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POLICY PAPER

Governance of Fractional Ownership Platforms

Are REITS the Right Answer?

August 2023

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Are REITs The Right Answer?

August 2023

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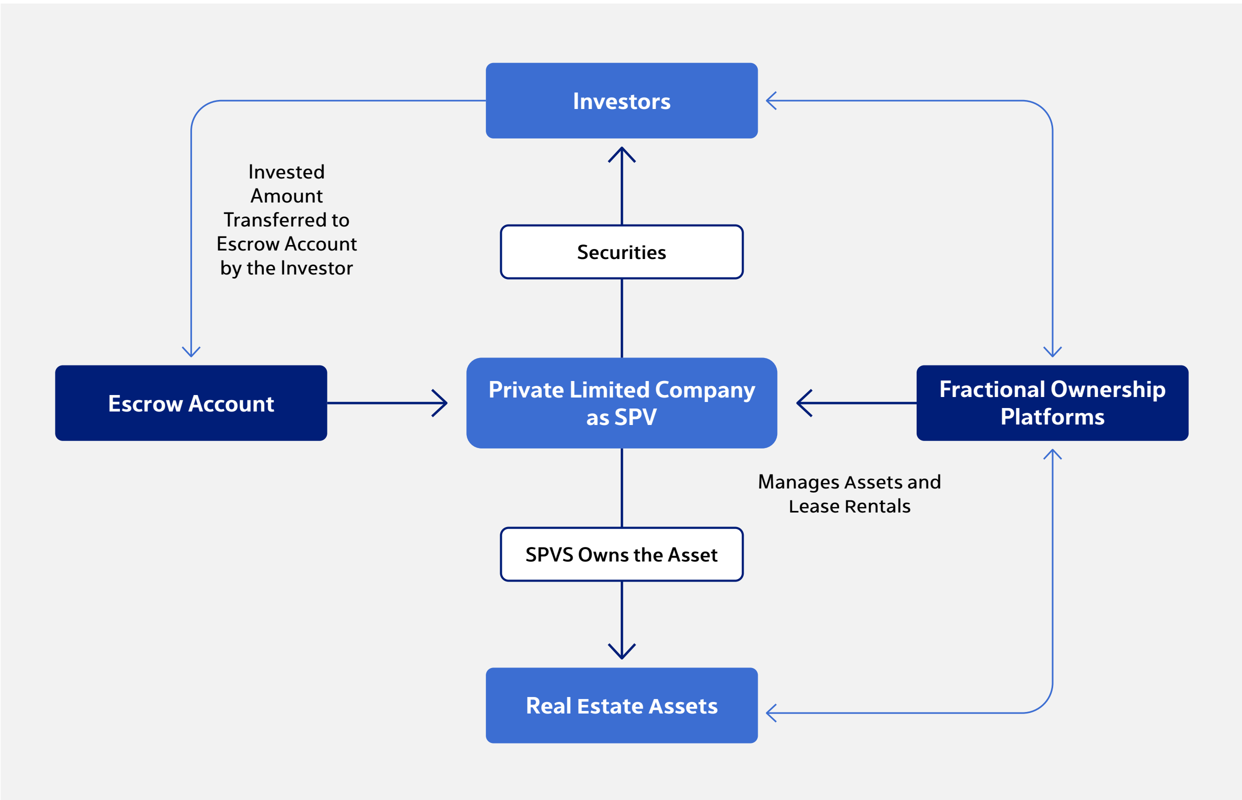
Real Estate Investments Through Fractional Ownership Platform

In the last few years, India has witnessed an emergence of web-based platforms that provide investors an opportunity to invest in real estate assets, such as buildings and office spaces, including warehouses, shopping centres, conference centres, etc., in exchange for fractional ownership in these real estate assets. Usually, the investors are required to invest an amount ranging from INR 10,00,000 (Indian Rupees Ten Lakhs) to INR 25,00,000 (Indian Rupees Twenty Five Lakhs) on these platforms, popularly known as, fractional ownership platforms (“**FOPs**”). The strategy generally adopted by these FOPs is that the investors subscribe to the securities of a special purpose vehicle (“**SPV**”) established by the FOPs, which in turn purchases the actual real estate asset. Through this approach, the cost of acquisition of any identified real estate is split among several investors.

In simple words, FOP provides a group of people an opportunity to pool in money and jointly purchase real estate assets. The FOP mechanism reduces the financial burden of a single investor and also helps an investor to increase his portfolio by letting the investor invest in several properties at the same time. Some of the eminent FOPs in India are Prop Share, Hbits, Strataprop, Asset Monk and Myre Capital, amongst others.

The structure of an FOP is provided below:[1]



In the above illustration, the SPV issues unlisted securities to the Investors.

1 SEBI, Regulatory Framework For Micro, Small & Medium REITs (MSM REITs), May 12, 2023, pg 15, available at: https://www.sebi.gov.in/reports-and-statistics/reports/may-2023/regulatory-framework-for-micro-small-and-medium-reits-msm-reits-_71149.html.

SEBI'S Take on FOPs

Recently, the Securities and Exchange Board of India ("**SEBI**") released a consultation paper titled 'Regulatory Framework For Micro, Small & Medium REITs (MSM REITs)' ("**Consultation Paper**").[2] The Consultation Paper proposes to govern the FOPs by bringing the same under the ambit of the SEBI (Real Estate Investment Trusts) Regulations, 2014 ("**REIT Regulations**") by introducing a new chapter on Micro, Small and Medium Real Estate Investment Trusts ("**MSM REITs**"). SEBI has suggested that the need to govern the FOPs originates from the fact that FOPs do not provide adequate protection to the investors and may violate the norms of the Companies Act, 2013, Prevention of Money Laundering Act, 2022 and other laws. Below are the major reasons highlighted by the SEBI for governing the FOPs: [3]

1. **Failure to obtain registration under Real Estate (Regulation and Development) Act, 2016 ("RERA"):** The FOPs do not register themselves as real estate agents under RERA, even though they act as real estate agents or property managers.
2. **Deemed Public Issuance of Securities:** There is a possibility that the SPVs, incorporated as a private limited company by the FOPs in most cases, may breach the maximum number of shareholders permitted for a private company as per the Companies Act, 2013 ("**Companies Act**"), i.e. 200 shareholders. Hence, this may violate the provisions under the Companies Act and other applicable laws.
3. **Lack of Exit Mechanism:** The investors are dependent on FOPs for necessary information regarding exit or liquidation of such fractional investment.
4. **No KYC / Compliance with PMLA:** Lack of compliance with the Prevention of Money Laundering Act, 2022 ("**PMLA**") or KYC requirements due to FOPs not being under the purview of any financial sector regulator purview.
5. **Lack of Transparency and Disclosure of Necessary Information:** Lack of transparency and disclosure of necessary information to an investor may lead to losses to the investor due to misselling, sale of real estate assets/securities of the SPVs without knowing the correct value, etc.

In view of the above, SEBI wants to regulate the FOPs to bring uniformity in disclosures and take steps toward investors' protection. However, most of the reasons suggested by SEBI are based on certain assumptions which may not be correct at this juncture. For instance, (a) if the FOPs are breaching the provisions of the Companies Act, RERA or PMLA, there are penal provisions in the respective legislations for such breaches, (b) exit mechanisms are usually well defined in the relevant contracts entered into between the investors and the SPVs, and (c) as the investors are shareholders in the SPVs they have the rights, including information rights provided to a shareholder under the Companies Act, in addition to the rights which may be contractually provided to such investors by the SPV. On the other hand, there are major benefits to the investors, if the FOPs are regulated as MSM REITs. The most important ones are (x) the obligation of FOPs akin to a sponsor to hold at least 15% (fifteen percent) of units in the MSM REITs, and (y) the obligation of sponsors to provide an exit to the investors.

To appropriately understand the impact of the proposed MSM REITs regulations and the expected advantages/disadvantages to the investors and FOPs, the paper has contrasted the same with existing REIT Regulations and the present model of FOPs.

2 Ibid.

3 Page 11 and 12, Consultation Paper.

REIT Regulations Vis-à-vis the MSM REIT Regulations

I. Structure of REITs

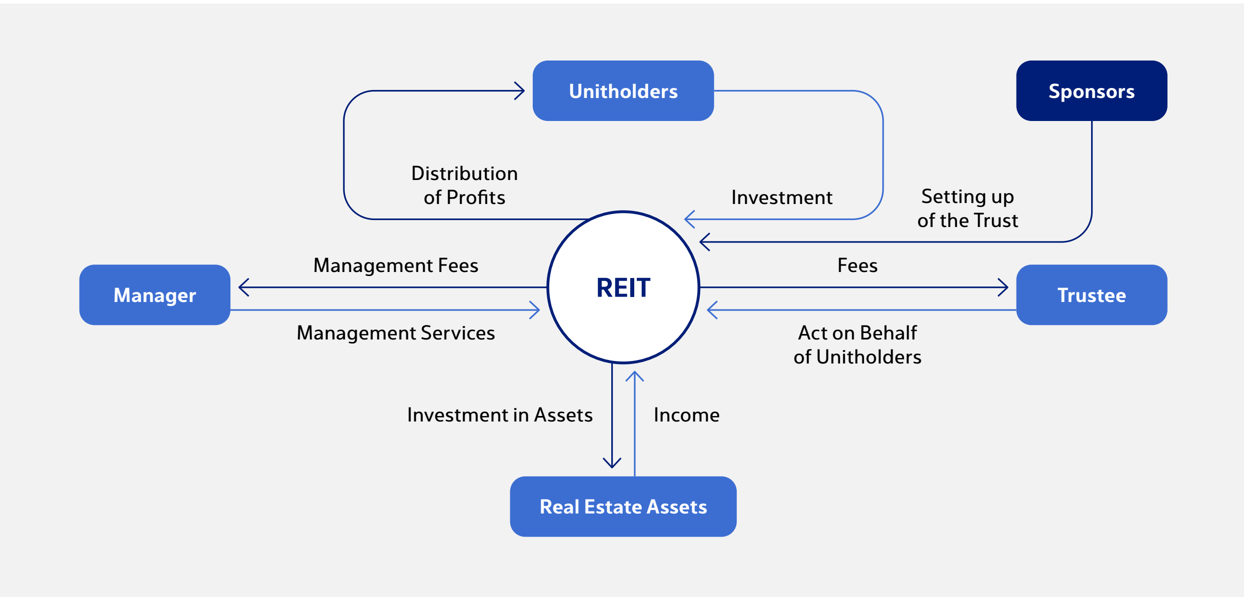
A REIT is essentially a pool of real estate assets[1] that are structured similar to a mutual fund and has the potential to provide consistent income to investors by giving the investors the opportunity to invest in real estate properties without having to actually own the properties themselves. The money invested by the investors in REITs is utilized for further investment into income or revenue-generating real estate projects like hotels, hospitals, convention centers, composite real estate projects, etc.

The REIT Regulations provide for the regulatory regime surrounding REITs, including the registration process, the eligibility criteria for all the parties to a REIT and other requirements related to listing and trading of units of a REIT. REITs have a similar structure to that of mutual funds with a sponsor, fund management company, and trustee. The sponsor promotes the REIT with its funds, and the fund management company selects and buys properties for the portfolio. The trustee ensures that the funds collected are utilized and managed, keeping the investor's interest in mind. Through REITs, investors gain by earning regular income in the form of dividends and can also diversify their investment portfolio.

REITs are typically listed on the stock exchanges through an Initial Public Offer ("**IPO**"). The units are traded on the equity cash segment on the stock exchanges like any other equity instrument. Once listed, they serve as permanent capital vehicles to raise debt and equity in the capital markets to acquire new assets to grow.

The below diagram represents the structure of a REIT.

Structure of a REIT



1 Section 2(zi), REIT Regulations provides that for the purposes of the REIT Regulations, 'real estate' includes land and any permanently attached improvements to it whether leasehold or freehold but excludes mortgage. Assets falling under the purview of 'infrastructure' are not considered as 'real estate' for the purposes of the REIT Regulations, though exceptions have been made with respect to (i) hotels, hospitals and convention centers forming part of composite real estate projects, whether rent generating or income generating; and (ii) common infrastructure for composite real estate projects, industrial parks and special economic zones.

It is noteworthy that despite there being immense potential in real estate investment, it has been observed that the primary reason for the lesser number of REITs in India may be attributed to the requirement of the minimum asset size of INR 500,00,00,000 (Indian Rupees Five Hundred Crores) and minimum offer size of INR 250,00,00,000 (Indian Rupees Two Hundred and Fifty Crores), as envisaged in the REIT Regulations. Hence, SEBI has decided to introduce MSM REITs into the REIT Regulation as a middle ground to cater to the needs of investors who are willing to invest in real estate assets but with a lower initial investment.

II. MSM REITs: Old Wine in a New Bottle?

Although the Consultation Paper majorly focuses on the regulation of FOPs by bringing them under the ambit of MSM REITs to promote investments by small investors, several significant changes have been introduced to the existing REIT Regulations to suit them to MSM REITs. There is no doubt that the MSM REITs will lead to more transparency, predicted firm regulation of the MSM REITs and additional benefits to the investors, but the same needs to be tested from the perspective of the feasibility of the business model as well.

a. Structure of MSM REITs and eligibility of parties: SEBI has proposed the MSM REIT be set up as a trust under the Indian Trusts Act, 1882, with its main objectives clearly specified under the trust deed as is the case with REITs. Further, similar to the REITs, MSM REITs shall have parties such as trustee, sponsor and investment manager.

   The sponsor will be required to have a net worth of at least INR 20,00,00,000 (Indian Rupees Twenty Crores) and at least 5 (five) years of experience in the real estate industry as either a developer or a fund manager. Further, the sponsor will be required to hold at least 15% (fifteen percent) of the total units of the MSM REIT for each scheme for a period of at least 3 (three) years from the date of listing of such units of such scheme pursuant to initial offer on a post-issue basis. The investment manager of the MSM REIT will be required to have a net worth of at least INR 10,00,00,000 (Indian Rupees Ten Crores)[2] and shall have an experience of minimum 5 (five) years' experience in find management in real estate industry or advisory services in the real estate industry or property management in the real estate industry or in development of real estate. In addition to these requirements, the Consultation Paper provides requirements for the unit holders, trustee, investment manager, and sponsor. These requirements are similar to the requirements applicable to the REITs under the REIT Regulations.[3]

   While mandatory unitholding of 15% (fifteen percent) for 3 (three) years by the sponsor of MSM REITs can be seen as a welcome move, this will give comfort to the investors that the party establishing the MSM REIT will have skin in the game and will work for the betterment of the scheme. However, as the FOPs primary business model is finding rent-yielding real estate projects and earn profits, the eligibility criteria for the sponsor and investment managers do not fit in properly, especially when looked at from the perspective of experience in the real estate industry.

b. Registration and KYC Requirements: SEBI has proposed the requirement of the existing FOPs to register themselves with SEBI as an MSM REIT along with fulfilling an eligibility criterion specified by the regulator. Non-fulfillment of such eligibility criteria shall lead to FOPs' operations being wound up. The MSM REIT will be required to hold 100% (one hundred percent) equity share capital in all the SPVs, which is much stricter when compared to 26% (twenty-six percent) threshold for REITs under the REIT Regulations.

2 Para 7.1.5.10., Consultation Paper.

3 Para 7.1.5., Consultation Paper.

Further, SEBI is also considering a KYC process[4] for FOPs that are to be registered under the MSM REIT Regulations in order to ensure transparency, which was lacking in the previous REIT regulations.

c. Number of Investors and Minimum Investment: Additionally, the regulator is also looking at bringing down the artificial limitations on the number of investors from 200 (two hundred) investors in case of REITs to 20 (twenty) in case of MSM REITs. This would allow more participation in the FOPs. Under the MSM REITs, the minimum ticket price is proposed at INR 10,00,000 (Indian Rupees Ten Lakhs).[5]

d. Distribution of income: Unlike the existing REITs which are required to distribute 90% (ninety per cent) of their net distributable cash flows to the investors, MSM REITs shall ensure that a minimum of 95% (ninety five per cent) of the net distributable cash flows shall be distributed and, 100% (one hundred per cent) of the cash flow of the MSM REIT shall be distributed to the scheme-wise unit holders.[6]

e. Exit Option to Unitholders: Further, unitholders can only sell their units on the stock exchange or in case an exit option is provided to them in situations of dissent towards resolutions such as a change in control of the investment, etc. A major reason for exit option to be provided to the unitholders is if the person/entity registering the REIT does not pass the eligibility process notified by SEBI.[7]

f. Taxation benefits: The Consultation Paper aims to bring the FOPs under the purview of the tax regulations applicable to REITs, who under the existing regime fall under the purview of a business trust.[8] Under the existing regime, the distribution of interest income, dividend income from the SPVs and rental income, by the REITs are usually exempt from taxes in the hands of the REITs, provided that the SPV has not opted for a concessional tax system. Except for the rental income, interest income, and dividend income, which are taxable in the hands of the unit holders, no other distributions received by the unit holders from the REIT are taxable in the hands of unit holders. However, with the introduction of section 56(2)(xii) vide Finance Act 2023, specified sums received (not in the nature of interest, dividend or rental income, or chargeable at the level of the REIT) will be taxable in the hands of unit holders[9] as income from other sources.

A comparative analysis of the MSM REITs and REITs is provided below:

Sr. No	Particulars	REITs	MSM REITs
1	**Registration**	Mandated but no KYC was required.	Mandatory registration with KYC requirements.
2	**Initial Offer of Units**	Within 3 years of registration.	No timelines outlined.
3	**Sponsor Criteria**	Minimum 5 years of experience in the real estate sector. For developers — 2 projects (minimum) to be completed.	Minimum 5 years of experience in the real estate sector.

4 Para 8.1.1., Consultation Paper.

5 Para 7.1.5.32., Consultation Paper.

6 Para 7.1.5.28., Consultation Paper.

7 Point 7.1.5.34., Consultation Paper.

8 Section 10 of Income Tax Act, 1961.

9 Effective April 01, 2024.

REIT Regulations Vis-à-vis the MSM REIT Regulations

Sr. No	Particulars	REITs	MSM REITs
4	**Manager Criteria**	Minimum 5 years of experience in the real estate sector. For developers — 2 projects (minimum) to be completed. Minimum net worth — INR 100 crores. Individual net worth (sponsor) — INR 20 crore. No mention of holding of liquid net worth in this case.	Minimum 5 years of experience in the real estate sector. Minimum net worth (sponsor) — INR 20 crores. Out of the specified limit, an amount of INR 10 crores shall be in the form of positive liquid net worth.
5	**Debt raising**	Can raise external debt.	No external debt allowed to be raised.
6	**Asset Ownership**	The ultimate holding interest of the REIT in the underlying SPV(s) is not less than 26%.	MSM REITs shall hold 100% ownership of its SPVs.
7	**Asset holding criteria**	At least 80% of the value of the REIT assets shall be invested into complete and revenue-generating properties. (The balance 20% may be invested in underdeveloped properties and other specified securities).	It is to be noted that the proposed regulations specifically state that the schemes of MSM REIT shall NOT be allowed to invest in under construction or non-rent generating property because 95% is required to be invested in complete and revenue generating property; the remaining 5% in liquid assets.
8	**Exit to unitholders**	No binding obligation to provide exit.	Exit opportunity to the existing investors, who are not desirous of continuing under the MSM REIT scheme, shares to be acquired at fair value by the sponsor.
9	**Scheme**	REITs are not allowed to float any scheme.	MSM REIT can float multiple schemes.

Impact of MSM REITs

As explained by SEBI, the introduction of MSM REITs under the REIT Regulations will have a positive impact on the FOPs. The net worth and deposit requirements for sponsors and managers will guarantee the platforms' financial stability. As a result, the number of artificial investors and the use of SPVs will be eradicated, thus allowing for more participation in FOPs. Further, the listing of FOP units on stock exchanges will address investor grievances and will allow robust risk management, fair pricing, guaranteed settlement, liquidity, and exit opportunities to investors.[1]

While the MSM REITs scheme will have certain positive impacts, it also has certain negative impacts, hence, a majority of the industry players have opposed the introduction of the MSM REITs.[2] The FOPs are not very confident of being under the ambit of the regulations proposed under the Consultation Paper. The MSM REIT schemes are not able to raise debt funding which has become a prominent issue for the investors involved in the process. This as a result will restrict the SPV's ability to access capital. Further, in the case of regular REITs, it has happened very recently that the regulator has allowed them to raise funds through the issue of commercial papers.[3] Another concern in line for investors is the ownership of assets. While existing REITs can own about 20% (twenty percent) of under-construction assets, MSM REITs can hold only rent-yielding assets. These built-to-suit assets should be allowed as those facilities give consistent rent and are already under the RERA regulations.[4]

Further, the minimum net worth subscribed by SEBI for sponsors and investment managers for the investment manager may act as entry barriers for major fintech players who are seeking to offer such products as either sponsors or investment managers.

In addition to the aforesaid issues, the present model under which the FOPs have been operating provides much more flexibility to the FOPs as well as takes care of investors' interests as well. The table below sets out in brief, the key differences between the FOP model and the MSM REIT model:

Sr. No	Particulars	Existing FOP Model	MSM REIT Model
1	**Regulations**	Real Estate (Regulation and Development) Act, 2016 (only certain FOPs); and Companies Act, 2013	MSM REIT Regulations
2	**Recognition of investors**	Recognised as shareholders and/or debenture holders	Recognised as unitholders
3	**Nature of the FOP**	Private Limited Company under the Companies Act, 2013	Set up as a trust under the Indian Trusts Act, 1882 and registered under the Registration Act, 1908

1 SEBI Considers Regulating Fractional Ownership Platform For Real Estate Investment, Outlook Money, May 15, 2023, available at https://www.outlookindia.com/business/sebi-considers-regulating-fractional-ownership-platform-for-real-estate-investment-news-286438.

2 Janaki Krishnan, 'Not feasible'. Fractional ownership platforms unhappy with SEBI's REIT proposal, the Hindu Business Line, June 10, 2023 Available at https://www.thehindubusinessline.com/news/real-estate/sebi-reit-proposal-putting-money-on-the-table-unviable-say-fractional-ownership-platforms/article66950253.ece.

3 Sebi permits REITs, InvITs to issue commercial papers, The Economic Times, September 22, 2023, available at https://economictimes.indiatimes.com/markets/stocks/news/sebi-permits-reits-invits-to-issue-commercial-papers/articleshow/94380606.cms?from=mdr.

4 Supra note 14.

Sr. No	Particulars	Existing FOP Model	MSM REIT Model
4	**Value of assets to be owned**	No prescribed limit	Minimum INR 20 crores
5	**Experience in Real Estate Industry**	Not required.	Sponsors and Investment Managers are required to have experience in real estate industry.
6	**Holding period of shares/units**	No prescribed time period for holding shares/securities by the promoters of the FOPs or by FOPs in the SPVs.	Minimum 3 years holding period for the Sponsors and atleast 15% of units to be held.
7	**Maximum Shareholding for person other than promoter/ sponsor**	No such criteria.	Any person other than Sponsor cannot hold more than 25% of units along with its affiliates.
8	**Minimum number of shareholders/ unitholders**	2 shareholders as per the Companies Act	Minimum twenty investors that are unrelated to the Sponsor
9	**Limitation on the maximum number of shareholders/ unitholders**	Maximum 200 investors	No maximum threshold
10	**Minimum Initial Investment for the acquisition of real estate asset**	No such criteria.	The size of initial offer of a scheme should be at least INR 25 crores and should not exceed INR 499 crores.

It can be concluded that the introduction of the MSM REITs is a good step on part of SEBI to protect the interests of the investors. However, it comes along with a very strict set of norms that may affect the industry and players may consider opting out of the FOP business altogether, which is definitely not the desired result from either SEBI's or the FOPs' perspective. Currently, there are minimal restrictions on the FOPs and with the introduction of the regulations to govern MSM REITs, the FOPs will go from being barely regulated to being highly regulated with several restrictions. It is yet to be seen if firstly, this Consultation Paper is adopted at all by SEBI and if, secondly, it receives positive feedback from the public.

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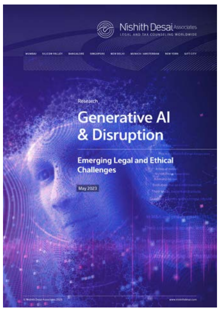

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