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## Regulating Investment Vehicles in India: A Comparative and Judicial Analysis of REITs, InvITs, and AIFs

Author  
Nandini Bahl



# Regulating Investment Vehicles in India: A Comparative and Judicial Analysis of REITs, InvITs, and AIFs

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## **Abstract**

*The real estate industry has been an essential component in the expansion of the Indian economy as a whole, just as it has been in other parts of the world during the same time period. A wide range of investment instruments have been developed by the government of India throughout the course of the past three decades, ever since the privatization of the Indian economy in 1991. These instruments have been designed to attract the interest of millions of potential investors. Over the course of the last few decades, the investment landscape in India has seen a considerable transition. This transformation has been brought about by the introduction of innovative financial instruments that are aimed to attract investors from both India and other countries. Among these vehicles, Real Estate Investment Trusts (REITs), Infrastructure Investment Trusts (InvITs), and Alternative Investment Funds (AIFs) have emerged as crucial platforms for channeling investments into essential sectors such as real estate, infrastructure, and different alternative assets. These assets include real estate, infrastructure, and alternative assets. The mobilization of capital, the promotion of economic growth, and the provision of investors with broad investment possibilities have all made significant contributions to the success of these instruments. This paper will discuss about these financial instruments, their regulatory framework, structure and functioning and the associated challenges.*

## **Judicial Framework**

The judicial interpretation is important in developing and enhancing the regulatory framework of the financial markets in India. The role of judicial intervention is even more eminent in the context of new investment vehicles like Real Estate Investment Trusts (REITs), Infrastructure Investment Trusts (InvITs) and Alternative Investment Funds (AIFs). These instruments are mainly controlled by the Securities and Exchange Board of India by a complex set of regulations but they are subject to change and in most cases, their complicated form and evolving nature may create a legal grey area. Judicial interpretation hence is a necessary tool in determining the scope of these structures, making sure that they are adhered to and safeguarding the interests of the investor.<sup>1</sup>

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<sup>1</sup> Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014, No. SEBI/LAD-NRO/GN/2014-15/10 (India); Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014, No. SEBI/LAD-NRO/GN/2014-15/11 (India); Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012, No. SEBI/LAD-NRO/GN/2012-13/04 (India).

The other significant aspect of judicial interpretation is that it helps to harmonize various bodies of law. REITs and InvITs are organized in the form of trusts and AIFs can be run in the form of trusts, companies, or limited liability partnerships. This heterogeneity demands the incorporation of the securities law principles, trust law and corporate law. The judiciary has played a significant role in this harmonization by giving meaning to the various provisions of the law in a way that brings about uniformity and coherency in these fields. This is a sophisticated strategy that is necessary in dealing with the legal complexities that have been presented in the operation of these investment vehicles.<sup>2</sup>

Moreover, the judiciary has highlighted the significance of transparency and disclosure in financial markets. The correct and timely information is very important in making informed decisions by the investors, particularly in complex investment structures like the REITs, InvITs, and AIFs. The judicial interpretation has strengthened the necessity of observing the disclosure norms thoroughly and has highlighted the incompliance repercussions. This transparency is not only beneficial to the investors but also helps to improve the credibility and effectiveness of the market in general.<sup>3</sup>

Moreover, the judicial decisions have emphasized the importance of fiduciary responsibilities in the operation of pooled investment vehicles. The trustees, fund managers and sponsors are charged with the role of managing the funds of the investors and their conduct should demonstrate high degree of care, diligence and integrity. The courts have always emphasized that such fiduciary duties are essential in making sure that the interests of investors are protected.<sup>4</sup>

Hence, judicial interpretation can be considered as a pillar of the creation and transformation of the regulatory framework of REITs, InvITs, and AIFs in India. The judiciary has been crucial to the development of a vibrant and healthy financial ecosystem by clarifying legal grey areas, strengthening regulatory efforts, and advancing values like transparency, accountability, and investor protection. This chapter thus looks into the role played by judicial approaches in the operation and regulation of these investment structures, a factor that has led to their development and stability in the Indian securities market.

### **Judicial Recognition of Powers of Securities and Exchange Board of India**

The development of the securities market in India has been greatly influenced by the judicial appreciation of the broad-based powers entrusted to the Securities and Exchange Board of India (SEBI). SEBI, which was founded under the act of SEBI, 1992, is the major regulatory body to safeguard the interests of the investors, enhance the growth of the securities market, and govern its operations. Indian courts and most importantly the Supreme Court over the years have

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<sup>2</sup> Securities and Exchange Board of India, *Consultation Paper on REITs and InvITs* (2013)(India).

<sup>3</sup> Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012, No. SEBI/LAD-NRO/GN/2012-13/04 (India).

<sup>4</sup> *Clariant International Ltd. v. Sec. & Exch. Bd. of India*, (2004) 8 S.C.C. 524 (India).

affirmed by its broad mandate of the SEBI, thus enhancing its effectiveness as an active and preventive regulator. The judicial interpretations have not only elucidated the extent of the powers of SEBI, but also supported the enforcement mechanisms of the authority, such as investigative, remedial and punitive powers. One of the first cases that solidified the power of SEBI is *Sahara India Real Estate Corporation Ltd. v. SEBI*<sup>5</sup>. The case that the Supreme Court was concerned with in this case involved the issue of optionally fully convertible debentures (OFCDs) that were issued by Sahara companies to millions of investors. The fundamental issue was whether such instruments came under the jurisdiction of the regulation of SEBI. The Court took a purposive approach to the interpretation of the SEBI Act and affirmed that any instrument to which a great number of investors are offered is a public issue and thus within the purview of SEBI. Notably, the Court has stressed that the role of SEBI is not only reactive, but also preventive and that it is geared towards protecting the interests of investors and market integrity. This ruling greatly expanded the jurisdiction of SEBI and strengthened its prerogative to intervene in the situations concerning hybrid or innovative financial instruments, which is most applicable to new arrangements as REITs and AIFs.

*SEBI v. Ajay Agarwal*<sup>6</sup> is another significant case that indicates the enforcement powers of SEBI. The court in this case supported the powers of SEBI to act against the market participants even when they committed an act before some of the regulatory amendments. The Court acknowledged the ability of SEBI to pass directions in the best interest of the securities market and it was found that these powers are remedial and preventive and not punitive. This interpretation is essential as it enables SEBI to take quick action to tame market anomalies without having to be bound by the technicalities of the process. Such flexibility can assist SEBI to react promptly to the risks that arise in the context of AIFs and REITs, where complex financial arrangements are at play.

The role of SEBI in the market in terms of fairness and transparency can also be judicially acknowledged as seen in the case of *Clariant International Ltd. v. SEBI*. This case concerned the rights of the shareholders, which related to takeover and the responsibilities of the acquirers according to the regulations of SEBI. The Court pointed out that the minority shareholders need to be safeguarded and that the regulatory frameworks should be run in a way that is just and transparent. The judgment has helped to establish a strong investor protection regime by enhancing disclosure and fair treatment of investors. These principles directly apply to the case of REITs and AIFs, where transparency and good governance are key factors to investor confidence.

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<sup>5</sup> *Sahara India Real Estate Corp. Ltd. v. Sec. & Exch. Bd. of India*, (2013) 1 S.C.C. 1 (India).

<sup>6</sup> *Sec. & Exch. Bd. of India v. Ajay Agarwal*, (2010) 3 S.C.C. 765 (India).

Market manipulation has also been frowned upon by the Supreme Court in the case of *SEBI v. Rakhi Trading Pvt. Ltd*<sup>7</sup>. The Court in this case supported the verdicts of SEBI that showed breaches of fraudulent and manipulative trading practices, and pointed out that even the seemingly technical breaches that distort market integrity could not be treated leniently. The court ruled in support of the power of SEBI to mete out fines and other corrective action to ensure that there is a healthy market. This is especially applicable to AIFs and other pooled investment vehicles, where the huge transaction volume has a potential to affect the market forces.

Along with the decisions of the Supreme Court, the decision of the Securities Appellate Tribunal (SAT) has also been instrumental in the establishment of the boundaries of the powers of SEBI. As an appellate authority, SAT goes through the orders issued by SEBI and makes sure that the regulatory measures taken are in line with the principles of natural justice. Although SAT has sometimes quashed the orders issued by SEBI on procedural grounds, it has not usually questioned the overall mandate of the regulator. This is a two-way relationship between SEBI and SAT, which helps to create a balanced regulatory framework whereby the powers of enforcement are imposed within the frames of fairness and legality.<sup>8</sup>

One of the most important elements of judicial interpretation is the fact that SEBI is a specialized regulatory agency that has technical expertise. Courts have in numerous cases recognized that SEBI is in a better position to be aware of the complexities of the financial markets and thus deserves a certain level of deference on its decision-making. The principle of judicial deference makes sure that courts do not improperly interfere with the actions of regulators unless there is a demonstrable breach of law or natural justice. This is necessary in ensuring efficiency and effectiveness of market regulation, particularly in the areas where complex financial instruments such as REITs, InvITs and AIFs are involved. Moreover, court decisions have underlined the need to protect investors as the foundation of the SEBI regulatory framework. Courts have continuously believed that the interests of investors should be of priority over commercial interests of players in the market. This investor-focused strategy is especially important when it comes to the emerging investment structures, retail and institutional investors are dependent on regulatory authorities to reduce risks. The judiciary has been instrumental in instilling trust and confidence in the securities market by ensuring that SEBI has the authority to take corrective measures against any form of misconduct.

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<sup>7</sup> *Sec. & Exch. Bd. of India v. Rakhi Trading (P) Ltd.*, (2018) 13 S.C.C. 753 (India).

<sup>8</sup> *Nat'l Sec. Depository Ltd. v. Sec. & Exch. Bd. of India*, (2017) S.A.T. Order (India).

The second interesting aspect of judicial interpretation is the justification of the quasi-legislative powers of SEBI. SEBI has the power to design regulations to cover different areas of the securities market such as REITs, InvITs and AIFs. These powers have been enforced in the courts so long as the rules are not in conflict with the parent statute and as long as they do not contravene constitutional principles. This understanding allows SEBI to change its regulatory framework to be responsive to market changes and world best practices.

To sum up, the judicial acknowledgment of the powers of SEBI has played an important role in the development of the regulatory environment of the securities market in India. The courts have confirmed the broad jurisdiction of SEBI, confirmed its enforcement measures, and strengthened its position as a protector of the interests of investors through a series of landmark judgments. These judicial interpretations present a good legal basis upon which modern investment vehicles like REITs, InvITs and AIFs can be regulated. With the help of regulatory powers and the principles of fairness and accountability, the judiciary has played a significant role in creating a strong and transparent financial ecosystem in India.

### **Judicial Interpretation of Collective Investment and Trust Structures: Legal Nature of REITs, InvITs, and AIFs as Investment Vehicles**

In India, modern investment vehicles like Real Estate Investment Trusts (REITs), Infrastructure Investment Trusts (InvITs) and Alternative Investment Funds (AIFs), have developed in terms of judicial interpretation. In spite of the fact that such structures are mainly regulated by the rules presented by the Securities and Exchange Board of India, courts have been instrumental in elucidating the legal nature behind such structures by relying on the principles of collective investment schemes, trust law, and the protection of investors. Since REITs and InvITs are trust-based, and AIFs can be a trust, a company, or limited liability partnership, judicial rulings have assisted in clarifying ambiguities concerning their classification, regulation, and governance.

*PGF Limited v. Union of India*<sup>9</sup> is a pioneer case in the concept of collective investment. This case involved the Supreme Court looking at the extent of collective investment schemes (CIS) under the SEBI Act and highlighting that any scheme in which there is pooling of funds between investors with an expectation of profits under the management of a third party is within the scope of the regulatory act of SEBI. The Court took a substance-over-form approach and believed that the essence of a scheme should be held based on the economic reality, not the legal form. This is directly applicable to the case of REITs, InvITs, and AIFs, which are essentially pooling of investor capital in investment of assets that generate income. The ruling supports the notion that these cars, no matter

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<sup>9</sup> *PGF Ltd. v. Union of India*, (2015) 13 S.C.C. 50 (India).

what they are called, are highly scrutinized by the regulations in order to safeguard investor interests.

The fact that REITs and InvITs are contract structures that involve trust makes the relevance of general principles of trust law a matter of concern. Though minimal judicial precedent exists on REITs and InvITs specifically, historically courts have interpreted trust structures with a focus on fiduciary responsibility, accountability, and transparency. The trustees are supposed to do this in the best interest of the beneficiaries so that the assets are managed in a prudent manner and in line with the governing regulations. These principles are well aligned to the regulatory framework of SEBI regarding REITs and InvITs where trustees, sponsors and managers play well defined roles and responsibilities.

The judicial interpretation has also helped to define the difference between legitimate investment structures and unregulated or fraudulent schemes. In *Sahara India Real Estate Corporation Ltd. v. SEBI*<sup>10</sup>, the Supreme Court was concerned with the hybrid financial instruments which were designed in a way to escape the regulatory control. The Court observed that any instrument or arrangement which actually functions as a public investment scheme should be subject to compliance with SEBI regulations irrespective of the labeling of the instrument. This observation applies especially to how AIFs are regulated, as they usually have complex investment strategies. It puts into focus the fact that financial structuring innovation cannot be employed to avoid regulatory requirements.

The other vital aspect of judicial interpretation is associated with the categorization and regulation of pooled investment vehicles. Particularly, AIFs fall into various classes, depending on their investment strategies and regulatory treatment. The AIFs have no real case law, but the courts have applied the general securities law principles in deciding matters concerning the management of funds, the disclosure requirements, and investor protection. Judicial bodies have always stressed the importance of transparency and accountability in how pooled funds are managed; the riskiness of these types of investments is well known. The judiciary has also played an important role in helping to differentiate between collective investment schemes and other investment schemes. Courts have established guidelines to establish whether a certain type of arrangement is a CIS and the facilities are; pooling of funds, common management, anticipation of profit, and absence of day to day control by investors. Such criteria are quite pertinent in considering the legal nature of the REITs and InvITs, which share all the features of collective investment vehicles but are specially regulated by special SEBI regulations. Through well-defined delimitations of CIS, judicial

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<sup>10</sup> *Sahara India Real Estate Corp. Ltd. v. Sec. & Exch. Bd. of India*, (2013) 1 S.C.C. 1, 35 (India).

interpretations have assisted in categorizing REITs and InvITs as regulated and acceptable investment structures in the wider securities market.

Moreover, court decisions have strengthened the essence of disclosure and transparency in collective investment plans. Courts have always believed that investors should be furnished with total and true information to be able to make sound decisions. The principle is also echoed in the regulatory requirements of REITs, InvITs and AIFs that require comprehensive disclosures on investment objectives, investment risks, financial performance, and governance arrangements. The fact that such requirements are supported by the judiciary, increases the credibility and reliability of such investment vehicles.

The fiduciary duty of the managers and trustees to investors is another important issue. In managing pooled investments, courts have pointed out that the management of the said entity should exercise the highest level of good faith, diligence and integrity. Violation of these obligations may lead to regulatory measures and legal implications. This applies especially in the AIFs where fund managers have a high degree of discretion in making investment decisions. The fiduciary obligations brought to the courts of law provide the judiciary with the discretion of exercising fiduciary duties in a way that benefits the interests of the investors.

### **Judicial Approach to Investor Protection and Market Integrity: Protection against Fraud, Misrepresentation, and Unfair Trade Practices**

The foundation of India securities regulatory framework is investor protection and maintenance of integrity in the market. The judiciary has been instrumental in supporting these goals by giving meaning to the securities laws in a way that gives precedence to transparency, fairness and accountability. Courts have also consistently supported the powers of the Securities and Exchange Board of India to exercise stern action against fraud, misrepresentation, insider trading and unfair trade practices through a line of landmark judgments. This judicial solution is especially important in situations when it comes to more advanced investment vehicles like REITs, InvITs, and AIFs, where the potential of information asymmetry and exploitation of investor money is naturally more pronounced.

A case that can be considered as one of the most authoritative cases in the field is the case of *SEBI v. Rakhi Trading Pvt. Ltd.*<sup>11</sup> in which the Supreme Court was concerned with the manipulation of trades in the market through synchronized trades that are aimed at generating artificial market volumes. The Court affirmed the findings of SEBI and stressed that although such transactions may seem right on the surface, their true motive of trying to skew market mechanisms makes them fraudulent. Notably, the Court embraced a purposive approach to the definition of the concept of fraud in that any action that compromises the integrity

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<sup>11</sup> *Sec. & Exch. Bd. of India v. Rakhi Trading (P) Ltd.*, (2018) 13 S.C.C. 753 (India).

of the market, including indirectly, should be regarded as a grave offense. This ruling gave SEBI a greater ability to enforce and sent a strong signal that no market manipulation, regardless of the nature of such manipulation will be condoned.

***Sahara India Real Estate Corporation Ltd. v. SEBI***<sup>12</sup> is another landmark case that has made a great contribution to the jurisprudence of investor protection. Here, the Supreme Court involved was the mass public fundraising by issuing optionally fully convertible debentures (OFCDs). The Court believed that these schemes comprising of millions of investors had to abide by the disclosure and listing requirements of securities laws. It also pointed out that the interest of investors is paramount over the technical arguments put forward by corporate groups. The ruling supported the doctrine of full and fair disclosure as a key to keeping investors confidence and making informed decisions. The principle is very applicable to REITs and AIFs in which disclosure requirements are important in the protection of their interests.

The judicial system has also been very tough on insider trading and misappropriation of unpublished price-sensitive information (UPSI). The Supreme Court in ***SEBI v. Kishore R. Ajmera***<sup>13</sup> made it clear that direct evidence of insider trading is not always readily available and thus, they could depend on circumstantial evidence and trading habits to prove violations. The Court acknowledged the complexity of securities markets and approved an expedient enforcing approach. This is especially significant to the contemporary investment vehicles, where fund managers and insiders may have access to sensitive information, which can be taken advantage of unfairly.

The judicial intervention has also played a major role in dealing with the cases of misrepresentation and fraudulent inducement. Courts have always believed that any false or misleading statement issued to investors, either in prospectuses or offer documents or any marketing material is a grave breach of securities legislation. The focus on the honesty of disclosure prevents investors being misguided to make assumptions based on false or unsubstantiated information. The requirement that the judiciary places on accuracy and transparency in the context of REITs and AIFs where investment decisions are frequently made based on projected returns and risk analysis is a crucial protection measure.

Besides fraud and misrepresentation, the judiciary has dealt with problems in unfair trade practices such as price manipulation, circular trading, and front-running. Courts have affirmed that SEBI is right in its mandate to probe and punish such practices as they destroy investor trust and disrupt market efficiency.

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<sup>12</sup> *Sahara India Real Estate Corp. Ltd. v. Sec. & Exch. Bd. of India*, (2013) 1 S.C.C. 1 (India).

<sup>13</sup> *Sec. & Exch. Bd. of India v. Kishore R. Ajmera*, (2016) 6 S.C.C. 368, 380 (India).

The unwavering judicial approval of the stringent enforcement practices has allowed SEBI to take decisive action against the misconducts in the market.

Moreover, the principle that the protection of investors extends beyond preventing fraud to encompass fair treatment and equitable access to information has been supported by judicial pronouncements. Courts have stressed the fact that irrespective of the size and sophistication of the investor, they have equal opportunities to be treated fairly and be given a chance to take part in the market. This is a non-discriminative strategy that enhances the general credibility of the securities market.

To sum up, judicial system has been instrumental in the development of investor protection and market integrity framework in India. It has broadened the definition of fraud by its interpretations, emphasized the significance of transparency and disclosure, and enforced the imposition of unfair trade practices. These judicial inputs have largely contributed towards the efficiency of the regulatory framework by SEBI and also have made sure that the securities market is fair, transparent and accountable. In the case of emerging investment vehicles like REITs, InvITs and AIFs, the principles offer a solid legal basis that facilitates investor confidence and sustainable market development.

### **Judicial Analysis of Alternative Investment Funds (AIFs): Regulatory Compliance, Fiduciary Duties, and Fund Governance**

Alternative Investment Funds (AIFs) are a complex category of the Indian financial market, comprising privately held pools of investment funds like venture capital funds, private equity funds, hedge funds and other special investment vehicles. AIFs are governed by the regulations that are stipulated by the Securities and Exchange Board of India and operate under the framework that places emphasis on flexibility, innovation and professional management. Nevertheless, with the nature of their business and the high level of discretion applied by fund managers, the problems of regulatory compliance, fiduciary obligations and governance have been subjected to greater judicial review. Despite the lack of direct case law on AIFs, judges have used more general principles of securities law, trust law and corporate governance to resolve disputes and provide guidance on the law.

One of the key areas of judicial analysis as applied to AIFs is compliance with regulation. Courts have consistently upheld SEBI's authority to regulate pooled investment vehicles and ensure adherence to statutory and regulatory requirements. *Sahara India Real Estate Corporation Ltd. v. SEBI*<sup>14</sup> is especially applicable to such cases. In the case, the Supreme Court stressed that any plan, which implies mobilizing finances among people, should be subject to disclosure standards and regulatory control regardless of the type of law that is chosen. The

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<sup>14</sup> *Sahara India Real Estate Corp. Ltd. v. Sec. & Exch. Bd. of India*, (2013) 1 S.C.C. 1 (India).

same applies to AIFs, which, despite being privately issued, entail the aggregation of investor capital and as such must be subjected to stringent adherence to SEBI requirements of registration, reporting and transparency.

A fiduciary duty of the AIF managers and the sponsors towards their investors is another significant aspect. AIFs are generally designed to have investors hand over their money to professional managers who make investment decisions on their behalf. Such a relationship creates fiduciary duties such as the duty of loyalty, duty of care and duty to act in the best interest of investors. Courts have interpreted fiduciary principles, although not necessarily directly connected to AIFs, by always noting that the entities that handle pooled investments are required to exercise their powers in a way that is honest, diligent and ethical. Regulatory measures and legal implications may befall any violation of these obligations, including conflict of interest, misappropriation of funds, and irresponsible decision-making.

The case of *SEBI v. Rakhi Trading Pvt. Ltd.*<sup>15</sup> decided by the Supreme Court also confirms the need to uphold integrity in fund management practices. Whilst the case was mainly about manipulation of the market, the comments of the Court about fairness, transparency, and preventing of any deceptive practices are directly relevant to AIF operations. Fund managers should make sure that their trading policies and choice of investments do not manipulate market mechanisms and harm investors.

Another important field where the judicial principles have been influential on AIFs is the governance. There should also be proper governance structures in place to promote accountability, transparency, and appropriate risk management. Courts have seen that lack of strong governance systems would result in abuse of investor capital and loss of confidence in the financial system. As a result, judicial decisions have facilitated regulatory mandates to ensure that both sponsors, trustees and managers have well defined roles and duties and internal control and compliance mechanisms are in place.

The role of disclosure in AIF governance has also been emphasized by the judiciary. Investors in AIFs highly depend on the information presented by fund managers to make a decision. Courts have always believed that any misrepresentation or omission of material facts in disclosure documents is grave infringement of the securities laws. This is especially relevant to AIFs, in which the investment plans can be associated with a greater risk and lower liquidity than the conventional investment options. Strict disclosure standards contribute to increasing investor confidence and transparency in the market due to the application of judicial interpretations.

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<sup>15</sup> *Sec. & Exch. Bd. of India v. Rakhi Trading (P) Ltd.*, (2018) 13 S.C.C. 753, 760 (India).

The other significant part of judicial analysis is the acknowledgment of the necessity of flexibility in regulations of AIFs. AIFs are also less regulated by traditional investment vehicles due to innovative and sophisticated strategies that do not always fit within a current regulatory framework. Courts have recognised this fact and have tended to be pragmatic in that SEBI has been left to its own devices in interpreting and applying rules. This is a flexibility that allows the regulator to respond to new challenges, and at the same time, not to jeopardize investor protection and market integrity.

Judicial review has also been applied to conflict of interest matters in AIFs. Fund managers can be in a conflict in the interests of the fund and the investors, e.g. dealing in multiple funds or related-party transactions. Courts have stressed upon the need to control these conflicts by means of adequate disclosure and fiduciary compliance. Otherwise, it will lead to regulatory fines and loss of investor confidence.

The role of the Securities Appellate Tribunal (SAT) has an auxiliary effect in determining the legal scope of AIFs by scrutinizing the enforcement measures taken by SEBI as well as making sure that they are in tandem with the doctrines of natural justice. Decisions made by SAT can be a good source of information on how the AIF regulations are interpreted, especially on how registration requirements, compliance requirements and enforcement measures are interpreted. Such an appeal oversight helps to build a harmonious and open regulatory regime.

Moreover, judicial interpretations have emphasized the accountability in fund governance. The courts have emphasized that the fund managers and other stakeholders who are critical to the management of funds should be held responsible to their acts, particularly when they are dealing with the management of the public or institutional funds. This focus on accountability means that AIFs will be acting in such a way that they will be consistent with the larger goals of financial stability and investor protection.

Finally, the case study of judicial review of Alternative Investment Funds in India shows a delicate and dynamic stance that balances regulation and market innovation. Courts have offered a solid legal basis on how AIFs operate by enforcing the principles of securities law, fiduciary duty and governance. Their focus on compliance, transparency and accountability has improved the regulatory framework and increased investor confidence. With the AIFs still gaining significance in the Indian financial system, judicial interpretations will keep playing a critical role in dealing with the arising issues and holding the AIFs accountable in running their activities in a fair, efficient, and responsible way.

## **Judicial Trends in REITs and InvITs Regulation: Ownership, Taxation, and Operational Challenges Interpreted by Courts**

REITs and InvITs are fairly new products of Indian financial and infrastructure products. These trust-based structures are meant to promote investment in income-generating real estate and infrastructure assets, and are governed by the Securities and Exchange Board of India under specific regulations. Although the statutory and regulatory framework on REIT and InvIT is clear, judicial interpretation has been crucial in solving emerging challenges in ownership, taxation, and complexities in operation. Since the instruments are new, courts have frequently applied more general principles of securities law, trust law, and taxation to solve problems and address ambiguities.

The acceptance of the hybrid legal nature of REITs and InvITs is one of the most important judicial tendencies in this field. These are entities that have a combination of characteristics of trusts, companies and collective investment schemes. Despite a scarcity of direct litigation involving REITs and InvITs, courts have used principles established under cases like *Sahara India Real Estate Corporation Ltd. v. SEBI*<sup>16</sup> to decide what to do with these entities, in terms of how they are regulated. The Supreme Court in Sahara pointed out that the nature of a financial arrangement should be dominant over its form especially where there is involvement of public funds. The concept is very applicable when it comes to the REITs and InvITs, whose intricate ownership structures and overlaid investments can obscure the nature of the transactions. The use of substance-over-form by the judiciary would guarantee such vehicles would stay within the scope of the regulations and would comply with investor protection practices.

Another important area of judicial concern entails ownership and control. REITs and InvITs are usually characterized by various stakeholders, such as sponsors, trustees, managers and unit holders, each having different rights and duties. Courts have stressed the need to clearly define these roles so as to avoid conflict of interest and achieve good governance. Relying on laid down principles of trust law, judicial interpretations have strengthened the fiduciary obligations of trust and the responsibility of managers. Such principles guarantee the management of underlying assets is conducted in the best interest of investors and this makes them place more confidence in these investment vehicles.

The taxation has become one of the most important questions of the judicial discussion of REITs and InvITs. Since they are pass-through in nature with income flowing to unit holders, there is always a question about how such distribution is taxed. The majority of the framework is governed by statutory provisions made under the Income Tax Act, but courts have sometimes been

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<sup>16</sup> *Sec. & Exch. Bd. of India v. Rakhi Trading (P) Ltd.*, (2018) 13 S.C.C. 753, 760 (India).

approached to interpret any ambiguities surrounding the classification of income, applicability of exemptions, and avoidance of double taxation. Court tendencies show that there is a tendency towards less obscure interpretations and tend not to impose excessive taxes on investors, thus favoring the expansion of REITs and InvITs as a valid investment option.

Judicial interpretation has also been used to solve operational issues such as meeting regulatory requirements and disclosure requirements. The significance of transparency in financial reporting and asset valuation has been held in court. Based on the tenets of *Clariant International Ltd. v. SEBI*, courts of law have highlighted the importance of ensuring that investors have access to the correct and relevant information in order to make sound decisions. This is especially relevant in the case of REITs and InvITs, where the value of underlying assets and income distributions are key to returns to the investors.

The other significant judicial trend is the rigid attitude to market integrity and avoidance of manipulative practices. In *SEBI v. Rakhi Trading Pvt. Ltd.*, the Supreme Court reiterated the importance of restraining the practices of manipulative trading that distort market mechanisms. In spite of the fact that the case did not directly touch upon REITs or InvITs, the principles established can be applied to these instruments as well, particularly due to their IPO listing on stock exchanges. Courts have therefore strengthened the necessity to abide by the market conduct rules and thus, trading in the REIT and InvIT units is fair and transparent.

Certain problems regarding regulatory compliance and enforcement have also been covered in the judicial interpretations. The deferential attitude to the expertise of SEBI has generally been applied in the courts, as they are seen as a special regulator, able to resolve the complexities of current financial instruments. This deference provides SEBI with the ability to design and impose rules that correspond to the distinct features of REITs and InvITs such as the minimum public ownership requirements, maximum leverage, and policies of distribution. Meanwhile, judicial review makes sure that regulatory measures do not surpass the statutory power and are taken in accordance with the principles of natural justice.

The Securities Appellate Tribunal (SAT) has played a critical role in dispute resolution in regard to REITs and InvITs. SAT, as an appellate organization, reviews decisions made by SEBI and clarifies on the interpretation of the provisions of regulations. Its judgments help to formulate a consistent jurisprudence that equally addresses regulatory goals and the rights of market participants. This appeal system increases the trustworthiness and stability of the regulatory process of REITs and InvITs.

The other new trend is the acknowledgment of the judiciary in the significance of these investment vehicles in enhancing the economic development. REITs and InvITs are very important in marshalling capital in real estate and infrastructure projects, which are critical in economic development. Courts have thus been conscious of the need to interpret laws in such a way that will ensure efficient operation of these instruments whilst protecting the interests of investors. This moderation in regulation will make sure that regulation does not become oppressive, and hence more people will be willing to engage in such markets. Moreover, court decisions have emphasized the importance of the constant development of the regulatory framework to meet the new challenges. With the increasing scale and complexity of the REITs and InvITs, new challenges associated with the cross-border investments, taxation, and governance will emerge. It has been acknowledged by the courts that dynamic and adaptive regulatory approach is necessary to follow these developments.

## Comparative Analysis

### Comparison Between REITs and InvITs

The table below provides a concise overview of the distinctions between REITs and InvITs:

<b>“Basis of Difference</b>	<b>REITs</b>	<b>InvITs</b>
<b>Investment Objective</b>	REITs focus on making real estate assets more accessible to individual investors and increasing retail participation.	InvITs focus on making infrastructure investments more accessible to private investors and expanding retail participation in the sector.
<b>Investment Avenue</b>	REITs invest in properties like warehouses, apartments, corporate offices, data centres, shopping malls, etc.,	InvITs invest across infrastructure projects like transmission, roadways, environmental and renewable projects, etc.
<b>Minimum Investment Amount</b>	The minimum subscription amount for REITs is INR 10,000 – 15,000. Earlier it was INR 50,000 <sup>17</sup> .	The minimum subscription amount for InvITs is INR 10,000 – 15,000. Earlier it was INT 1,00,000.
<b>Income</b>	REITs offer highly stable income. Since they invest in commercial real estate with long-term leases, 80% of REIT assets are invested in income-generating (rental)	InvITs also offer stable income. They invest more than 80% of their assets in operational and revenue-generating infrastructure with long-term contracts. Though they offer

<sup>17</sup> “What is the Difference Between REIT and InvIT? (n.d.). Groww. <https://groww.in/p/difference-between-reit-and-inv-it>.”

	properties. The long-term contract assures that the REIT receives rent consistently.	stability, the income depends on various circumstances, including tariff constraints, project deadlines, etc. Thus, in comparison to REITs, this is a less stable investment.
<b>Risks</b>	Since REITs own their real estate through long-term leases or freehold ownership, they are safe from political and regulatory threats. Furthermore, as REITs serve corporate clients, they face less political and regulatory risk.	Numerous InvITs invest in sectors associated with public welfare (Highways and Utilities), and any delay in regulatory approvals or regulatory changes could risk the infrastructure project. Additionally, any protests by environmentalists against road building or other such issues could risk the revenue generated by the infrastructure project in which InvIT has invested.
<b>Liquidity</b>	Lower unit pricing and smaller minimum trading quantities make REITs more liquid.	Large trading lot size and higher unit price of InvITs, make them less liquid.
<b>Investor Participation and Knowledge<sup>18</sup></b>	Most investors are familiar with the real estate business; thus, retail investor participation is significant. Also, the future prospects look bright.	Retail investors may be hesitant to engage in InvITs due to their lack of expertise in the infrastructure sector. It may take time for investors to participate in InvITs actively.
<b>Ownership</b>	REITs either own the property or lease it on a long-term basis.	InvITs invest in infrastructure projects that are given back to the authority on completion or rebid once the contract period has expired.
<b>Growth Prospects<sup>19</sup></b>	REITs have a greater potential for growth due to their ability to remodel current properties, build new ones, and acquire completed/leased assets. REITs can also periodically adjust rents to keep pace with rising market expenses, allowing them to receive	InvIT can only grow if it can acquire projects at lower bids. Additionally, revenue increases when the infrastructure asset generates more money than anticipated. This could result in a significant monetary gain for InvIT in the stock market. For instance, a

<sup>18</sup> Bansal, R. (2024, April 8). What is the Difference Between REITs and InVITs 2024? Propacity Blog. <https://www.propacity.in/blog/reits-and-invits/>.

<sup>19</sup> Rao, P. (2023, October 5). Difference Between REIT and InvIT? Meaning and Types in Detail. Jupiter Money. <https://jupiter.money/blog/difference-between-reit-and-invit/>.

	a bigger percentage of rental revenue.	highway project may generate high toll revenue because the traffic is more than anticipated.
<b>Regulations</b>	REITs must follow the SEBI Real Estate Investment Trust Regulations, 2014.	InvITs must follow the SEBI Infrastructure Investment Trust Regulations, 2014’.

### **REIT vs InvIT - Which is Superior?**

REITs and InvITs offer a convenient and uncomplicated method for investing in real estate. You can capitalize on the appreciation of real estate assets without suffering the exorbitant expenses associated with acquiring real estate ownership.<sup>20</sup> In essence, it is like to possessing real estate within your dematerialized account.

InvITs and REITs are appealing to regular investors, high net worth individuals (HNIs), and retired folks seeking a stable income stream. Furthermore, REITs have a legal obligation to allocate most of their earnings to investors, making them a dependable source of consistent income, much like debt funds.

The decision between the two options primarily relies on your investing objective and your degrees of risk tolerance. Furthermore, Real Estate Investment Trusts (REITs) exhibit higher liquidity due to their lower unit prices and smaller trading volumes. InvITs have a lower level of liquidity compared to REITs. Moreover, InvITs are more susceptible to political and regulatory risks compared to REITs. Therefore, REITs are marginally more secure investment choices for investors.

When evaluating REITs or InvITs, it is important to include ratings from independent agencies that assess these trusts based on the quality of their assets, cash flows, and other relevant factors. Furthermore, due to the intricate nature of these investment vehicles compared to conventional mutual funds, it is advisable to seek professional guidance before making any investing decisions.

## **LESSONS FROM INTERNATIONAL BEST PRACTICES**

### **Real estate investment trusts, (REITs)**

#### **A. Framework for Regulatory Compliance and Transparency:**

- One of the most developed real estate investment trust (REIT) marketplaces in the world is found in the United States, which is governed by the Securities and Exchange Commission (SEC). Among the most important best practices are strong disclosure rules and regular

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<sup>20</sup> “Ponaka, S. (2023, October 24). Difference Between REIT and InVIT. Scripbox. <https://scripbox.com/pf/reit-vs-invit/>”.

financial reporting, both of which serve to safeguard investor interests and maintain openness.<sup>21</sup> Regulatory bodies in India have the ability to implement such thorough disclosure standards in order to boost investor confidence.

- The Monetary Authority of Singapore (MAS) is responsible for enforcing stringent governance requirements in Singapore. These criteria include obligatory external audits and adherence to a code of corporate governance. The credibility and stability of Indian real estate investment trusts (REITs) could be improved with the implementation of such stringent governance norms in India.

**B. Tax Incentives:** Australia The Australian real estate investment trust (A-REIT) market provides real estate investment trusts (REITs) and their investors with significant tax incentives, which has helped to the growth of the sector. Investments in real estate investment trusts (REITs) could be made more appealing to Indian policymakers by altering existing tax structures.

### **Infrastructure investment trusts are referred to as InvITs.**

#### **A. Investor Protection and Market Confidence**

- Canada: Infrastructure funds in Canada frequently incorporate comprehensive risk assessments and offer substantial investor education in order to improve both comprehension and trust. The adoption of methods that are comparable in India could assist in the reduction of risks and the development of a more solid investor base.
- Infrastructure funds in Europe are well-known for the fact that they place a strong emphasis on environmental, social, and governance (ESG) requirements. It is possible that the incorporation of ESG principles into Indian InvIT rules may attract investors from around the world who are interested in sustainable investments.

**B.** With regard to operational flexibility and efficiency, the United Kingdom: InvITs are able to effectively manage and extend their asset portfolios because to the regulatory framework that is in place in the United Kingdom, which allows for greater operational flexibility. Adjustments might be made to Indian legislation in order to give a comparable degree of flexibility, which would encourage growth and innovation within the sector.

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<sup>21</sup> “Rao, P. (2023, October 5). Difference Between REIT and InvIT? Meaning and Types in Detail. Jupiter Money. <https://jupiter.money/blog/difference-between-reit-and-invit/>”

## **Alternative Investment Funds, often known as AIFs**

### **A. Innovation and Diverse Investment methods**

- **United States:** The American Investment Fund (AIF) market, which is regulated by the Securities and Exchange Commission (SEC), fosters a wide variety of investment methods, such as hedge funds, private equity, and venture capital. Indian authorities might encourage a wider variety of investment methods inside alternative investment funds (AIFs) in order to meet the requirements of a wide range of investors and market conditions.
- **Luxembourg:** The regulatory framework in Luxembourg encourages innovation in fund structuring and investment techniques, which has resulted in Luxembourg becoming a leading hub for alternative investments. It would be beneficial for India to adopt a regulatory strategy that is more flexible in order to foster innovation and attract international capital.

### **B. Risk Management and Investor Protection:**

- **Switzerland:** The legislation in Switzerland place a strong emphasis on the implementation of stringent risk management techniques and investor protections. Indian alternative investment funds (AIFs) have the potential to improve their stability and appeal to a wider variety of investors if they put in place strong risk management procedures.
- **Hong Kong:** The Securities and Futures Commission (SFC) of Hong Kong mandates that the fund provide comprehensive disclosures regarding its investment strategy and risk profile. Such extensive disclosure methods might be adopted by Indian alternative investment funds (AIFs), which would boost transparency and investor trust.

## **Future Trends**

The past few years have been marked by the growing popularity of alternative investment funds (AIF), real estate investment trusts (REITs), and infrastructure investment trusts (InvITs) in the financial services sector. These three types of investment trusts are referred to as various acronyms. It has been observed that these ways of investment are gaining confidence among investors and are becoming an increasingly popular vehicle of investment across the board<sup>22</sup>.

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<sup>22</sup> “Kubadiya, P. (2022, January 21). Budget 2022: What to expect from govt on REITs, InvITs and AIFs. Business Today. <https://www.businesstoday.in/union-budget-2022/opinion/story/budget-2022-what-to-expect-from-govt-on-reits-invits-and-aifs-319907-2022-01-21>”.

**Real Estate Investment Trusts (REITs) are investment vehicles that specialize in owning and operating income-generating real estate properties.**

1. Focus on sustainability and adherence to environmental, social, and governance (ESG) standards.

The trajectory of Real Estate Investment Trusts (REITs) will be significantly shaped by the increasing focus on Environmental, Social, and Governance (ESG) standards.<sup>23</sup> Investors are placing a growing emphasis on sustainable and socially responsible investing. REITs that integrate green building certifications, energy-efficient technologies, and sustainable construction techniques are anticipated to garner increased financing. Integrating ESG principles not only improves the environmental impact but also boosts the marketability and competitiveness of REITs. Internationally, markets such as the United States and Europe have already experienced a substantial transition towards investments that adhere to environmental, social, and governance (ESG) standards. This movement is also anticipated to gather steam in India.

2. Progress in Technology<sup>24</sup>

Technological progress is expected to have a vital impact on the development of REITs. Implementing smart building technology, the Internet of Things (IoT), and data analytics can greatly increase property management efficiency, lower operational expenses, and enhance tenant satisfaction. By utilizing these technologies, Real Estate Investment Trusts (REITs) can enhance their performance and improve their management of assets, resulting in increased value for investors. Moreover, the adoption of blockchain technology for transparent and secure property transactions is anticipated to become increasingly widespread.

3. Broadening and Enlargement

It is anticipated that Real Estate Investment Trusts (REITs) in India will expand their investments across different regions and industries in order to achieve diversification. From a geographical perspective, Indian REITs have the ability to consider investments in overseas markets. This would allow them to get exposure to global real estate prospects and reduce the risks associated with the domestic market. In terms of sectors, in addition to conventional divisions like commercial and retail buildings, Real Estate

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<sup>23</sup> “REITs & Sustainability: Environmental, Social & Governance. (n.d.). Nareit. <https://www.reit.com/investing/reits-sustainability>”.

<sup>24</sup> “NAVIGATING THE FUTURE: THE IMPACT OF TECHNOLOGY AND AI ON THE REIT INDUSTRY, FEBRUARY 12, 2024, <https://armadahoffler.com/navigating-the-future-the-impact-of-technology-and-ai-on-the-reit-industry/#:~:text=Technology%20has%20reshaped%20the%20way,investors%20seeking%20data%20driven%20insights>”.

Investment Trusts (REITs) are expected to diversify into developing areas such as logistics, data centers, and healthcare facilities. The diversification will be motivated by evolving market demands and the necessity to access high-growth industries.

**Infrastructure Investment Trusts (InvITs) are financial instruments that allow investors to invest in infrastructure projects.**

1. Diversifying investment options

InvITs are expanding their focus beyond conventional infrastructure assets like highways and power transmission lines to encompass areas such as renewable energy, urban infrastructure, and telecommunications. The expansion into renewable energy assets is in line with worldwide trends towards sustainable investments and reinforces India's dedication to achieving renewable energy goals. This expansion not only offers fresh investment prospects but also aids in reducing sector-specific hazards.

2. Increased involvement of individual investors in the retail sector.

Regulatory modifications are expected to enable increased involvement of individual investors in InvITs. To democratize access to infrastructure investments, the market can achieve this by reducing investment thresholds and enhancing investor knowledge<sup>25</sup>. By including ordinary investors, the investor base will become more diverse, market liquidity will increase, and infrastructure projects will have a more dependable source of finance. Moreover, enhancing the accessibility of InvITs to retail investors has the potential to enhance market trust and stimulate growth in the sector.

3. Encouraging the influx of foreign investment

Enhancing legal frameworks and increasing transparency are crucial factors in attracting a larger number of overseas investors to Indian InvITs. Emerging nations are attracting global investors seeking greater returns, and India's infrastructure sector offers a promising possibility. By adhering to global standards and implementing strong oversight, InvITs can enhance their appeal to foreign institutional investors, leading to a rise in capital inflows and facilitating the construction of extensive infrastructure projects.

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<sup>25</sup> “Narayan, S. (2024, March 24). For private InvITs, a new asset category is about to open up | Today News. Mint. <https://www.livemint.com/news/for-private-invits-a-new-asset-category-is-about-to-open-up-11711272455071.html>.”

**Alternative Investment Funds (AIFs) are investment vehicles that differ from traditional investment options. They provide investors alternative strategies and asset classes to diversify their portfolios.**

### **1. Cutting-edge Investment Strategies**

In the future, AIFs are expected to experience an increase in creative investing methods, especially in industries driven by technology. It is anticipated that AIFs will prioritize high-growth sectors such as fintech, edtech, healthtech, and other technology-driven companies. These industries have considerable opportunities for substantial profits, fueled by the swift digital revolution and growing implementation of technology in many areas.<sup>26</sup> Artificial intelligence funds that possess the ability to accurately identify and invest in these possibilities will be strategically positioned to attain exceptional returns.

### **2. Expansion in the field of Venture Capital and Private Equity**

The AIF space is experiencing an increasing interest in venture capital and private equity investments. This is driven by the strong startup environment and the demand for funding at the early stages. Given the increasing interest of wealthy individuals and institutional investors in investing in startups and developing firms with strong growth potential, Alternative Investment Funds (AIFs) are expected to have a significant role in supplying the required money. This trend is anticipated to stimulate substantial expansion in the venture capital and private equity sectors of Alternative Investment Funds (AIFs).

### **3. Strengthened Risk Management and Regulatory Frameworks**

Effective risk management procedures and continuous enhancements in the regulatory framework will be essential for the future prosperity of AIFs. SEBI is consistently enhancing regulations to offer enhanced transparency and safeguard investors, hence enhancing the appeal and security of AIFs. Implementing rigorous risk management frameworks, which include thorough due diligence and enhanced transparency, will aid in reducing risks and attracting a larger pool of smart investors. Implementing this measure will guarantee the stability and sustained expansion of Alternative Investment Funds (AIFs) in India.

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<sup>26</sup> “The role of Technology in AIF investing, Published on 15<sup>th</sup> Dec 2022, <https://www.kfintech.com/the-role-of-technology-aif-investing/>”.

## **Conclusion**

In India, the emergence of Real Estate Investment Trusts (REITs), Infrastructure Investment Trusts (InvITs), and Alternative Investment Funds (AIFs) has been distinguished by substantial legislative improvements that aim to stimulate growth, transparency, and investor trust. These advancements have been an important part of the evolution of these investment vehicles. This important study sheds light on the complexities and efficiency of the existing legal system that governs these investment vehicles. It also identifies areas of strength and potential areas for development.

## **Reforms Needed**

### **1. Increased clarity and simplification of regulatory requirements**

The present regulations for real estate investment trusts (REITs), investment in equity funds (InvITs), and alternative investment funds (AIFs) are dispersed throughout a number of guidelines and circulars that have been issued by the Securities and Exchange Board of India (SEBI). It is necessary to have a regulatory framework that is more uniform and simplified, and that consolidates these principles in order to make them easier to comprehend and comply with. In order to lessen the administrative constraints that are associated with REITs, InvITs, and AIFs, the registration and compliance procedures for these firms should be simplified. This will encourage more businesses to enter these markets.

### **2. Enhanced Taxation Policies and Procedures**

**Clarification and Relief on Taxes** Despite the fact that certain tax incentives are offered, the policy on taxation requires additional clarification, particularly with regard to the assignment of income and gains from investments. These investment vehicles have the potential to become more appealing to domestic and foreign investors if they are provided with enhanced tax incentives and clarity on tax treatment. A level playing field can be achieved and these instruments can become more competitive if tax parity is brought about between real estate investment trusts (REITs) and investment vehicles (InvITs).

### **3. Improving the Investor Protection and Confidence in the Market**

**Improving the Requirements for Informed Disclosure:** Increasing the disclosure standards for real estate investment trusts (REITs), investment trusts (InvITs), and alternative investment funds (AIFs) can boost openness and investor confidence. This comprises specific information on the valuations of assets, risk factors, and the performance of the overall financial system. Through the implementation of comprehensive investor education programs, prospective investors can gain a better understanding

of the advantages and dangers associated with the investment vehicles in question, hence expanding the market for investors.

#### **4. Making the Market Development Process Easier**

Increasing involvement from Institutional Investors Reforms should be aimed at increasing the amount of involvement from institutional investors such as pension funds, insurance firms, and foreign investors. This can be accomplished by making alterations to the regulatory framework in order to accommodate their particular investment criteria. Creating a healthy secondary market for real estate investment trusts (REITs) and investment-in-the-money (InvITs) can give investors with liquidity and exit options, hence increasing the overall attractiveness of these instruments.

#### **5. Dealing with Problems That Are Both Structural and Operational**

**Flexibility in the Policies Regarding Investments:** Real estate investment trusts (REITs), investment investment funds (AIFs), and investment funds (InvITs) can be better able to respond to changes in the market and opportunities for investment if their investment strategies are more flexible. It is possible to improve the performance of these organizations and protect the interests of investors by encouraging the adoption of best practices in governance, risk management, and operational efficiency.

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