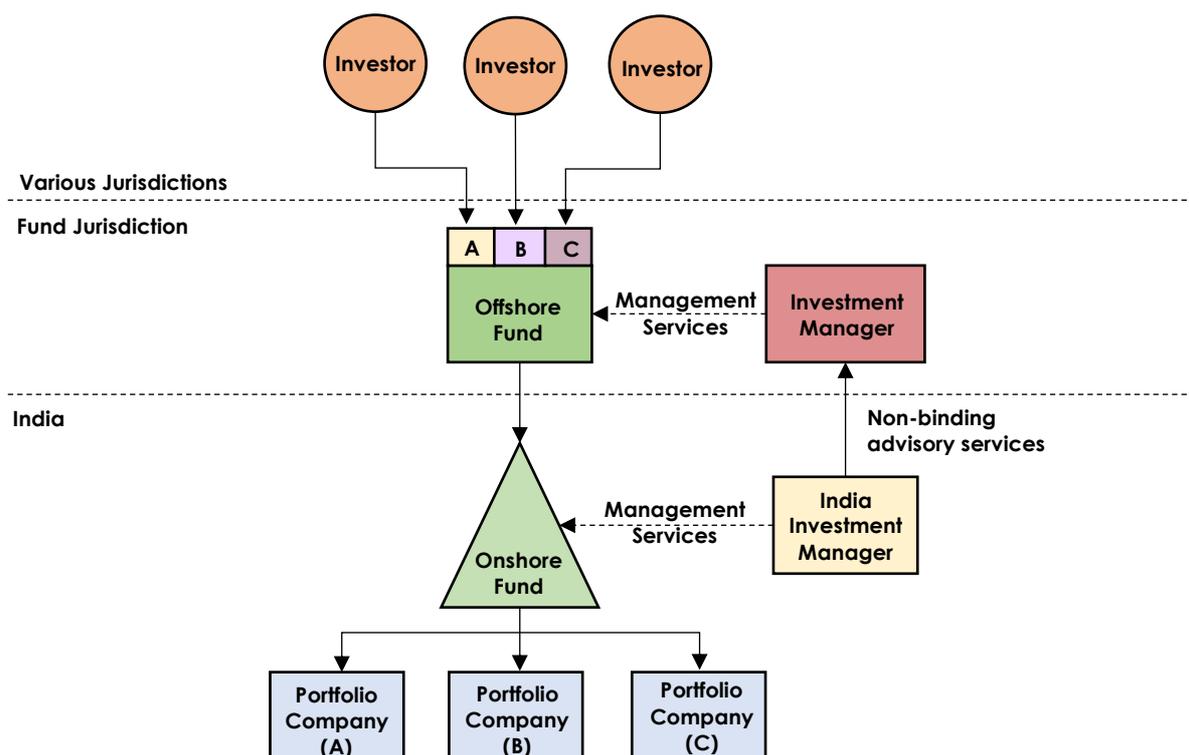
In other words, only Investor 3 will participate in the profits and losses of Portfolio Company (C) whereas Investors 2 and 3 will participate in the profits and losses of Portfolio Company (B) and Investors 1, 2 and 3 will participate in the profits and losses of Portfolio Company (A).

One thing to note with multi-class structures is that the various classes are established by contract i.e. the different classes do not flow naturally from the structure of the vehicle. As

a result, the losses from one class can only be contractually ring-fenced from other classes and therefore investors holding a class which has earned profits may be called upon to make good losses arising to another class.

### Variable Cell Companies

An alternative to the multi-class structure is the variable class company (VCC) structure. Below is an illustration of the VCC structure.



A variable cell company (which is referred to in some jurisdictions as a protected cell company or a segregated portfolio company) is a vehicle with multiple cells, each of which is bankruptcy remote from the other. In other words, the losses and liabilities of a given cell are structurally segregated from the profits and assets of other cells.

In a VCC structure, an investor would subscribe to interests issued with respect to a given cell. This structure can be used in the same manner as a multi-class structure such that each cell could be used to track a specific investment. The advantage of the VCC structure in comparison to the multi-class structure is that assets and liabilities of each investment are structurally ring-fenced from one another.

The VCC structure is often used where offshore investors want to take exposure to specific investments in India. Whilst the onshore fund could theoretically issue different classes of units to track each investment, the Indian securities regulator tends to frown upon the practice of using tracking interests.

In such cases, investors subscribe to shares of a VCC, which in turn invests into a domestic alternative investment fund, which ultimately deploys capital into various portfolio companies. Proceeds arising from each investment are up-streamed to the offshore fund and apportioned between the various cells.

### Key Tax Risks

Offshore pooling structures are likely to be on the taxman's radar on account of their size and complexity. Moreover, tax authorities may think of offshore funds as soft targets given that most LPs are sensitive to having their capital locked into a long-drawn tax litigation. Below are some of the broad categories of tax risks applicable to offshore funds.

#### *Association of Persons (AOP) Risk*

Although the Tax Act does not specifically define the term 'association of persons', the Indian courts have held that the critical determining factor of an AOP is whether persons have joined in a common purpose or common action with the object of producing income. This is a principle that needs to be tested in the facts and circumstances of each case. Where AOP treatment is applied, then the individual vehicles in the structure are not taxed separately and ultimately, the tax authorities may rely on such treatment to deny treaty benefits and undermine tax transparency.

In an investment funds context, the AOP risk is implicated in two scenarios: (i) in a parallel investment structure where tax authorities may look to characterise the onshore fund and the offshore fund as an AOP; and (ii) in a master-feeder structure where again the tax authorities may characterise the onshore fund and the offshore fund as an AOP on the basis that they are effectively controlled by the domestic fund manager.

#### *Indirect Transfer of Capital Asset Risk*

Under the Tax Act, capital gains tax may be levied on income arising from the transfer of shares or interests in a company or entity registered or incorporated outside India if such

shares or interests directly or indirectly derive their value substantially from assets located in India.<sup>18</sup> This came to be informally known as the 'indirect transfer tax'.

The indirect transfer tax risk had serious implications in an investment funds context since, at least in theory, its reach could inter alia extend to secondaries transactions (i.e. where an LP transfers its interest in an offshore fund invested in India), investor redemptions and distributions that are given effect to by way of a buyback of shares.

However, a number of clarifications were issued over the years by tax authorities and the legislature, which have had the effect of paring back the enormity of this risk.

1. In 2015, the CBDT clarified that a declaration of dividends by a foreign company in respect of shares or interests that derive value substantially from assets in India would not attract the indirect transfer tax.<sup>19</sup>
2. In 2017, the Finance Act, 2017 amended the Tax Act to carve out interests held by non-residents on account of their investments in Category I or Category II FPIs thereby eliminating the principal tax risk attached to investor redemptions.<sup>20</sup>
3. In 2017, the CBDT clarified that the indirect transfer tax would not apply to income accruing or arising to a non-resident on account of redemption or buyback of its shares or interest held indirectly in Category I or Category II AIFs (if such income accrues or arises from or in consequence of transfer of shares or securities held in India by such funds and such income is chargeable to tax in India).<sup>21</sup> This clarification provided relief to a vast number of fund platforms set up as master-feeder investment structures.

### *General Anti-Avoidance Rule (GAAR) Risk*

Chapter X-A of the Tax Act sets out the statutory scheme for the General Anti-Avoidance Rule. GAAR had been introduced into the Tax Act in 2013 but first started to apply with respect to the financial year 2017-2018. GAAR empowers tax authorities to declare an arrangement whose main purpose is to obtain a tax benefit and which additionally: (i) creates rights or obligations not ordinarily created between persons dealing at arm's length; (ii) directly or indirectly results in the misuse or abuse of provisions of the Tax Act; (iii) lacks commercial substance (or is deemed to lack commercial substance); or (iv) is entered into

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<sup>18</sup> Explanation 5 to Section 9(1)(i) of the Tax Act read with section 45 of the Tax Act.

<sup>19</sup> CBDT Circular No. 4 / 2015 dated 26.03.2015.

<sup>20</sup> Second proviso to Explanation 5 to Section 9(1)(i) of the Tax Act. See also the third proviso to Explanation 5 to section 9(1)(i) of the Tax Act which was inserted by the Finance Act, 2020 following the introduction of the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019.

<sup>21</sup> CBDT Circular No. 28 / 2017 dated 07.11.2017.

for non bona fide purposes, as an impermissible avoidance arrangement and apply tax consequences accordingly.<sup>22</sup> Such consequences could include the denial of benefits under a tax treaty.<sup>23</sup>

Whilst GAAR remains a largely untested regime, the statutory scheme does reflect the thinking and intention of tax authorities to clamp down on innovative tax structuring. It is therefore important to ensure that the various transactions contemplated as part of the investment structure have sufficient commercial justification. In particular, the fund vehicles in the structure should be able to demonstrate adequate commercial substance.

### *Permanent Establishment (PE) Risk*

In cases where the management of an offshore fund investing into India appears to be situated or controlled in India, tax authorities may declare an Indian entity (usually the domestic investment manager / advisor) to be a permanent establishment (PE) of the offshore fund and apply Indian tax to the offshore fund. To mitigate this risk, the offshore vehicle should be able to demonstrate independent decision-making and any Indian inputs to the offshore fund (or the external investment manager of the offshore fund) should be advisory and non-binding in nature.

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<sup>22</sup> Sections 95 and 96 of the Tax Act.

<sup>23</sup> Section 98 of the Tax Act.

## G. Discussion on Select Fund Terms

LPs investing into India-focused funds have heightened their scrutiny of the terms on which they participate in such funds. This comes in the backdrop of the general global shift towards greater scrutiny of fund terms over the last decade as well as the increasing organisation of institutional investors. These trends are likely to continue and the general legal interface between LPs and GPs could well witness some disruption.

Whilst a detailed discussion of various fund terms is outside the scope of this paper, a summary of the most negotiated and discussed fund terms in the Indian context is set out below.

### Management Fees

Management fee is the consideration paid to sponsors for providing management services to investors in connection with their investment in the fund. Management fee was historically charged at 2% in line with the famous “2 and 20” fee structure. However, following the financial crisis in 2008, managers have come under significant LP pressure to lower the headline fee percentage and offer various other fee concessions.

### *LP Expectations*

<b>Headline Fee Rate</b>	LPs have become resistant to a blanket 2% headline fee rate. Depending on fund strategy (and certain other factors), investors have, for the most part, managed to push down the headline fee rate to the 1-2% range.
<b>Discounts</b>	Most investors expect to see a volume discount tied to the size of their commitments as well as an early bird discount if they invest at the first closing.
<b>Fee Base</b>	At present, fee negotiations are focused on the base on which fee is calculated – LPs expect to see a number of adjustments to the base (including subtractions for investments written off and written down).

<b>Step-down</b>	LPs expect sponsors to 'step-down' the management fee when they repeatedly extend the term of the fund or when they activate a successor fund. Sponsors tend not to put up a strong resistance to this.
<b>Governance</b>	LPs have also negotiated a slew of governance-related adjustments to fees e.g. fee waivers on occurrence of a key person event.

### *GP Considerations*

<b>Utilising Fee Discounts</b>	Most LPs now expect to see some variety of discount. Sponsors are increasingly viewing discounts as tools they can capitalise on to differentiate themselves from peer funds and hasten the fundraising process.
<b>Resisting Value-linked Decreases</b>	Seasoned GPs resist adjustments for investments written off / written down on the basis that the fee base does not increase to reflect the value of investments that have appreciated and therefore should not be revised to reflect investments that have decreased in value.
<b>Preserving Fee on Term Extensions</b>	Managing investments at the end of the term still involves effort for which managers ought to be compensated. While a step-down of fee may be reasonable, a steep reduction or waiver may incentivise a fire sale, which would not be in the best interests of the GP or the LPs.
<b>Actuals</b>	GPs may prefer to charge fees on actuals i.e. on expenses that are actually incurred rather than as a percentage. While LPs are open to such an arrangement, they will ordinarily insist on some form of fee cap and/or the ability to audit expenses incurred.

## Recycling Capital

It is common for sponsors to retain the ability to reinvest (or recycle) proceeds arising from an investment that has been realised prior to the end of the investment period. Over the years, LPs have become alert to potential hazards of allowing sponsors unfettered recycling powers. Some of these risks along with the key points of negotiation between LPs and GPs as regards recycling capital are set out below.

### *Principal risks of recycling*

<b>Style Drift</b>	The possibility of recycling may tempt managers to seek out 'quick wins' by deploying capital in shorter-term investments, thereby leaving less capital for deployment in opportunities more suited to the manager's investment style.
<b>Management Capacity</b>	LPs invest in a fund with an eye on the hard cap. The ability to recycle capital would mean that sponsors will have effective access to investible funds over and above the hard cap, which may trigger concerns about whether management has the capacity to manage an enlarged pool of capital.
<b>Liquidity Concerns</b>	The recycling of capital may impact the liquidity management programme of LPs since it would mean that LPs are required to re-contribute amounts that have been distributed i.e. amounts which would otherwise not be available for investment purposes.
<b>Loss Aversion</b>	Some LPs are in principle averse to re-deploying capital that has already been subjected to the investment cycle into fresh investments as they run the risk of incurring losses.

### *Safeguards expected by LPs*

<b>Restricted Amounts</b>	LPs often insist that only certain amounts up to a certain extent will be available for recycling e.g. only amounts up to the acquisition cost of an investment that has been realised will be available for draw down.
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<b>Time Limits</b>	It is common for LPs to negotiate the timeline during which capital can be recycled e.g. recycling limited only to proceeds arising within 12 – 18 months from the acquisition of an investment.
<b>Special Situations</b>	LPs may seek to restrict recycling to specific circumstances e.g. in a “flip” transaction, where proceeds are distributed as part of a restructuring exercise with the intention of being reinvested.
<b>Aggregate Cap</b>	LPs may look to regulate recycling by imposing one of two kinds of caps: (1) a cap on the aggregate amounts that can be recycled (e.g. 25% of Total Commitments); or (2) a cap on the total amounts that can be invested by the fund (e.g. 125% of Total Commitments).

*Presenting the case for recycling*

<b>Defending the Principle</b>	The purpose behind recycling capital is to ensure that as much of the capital raised by the fund as possible is actually deployed in investments (i.e. without leakages on account of fees and other charges). Moreover, recycling provides flexibility for the fund to participate in investment opportunities that it might otherwise have to forgo.
<b>Cash Management</b>	Most LPs have a well-defined cash management strategy that anticipates distribution timelines. Recycling capital helps harmonise the actual distribution timeline with the timelines projected by LPs. Restrictions on recycling may disturb an LP’s cash management strategy.
<b>Performance Indicators</b>	A number of LPs evaluate their fund investments using the ‘multiple of money invested’ (MoM) parameter rather than on an IRR basis. Whilst a restriction on recycling may help protect IRR, it may discourage GPs from making longer-term investments that will boost the MoM.

## Distribution Waterfall

The distribution waterfall sets out the sequence and proportions in which monies are distributed between the investors and the sponsor. The overwhelming majority of sponsors investing in India have adopted a European-style waterfall where carried interest distributions are triggered only after investors have received a full return of their capital together with a preferred return. Whilst a pure US-style waterfall is unlikely to find favour with LPs investing into India-focused funds, sponsors are testing a number of ideas within the European-style template.

### *Innovations in Waterfall Structures*

<b>Staggered Catch-up</b>	Once the preferred return is distributed to the investor, amounts are distributed to both the sponsor and the investor in an agreed proportion (e.g. 50%) until the amounts received by the sponsor and the investor are in the agreed profit-sharing ratio. This gives comfort to LPs as they receive distributions at each stage of the waterfall.
<b>Investor Choice</b>	Under this structure, LPs are permitted to choose between a deal-by-deal waterfall and a whole-of-fund waterfall. The different waterfalls are usually tracked through different classes of units / interests. Sponsors may try to incentivise the deal-by-deal option by offering it with lower management fees.
<b>'Deal-by-Deal' Sleeve</b>	As LPs are likely to balk at a wholesale shift to a US-style waterfall, some sponsors have adopted a 'deal-by-deal' sleeve under which say 10% of investor commitments and distribution proceeds are tracked though a deal-by-deal waterfall.
<b>Blended Carry</b>	Investors have the option of dividing their commitment between different classes, each of which will have a separate carried interest rate. Ultimately, the carry percentage for each investor is calculated on a weighted average basis.
<b>Graded Carry</b>	Under this structure, the carried interest percentage is linked to the investor's IRR and rises as the investor's IRR crosses certain

thresholds. This structure is finding increasing favour among LPs as it reflects true alignment of interests between LPs and the sponsor.

## Clawbacks

From the very inception of the private equity fund model, LPs have been sensitive to sponsors benefitting disproportionately to investors. The idea behind a clawback is to ensure that sponsors have not been overpaid beyond the remit of the waterfall. In the event of overpayment, a sponsor is under an obligation to return distributions until the amounts distributed to the investors and the sponsor are in the agreed profit-sharing ratio.

A clawback is designed to satisfy two conditions: (1) the GP should not receive any distributions until the LPs have received a return of their capital together with a preferred return; and (2) the GP should receive no more than the agreed percentage of the post-capital profits. In the event that either of the foregoing conditions is breached, the GP must repay amounts to the fund, which in turn will be re-distributed to the LPs to the extent necessary to satisfy both conditions.

### *Types of Clawback Protection*

<b>Interim Clawback</b>	A clawback test is undertaken at one or more regular intervals during the life of the fund. To the extent that the test reveals that the GP has received carry distributions in excess of its entitlement, it will be under an obligation to repay the fund at each such interval.
<b>Escrow Reserve</b>	A percentage of all carried interest distribution that the sponsor would ordinarily be entitled to receive is reserved in an escrow account. Such amounts will either be used to meet any shortfall in the event of a clawback being triggered or will be paid out to the sponsor at the end of the life of the fund.
<b>Guarantees</b>	The ultimate carry recipients enter into a guarantee to repay carried interest distributions to the extent necessary to meet any shortfall. LPs tend to require carry recipients (particularly the more senior members in the team) to provide a guarantee on a joint and several basis for all members of the team.

## Givebacks

There may be circumstances in which the fund is required to return monies to meet a liability or an obligation. For example, a counterparty may claim against the fund for a breach of representation. If such a claim is successful and the fund has exhausted all other methods to satisfy the liability (e.g. reserves, insurance, etc.), the investors (and the sponsor) will be required to “give back” a portion of the amounts distributed to them to satisfy the liability.

### *LP Protections*

<b>Cap on Amounts</b>	LPs would expect to see a cap on the amount that they are liable to return to the fund to satisfy a giveback obligation. Depending on the outcome of negotiations, the cap may be set at a percentage of total distributions or commitments or a formula that combines both.
<b>Time Limit</b>	LPs will generally seek to exclude amounts distributed to them from the ambit of the giveback obligation a few years after the relevant amounts have been distributed. Internationally, the time limit tends to be 2 years; for most Indian funds, the time limit is set at 3 years.
<b>Scope</b>	LPs will expect giveback amounts to be utilised solely in connection with liabilities and obligations in respect of the fund as a whole (and not to address liabilities / obligations that have arisen on account of the facts and circumstances applicable to a specific investor).
<b>Reverse Order of Waterfall</b>	Notwithstanding the comfort of the clawback, investors will insist that the giveback is satisfied in accordance with the reverse order of waterfall, which would mean that a sponsor that is in the carry will typically have to return amounts in parallel with the investors.

### *Negotiating the giveback provision – GP Considerations*

<b>Rate of Distribution</b>	Giveback should be viewed as a halfway house offered by the GP to balance the interests of its LPs on the one hand and those of its investment counterparties on the other hand. The giveback provision allows the GP to return investment proceeds to its LPs
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	(rather than retain them in a reserve to meet any liabilities / obligations that may arise to the fund), thereby improving investor IRR.
Alternative to using reserves	Whilst investors will expect some cap on amounts that are subject to giveback, the GP can negotiate more headroom by demonstrating that the alternative scenario would mean that proceeds that could be distributed to investors would be held up in a reserve, which would not be in the interests of either the LPs or the GP.
Segregation of Liabilities	Not all liabilities are created equal and not all liabilities come with a short limitation period. Therefore, whilst negotiating the cap on amounts or the time limit for the giveback, the GP should carve out extraordinary liabilities such as tax liabilities.
Overlapping Caps	GPs should ensure that the giveback obligation does not overlap with any other cap agreed with investors in respect of any of the other fund terms. For example, amounts that are returned under the giveback should not be treated as fund expenses and should therefore not be included when determining whether the expense cap has been hit.

### Key Person Protections

A Key Person Event is a critical event in the life of the fund as it usually means that the team responsible for managing the investments and operations of the fund has become materially different. An investor that makes a commitment to a fund does so in large measure on the strength and quality of the fund's management team. Therefore, investors will be wary of, and will want to control, material changes to the composition of the management team.

### *Consequences of a Key Person Event*

Suspension of Investments	The first and most obvious consequence of a key person event is a suspension on new investments. When LPs commit to a fund, they do so on the strength of the management team. A material
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	alteration in the composition of the team casts doubt over this premise.
Search for replacements	Following a Key Person Event, the sponsor will typically have a certain timeline (usually 2-3 months) during which it will have to identify suitable replacements for key persons who have departed. Once identified, the relevant candidates will need to be blessed by the LPs in some form.
Termination of Commitment Period	In certain cases, LPs may have negotiated for themselves an automatic termination of the commitment period on the occurrence of a key person event or the ability to vote to terminate the commitment period.
Fee Reduction	Some LPs negotiate a step-down / waiver in the management fee rate for the duration of the period in which the key person event subsists.
'Cause' Trigger	On account of the LPs' relatively stronger bargaining power, some sponsors have had to accept the occurrence of a key person event as a trigger of 'Cause', which in turn would make it easier for LPs to remove the sponsor.

### *Negotiating the Key Person Provision – LP Considerations*

Scope of Commitment	LPs should look to ensure that the key person clause covers the relevant people in the investment / management team i.e. such persons are under an obligation to devote their attention to the affairs of the fund. Where an LP is invested in more than one fund managed by the same persons, the key person provision should cover all of such engagements.
Devotion of Time	Depending on the bargaining power of the parties, an investor may be able to negotiate a time commitment from the key persons, which may be expressed in specific numbers or alternatively in more

	general terms e.g. "majority of time", "substantial majority of time", etc.
Determination of Key Person Event	A key issue during negotiations is the manner in which the occurrence of a key person event is determined (particularly where the trigger lies in imprecise events such as not devoting sufficient time to the affairs of the fund).
Fee Reduction	If the investment programme of a fund is suspended following the occurrence of a key person event, then there are strong reasons for a step-down or even a waiver of management fee, at least for such time as the key person event subsists.
Long-term Consequences	LPs should think through the whole range of consequences that may arise on the occurrence of a key person event (including where suitable replacements are not identified) and plan accordingly. This would mean that thought should be given to various provisions including liquidation, transfer, carried interest, etc.

*Negotiating the Key Person Provision – GP Considerations*

Multiple funds	Often a sponsor will be managing more than one fund. These funds may spread across a number of investment strategies. A sponsor should therefore consider its specific facts and circumstances and ensure that its key person obligations across its various funds are not inconsistent with one another.
Consistency of obligations	As a general principle, sponsors should steer clear of agreeing bespoke key person arrangements with specific investors since a consistent key person obligation will make the obligation easier to manage.
Controlling the process	To the extent possible, the sponsor should look to retain control over the key person process including by retaining the right to initiate the process by notifying the occurrence of a key person event. Permitting investors to unilaterally call a key person event

	may have rollover implications across the funds managed by the sponsor.
<b>Avoiding shutdowns</b>	The process for replacing key persons must be drafted in a manner that prevents investors from using the key person provision to force a shutdown of the fund (by arbitrarily rejecting any replacement put forward by the sponsor).
<b>Fee Reduction</b>	A sponsor should strongly resist fee waivers / reductions for a couple of reasons: (i) the occurrence of a key person event does not release the sponsor from paying its periodic overheads; and (ii) the management team is not completely dormant in that it would still be empowered to complete follow-on investments and other binding engagements, that are carved out from the general suspension.

### No-Fault Divorce

A no-fault divorce right is a standard provision incorporated in fund documents which allows a certain percentage of investors to vote to remove the sponsor / GP without offering any reason or explanation. In practice, however, this right will only be invoked in the event of poor performance on the part of the sponsor or in pursuance of a managed restructuring exercise.

### *LP Considerations*

<b>Investor Vote</b>	As the no-fault divorce process is kickstarted by the investors, the structure of the vote becomes important. While the voting threshold is between 66.67 – 75%, a cornerstone LPs may wish to negotiate a lower threshold or retain a unilateral right to trigger a divorce. Naturally, the vote should also exclude commitments associated with the sponsor.
<b>Replacement / Liquidation</b>	Where a no-fault divorce is exercised, LPs will either need to appoint a replacement sponsor or put the fund into liquidation. Where a replacement is brought in, the investor base may expect the incoming sponsor to take some skin in the game by investing in the

	fund. These issues point to the planning that is required prior to triggering the divorce.
Haircut	Where a sponsor is removed before the end of the life of the fund, it will have to forego a portion of carried interest. The extent and structure of carried interest haircut is hotly contested at the time of fundraising. Another point to bear in mind is that the haircut structure must leave sufficient incentive for a replacement sponsor. Negotiations have yielded a number of creative solutions.

### *GP Considerations*

Reputational Damage	Although a no-fault divorce may be triggered without any reason, it implicitly points to the poor performance of a sponsor. Moreover, a no-fault divorce triggered on one fund managed by a sponsor will have spill over effects on other funds managed by the sponsor. It is therefore in the GP's interest to deter the exercise of the no-fault divorce.
Honeymoon Period	A sponsor (particularly a relatively new sponsor) should look to embargo the exercise of no-fault divorce for at least the initial few years of the fund's life so as to allow itself a sufficient period of time to establish itself. However, a relatively more seasoned sponsor managing multiple funds will find it more difficult to negotiate a honeymoon period.
Management Fee	A sponsor that is removed without cause will still need to pay its periodic overheads. In light of this, it is common for GPs to negotiate a termination fee equivalent to anything between 1-2 years' management fee.
Sponsor Commitment	A sponsor that is removed may not wish to have its capital managed by a replacement sponsor. Therefore, a GP should look to negotiate a mechanism by which it can sell its investment in the fund.

<b>Carry Haircut</b>	In a no-fault removal scenario, a GP is well within its rights to protect its carry entitlement. While most LPs insist on some form of haircut, it is not unusual for sponsors to resist these efforts. As the fund will come under new management post-removal, an outgoing sponsor should consider negotiating a first charge to secure payment of its carried interest entitlement.
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## Fiduciary Duties

Across the Commonwealth, a fiduciary relationship is understood as one in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. In an investment funds context, the sponsor stands in a fiduciary relationship with the investors as a whole and is therefore under a duty to act with the highest standard of care and in the best interests of the investors as a whole.

### *Implication of fiduciary duties in an investment funds context*

<b>Preferential Terms</b>	The most common claim for a breach of fiduciary duties is a scenario in which investors are placed on different pedestals. While it is open to a GP to offer different terms to different investors, the same requires to be effectively disclosed before the fact.
<b>Most Favoured Nations</b>	Most sponsors will agree to afford the same treatment to investors that are similarly placed. This is normally incorporated by way of a Most Favoured Nations (MFN) clause in a side letter or, more frequently, in the governing document of the fund. A failure to provide equal treatment may trigger a claim for breach of fiduciary duties.
<b>Alignment of Interests</b>	The duty of loyalty is a key fiduciary duty and therefore, an egregious misalignment of interests between LPs and the GP could trigger a claim for breach of fiduciary duties. There are various examples of misalignment including notably 'cherry-picking' of investments.
<b>Multiple Funds</b>	A seasoned institutional sponsor will typically manage a number of funds across various investment strategies. Managing multiple

	funds presents the risk that a sponsor may act in the interests of one fund at the cost of other funds. This may be unintentional or intentional (where, for example, the sponsor stands to gain more carried interest by prioritising a specific fund).
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*How can a sponsor discharge its fiduciary duties?*

Prior Disclosure	The best response to claims for breach of fiduciary duties is that the sponsor has made prior disclosure of the facts leading to such claim. For example, a disclosure that investors may be eligible for certain preferential terms may ward off a breach of fiduciary duties challenge.
Duty to investors 'as a whole'	The fiduciary duty of the sponsor is to act in the best interests of the investors as a whole. Given the diversity of the investor base, it may not be possible (or desirable) to satisfy the interests of each investor. However, the sponsor should prepare a record of how its actions and decisions are intended to benefit the investor class as a whole.
Pre-empting Conflicts	To address claims founded on disloyalty, a sponsor must identify potential conflicts of interest and describe the manner in which it proposes to address such conflicts (e.g. the issue of a sponsor managing multiple funds may be addressed through an allocation of investment policy that investors have had the opportunity to review prior to being onboarded).
Take investors into confidence	Potential conflicts may be referred to the investors (or more commonly to an investor body like the LPAC) for review and approval. Whilst this is a fairly foolproof solution, it may not be in the fund's best interests for certain issues to be referred to investors (or the LPAC) particularly where these issues relate to time-sensitive events.

### Antitrust Approval

The Competition Act, 2002 (the “**Competition Act**”) and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (the “**Combination Regulations**”) require mandatory pre-notification to, and prior approval of, the Competition Commission of India (“**CCI**”) for all domestic and international mergers, acquisitions and other types of ‘combinations’ which exceed the asset or turnover thresholds prescribed under the Competition Act (refer Annexure 2 for these thresholds). These thresholds apply to the acquirer and the target jointly, and to the group to which the target will belong after the combination in question.

The definitions of “enterprise” and “person” under the Competition Act (which regulates, inter alia, acquisitions of shares, assets, voting rights and / or control) are wide enough to include AIFs within their ambit in view of the nature of their economic activity and since an AIF can be established as a trust, company, LLP or a body corporate. In this regard, the various instances involving AIFs which may require a merger control analysis are as follows:

- a) *Setting up an AIF*: A notifiability analysis may need to be conducted at the time of setting up an AIF by a sponsor. However, this is likely to be covered under the de-minimis exemption (explained below) as the newly established AIF is unlikely to have substantial assets or turnover.
- b) *Capital commitment, and subsequent acquisition of units, by investors and sponsors*: Provided that the jurisdictional thresholds are met and the proposed transaction cannot avail of any exemption, an acquisition of the units of an AIF (either primary or secondary) could trigger a merger control filing with the CCI. Whilst an investor or the sponsor may not receive any units or voting rights or controlling rights as such at the time of making the capital commitment, it may be prudent to assess notifiability from a holistic perspective at the capital commitment stage itself considering that the actual acquisition of units and / or rights in the AIF will inevitably follow. The two steps (viz. making of a capital commitment and the subsequent acquisition of the units) are likely to be treated as inter-connected transactions under regulation 9(4) of the Combination Regulations, which requires parties to file a composite notice (covering all transactions) where the ultimate intended effect of

a business transaction is achieved by way of a series of steps or individual transactions that are inter-connected.

- c) *Downstream acquisitions by the AIF*: A downstream acquisition by an AIF (either primary or secondary) could trigger a merger control filing if the jurisdictional thresholds are met and the transaction cannot avail of any exemption.

The notifiability events mentioned above are not exhaustive and the merger control analysis would vary from case to case. For instance, the analysis could vary in the event an investor makes an investment in the manager / sponsor (or the trustee) and in such case, the transaction would have to be analysed in conjunction with the instances described at (b) and (c) above. Moreover, a buyout of the sponsor is also likely to require a merger control analysis as a new sponsor would acquire control over the AIF.

### Exemptions

There are certain standard exemptions provided by the CCI under Schedule I to the Combination Regulations (refer Annexure 3) and other notifications. Notably, the Government through a notification has prescribed that any transaction where the target has assets not exceeding INR 350 crore (approx. USD 50 million) in India, or has a turnover not exceeding INR 1,000 crore (approx. USD 140 million) in India, is exempt from the mandatory pre-approval merger filing ("**Target Exemption**").

In addition, if the Target Exemption cannot be availed of, investors can explore the possibility of availing other exemptions mentioned under Annexure 2. One such exemption is for minority acquisitions below 25% made "solely as an investment" or "in the ordinary course of business", which do not lead to any acquisition of control. Accordingly, if a potential AIF unit holder does not get controlling rights in an AIF or in the manager / sponsor (or the trustee), then it is likely that the acquisition of less than 25% of units of an AIF could be considered to be a simple investment and, therefore, eligible for the item 1 exemption under Schedule I to the Combination Regulations mentioned at Annexure 2. However, in the event it becomes possible for an investor (i.e. a unitholder) to negotiate and obtain rights that are not available to "ordinary" unit holders, or an investor proposes to acquire "control" over the AIF or the manager / sponsor (or the trustee), then such an acquisition might trigger a merger filing regardless of the number of units proposed to be acquired.

It must be noted that the notifiability of such acquisitions still needs to be tested and further developed. Accordingly, the transaction has to be viewed holistically and several factors

have to be examined closely before arriving at a conclusion, including investments into the AIF by the investors (even at the capital commitment stage), the nature of special / veto rights being obtained by the investors, and the nature of control exercised by the investors in the AIF.

## I. Key International Regulatory and Tax Considerations

Fundraising is a global activity that implicates rules and regulations in various jurisdictions. Some of these come into play in connection with the marketing of interests in a fund to investors resident or domiciled in various jurisdictions whilst others become relevant in connection with the operations of the fund (but which need to be anticipated at the time of the fundraise). A detailed discussion of foreign laws and regulations applicable to private funds is beyond the scope of this paper. However, a summary of some of the key regulatory and tax considerations in the context of India focussed funds is set out below.

### Private Placement in the United States

To avoid triggering the onerous registration requirement under the U.S. Securities Act of 1933 (the "**Securities Act**"), interests in a private fund need to be offered and sold on a private placement basis. For India-focused funds, this is ordinarily accomplished by relying on the exemption from registration in Rule 506(b) of Regulation D of the Securities Act (and in some recent cases, under section 4(a)(2) of the Securities Act). Rule 506(b), which is most commonly relied on, permits an offering of interests to an unlimited number of "accredited investors" (as defined in Rule 501(a) of Regulation D) and up to 35 non-accredited sophisticated investors but prohibits the use of general solicitation. Where a fund relies on Rule 506 to make its offering, it is required to make a Form D filing no later than 15 days following the first sale of interests.

### Exemption from Registration of the Fund in the United States

A fund may be required to register itself with the regulator in the jurisdiction in which it has been established. Depending on the jurisdiction and the regime under which the fund is established, interaction with the regulator may not be frequent or extensive.

In the United States, an issuer of securities that is engaged, or which holds itself out as being engaged, in the business of investing or trading in securities will be required to register under the Investment Company Act of 1940 (the "**40 Act**") unless it can avail itself of an exemption. The most relevant exemptions for India-focused funds are the ones set out in sections 3(c)(7) and 3(c)(1) of the 40 Act. The section 3(c)(1) exemption is available where interests in the fund are not beneficially owned by more than 100 persons. The section 3(c)(7) exemption is available where interests in the fund are sold exclusively to "qualified

purchasers". Both exemptions are available only when the fund is not making a public offering of securities. The '100 persons test' under section 3(c)(1) and the 'qualified purchasers' test under section 3(c)(7) are only applied to investors resident in the United States (and not more generally to the fund' investor base).

### Registration of Investment Managers in the United States

In the United States, investment advisers (i.e. persons providing investment advice for some form of compensation) must register with the Securities and Exchange Commission pursuant to the U.S. Investment Advisers Act of 1940 (the "**Advisers Act**"). Generally, non-U.S. investment managers are not required to register under the Advisers Act. However, they may be required to make certain filings as 'exempt reporting advisers'. The most common exemptions available to non-U.S. investment managers are the "foreign private adviser exemption" and the "private fund adviser exemption".

The 'foreign private adviser exemption' applies to investment managers that do not have a place of business in the U.S. and that have fewer than 15 U.S. clients with less than USD 25 million of assets under management attributable to such U.S. clients.

The 'private fund adviser exemption' applies to both U.S. and non-U.S. managers. In the case of managers whose principal place of business is outside the United States, the exemption would apply if the manager has no advisory clients who are U.S. persons other than private funds and it manages less than USD 150 million in assets at a place of business in the United States.

### Certain U.S. Tax Issues

The principal fund vehicle is generally classified as a partnership for U.S. federal income tax purposes. U.S. tax exempt investors often constitute a major chunk of commitments raised from the United States. These include university endowments, charities, pension plans, etc. Although such entities are tax exempt, they remain subject to U.S. federal income tax on UBTI i.e. unrelated business taxable income. This could arise, for example, where management fee payable by investors is reduced by the amount of other fees (such as portfolio monitoring fees, director fees, etc.) received by the fund or the manager. Non-U.S. persons are subject to U.S. federal income tax on ECI i.e. income effectively connected with the conduct of a trade or business in the United States. Whilst some sponsors are able to deal with these issues by providing simple covenants to avoid UBTI / ECI, it is increasingly common for sponsors to offer investors the option to invest through a U.S. blocker (i.e. an

entity that elects to be treated as a corporation for U.S. federal income tax purposes) as a protection from UBTI / ECI.

### ERISA

Unless an investment fund operates under an exemption from ERISA, the presence of ERISA investors could subject a fund and the sponsor to extensive regulation and compliance requirements. The most common exemptions from the perspective of India-focused funds are the 25% exemption and the VCOC exemption. The 25% exemption applies where ERISA investors in the fund constitute less than 25% of the total commitments in the fund. In order for the VCOC (venture capital operating company) exemption to apply, the fund will need to negotiate “management rights” with respect to a majority of its portfolio companies. Such rights would include the ability to appoint directors to the board of a portfolio company, the right to receive financial statements and inspect the books of a portfolio company, etc. As these rights have become customary in most deals, it is likely that most India focused funds would satisfy this requirement as a matter of course.

### GDPR

The European Union’s Global Data Protection Regulation (“**GDPR**”) becomes relevant whenever a fund seeks to raise capital from investors in the EU. Pursuant to GDPR, sponsors are only permitted to process personal information for limited purposes and are restricted from making unauthorised use of such information. The GDPR also governs the flow of information outside the EU. A number of other jurisdictions have also enacted data protection legislation along the lines of the GDPR. Sponsors will need to comply with such legislation to the extent they are engaged in fundraising in such jurisdictions.

### AIFMD

The European Union’s Alternative Investment Fund Managers Directive (“**AIFMD**”) lays down a standardised regulatory framework for fund managers in the EU. The AIFMD will come into play if the fund and / or the fund manager is established in the EU or even if a fund set up outside the EU is raising capital from investors in the EU. Most India-focused funds will be set up outside the EU (and their fund managers will similarly be set up outside the EU). Such funds will have to comply with the national private placement regime(s) in the jurisdiction(s) from which it intends to raise capital. This will ordinarily involve making a marketing notification or obtaining a marketing licence.

## ANNEXURE 1

List of sectors in which an FVCI is allowed to invest is as follows:

1. Biotechnology
2. IT related to hardware and software development
3. Nanotechnology
4. Seed research and development
5. Research and development of new chemical entities in pharmaceutical sector
6. Dairy industry
7. Poultry industry
8. Production of biofuels
9. Hotel-cum-convention centres with seating capacity of more than three thousand
10. Infrastructure sector (*The term "Infrastructure Sector" has the same meaning as given in the Harmonised Master List of Infrastructure sub-sectors approved by Government of India vide notification F. No. 13/06/2009- INF, dated the March 27, 2012 as amended or updated.*)

## ANNEXURE 2

### Competition Act – CCI Notification Thresholds

INDIA	Assets		Turnover
Either acquirer or target or both have:	INR 20 billion (~ USD 265 million)	Or	INR 60 billion (~ USD 800 million)
Group to which the target will belong has:	INR 80 billion (~ USD 1.1 billion)	Or	INR 240 billion (~ USD 3.2 billion)
WORLDWIDE	Assets		Turnover
Either acquirer or target or both have:	USD 1 billion with at least INR 10 billion (~ USD 133 million) in India	Or	USD 3 billion with at least INR 30 billion (~ USD 400 million) in India
Group to which the target will belong has:	USD 4 billion with at least INR 10 billion (~ USD 133 million) in India	Or	USD 12 billion with at least INR 30 billion (~ USD 400 million) in India

## ANNEXURE 3

### Schedule 1 of the Combination Regulations

- (1) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub clause (ii) of clause (a) of section 5 of the Act, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold twenty five per cent (25%) or more of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a shareholders' agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.

Explanation: The acquisition of less than ten per cent of the total shares or voting rights of an enterprise shall be treated as solely as an investment:

Provided that in relation to the said acquisition:

- (A) the Acquirer has ability to exercise only such rights that are exercisable by the ordinary shareholders of the enterprise whose shares or voting rights are being acquired to the extent of their respective shareholding; and
- (B) the Acquirer is not a member of the board of directors of the enterprise whose shares or voting rights are being acquired and does not have a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired and does not intend to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired.
- (1A) An acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, where the acquirer or its group, prior to acquisition, already holds twenty five per cent (25%) or more shares or voting rights of the enterprise, but does not hold fifty per cent (50%) or more of the shares or voting rights of the enterprise, either prior to or after such acquisition:

Provided that such acquisition does not result in acquisition of sole or joint control of such enterprise by the acquirer or its group.

- (2) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, where the acquirer, prior to acquisition, has fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control.
- (3) An acquisition of assets, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.
- (4) An amended or renewed tender offer where a notice to the Commission has been filed by the party making the offer, prior to such amendment or renewal of the offer:

Provided that the compliance with regulation 16 relating to intimation of any change is duly made.

- (5) An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business.
- (6) An acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or buy back of shares or subscription to rights issue of shares, not leading to acquisition of control.
- (7) Any acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be.

- (8) An acquisition of shares or voting rights or assets, by one person or enterprise, of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group.
- (9) A merger or amalgamation of two enterprises where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held by enterprise(s) within the same group:

Provided that the transaction does not result in transfer from joint control to sole control.

- (10) Acquisition of shares, control, voting rights or assets by a purchaser approved by the Commission pursuant to and in accordance with its order under section 31 of the Act.

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Adhitya focuses his practice on the structuring and negotiation of private funds, managed accounts and other investment platforms, representation of LPs in bespoke transactions and advising sponsors on governance and fiduciary issues. He has acted for sponsors in India, the U.K. and the E.U. and is conversant with the various economic and governance issues that are hotly contested during the fundraising process and is familiar with a range of asset classes. He has experience dealing with secondaries transactions and has regularly advised on co-investment deals.

Adhitya holds degrees in law from the National Law Institute University, Bhopal and Harvard Law School. He is a dual-qualified lawyer admitted to practise in India and England. Prior to his return to India, he worked in London as an associate at Herbert Smith Freehills LLP and more recently at Simpson Thacher & Bartlett LLP.

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Dhairya graduated in 2020 and is one of the youngest members of the team working closely with the private equity, structured finance and fund formation teams at the firm. He has been a passionate mooter, played on the National Amateur Level Golf Circuit of India and founded ED Times, one of India's leading youth media publications during his initial college years.

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Gaurav is a qualified lawyer and company secretary. After completing his LLM from Kings College, London, Gaurav joined the firm in 2006. He has represented large institutional investors on marquee transactions in the fund formation space, including a GCC sovereign wealth fund in its USD 1bn investment into NIIF and USD 500mn investment into Kotak Special Situations Fund, and Roadis' (PSP) USD 2bn investment platform with NIIF.

Gaurav has been involved in advising a number of international strategic investors and institutional investors such as leading sovereign wealth fund, BP, Tencent and General Dynamics, CDPQ, Siemens, Anheuser-Busch InBev and Porsche on a range of corporate and anti-trust matters. Gaurav has been involved in the filing of the country's first two "long form" notifications and one of the first "green channel" notifications with the Competition Commission of India.

Gaurav has been consistently ranked as a leading lawyer for Corporate M&A by Chambers & Partners. In recognition of his contribution on some of the largest cutting-edge antitrust matters, Gaurav has also been nominated into the high profile list of "Future Leaders" by Who's Who Legal (2019).

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Ruchir heads the Mumbai office of the firm and advises on private and public equity investments, M&A, structured finance, and fund formation from a legal, regulatory and cross-border tax perspective. He advises leading sponsors, institutional investors, and SWFs in their investments across asset classes with a focus on financial services (BFSI), infrastructure, and real estate sectors. He has advised on some of the largest investment and acquisition transactions as well as on the setup of asset-specific tax optimized investment platforms and managed accounts. Ruchir joined the firm in November 2020 from another established firm where he acted for large institutional investors such as GIC Singapore, Brookfield and Investcorp on public and private transactions across asset classes exceeding USD 5 billion in deal value in 2019 alone.

With over 15 years of experience, Ruchir actively contributes to policy advocacy for private equity and structured finance through leading investor bodies. Ruchir is rated for Corporate M&A and Private Equity as a 'Distinguished Practitioner' (Asialaw, 2021) and a 'Notable Practitioner' (IFLR 1000, 2020). He was nominated as 'Deal Maker of the Year 2019' by Thomson Reuters- Asian Legal Business, 2019 and amongst top 3 corporate lawyers in India (under 35 category) by IDEX Legal. He is also recognised by Financial Times, London for several of his transactions being "Most Innovative".

Shreyas Bhushan

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Shreyas Bhushan is a senior member with the Mumbai office of the firm. His practice entails advising on cross-border PE, M&A and Structured Finance transactions from a legal, strategic and tax perspective. Shreyas has represented leading global funds and corporate houses on a broad range of corporate transactions including PIPE deals, tender offers and take-private transactions, asset and business acquisitions, mezzanine financings and corporate governance issues. Shreyas' practice spans across a wide range of industries, with strong focus on the financial services, TMT, infrastructure and real asset verticals.

Shreyas joined the firm in November 2020 from another established firm where he was involved in setting up of Investcorp's private equity and real estate business in India, and several InvITs including GIC-IRB InvIT (India's first and only unlisted InvIT, with an EV of USD 3.1bn). He also represented GIC in their investment into the Reliance-Tower InvIT alongside Brookfield and BCI (USD 3.3bn). He is also involved in policy advocacy initiatives through industry associations, and regularly provides recommendations to SEBI and RBI on the workability of existing and proposed legislations.



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