

# Implementation of the Real Estate Regulation and Development Act, 2016

## Centre-State divergence



*INSTITUTE OF PUBLIC AUDITORS OF INDIA*

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## PREFACE

1. A batch of Writ Petitions were filed in the Hon. Supreme Court under Article 32 of the Constitution, raising the grievance that homebuyers are left to be exploited as a result of one-sided agreements loaded in favor of developers. In the absence of a uniform or model builder-buyer agreement and agent-buyer agreement, homebuyers are left to the mercy of housing project developers in respect of the terms and conditions which are imposed on them at the time of entering into such agreements.
2. On February 14, 2022, Hon. Supreme Court passed orders in a public interest litigation (Ashwini Kumar Upadhyay vs Union Of India, Writ Petition Civil no 1216 of 2020) directing a review of the Rules made by the State Governments under the RERA Act, 2016 so as to identify provisions therein that are different from the Rules made by the Central Government for Union Territories. The petitioners have raised the apprehension that the protections available to homebuyers under State Rules are weaker than those under the Central Rules. On April 18, the Court has directed all the States/UTs to respond to the MoHUA by May 15, 2022. The petitions are to be listed in the third week of July 2022.
3. Institute of Public Auditors of India (IPAI) is a not-for-profit organization comprising professionals with experience in audit, accounts, public finance, law and governance. The IPAI has, on its own, conducted a study of the subject matter of deviations in State Rules vis-à-vis Central Rules and State Rules vis-à-vis Central Act in the implementation of the RERA Act.
4. From our study, we find that indeed there are some significant deviations against the interests of homebuyers under some State Rules. However, there are also some State Rules that provide additional protection to homebuyers than under the Central Rules.
5. There are aggrieved homebuyers waiting for years to move in to their own homes who have their precious savings locked up in stalled projects. There are delinquent project developers who have been found deficient in corporate governance, where delinquent

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promoters who have diverted funds or otherwise cheated homebuyers. There are also project developers who have their own set of genuine problems like input cost escalation, lack of adequate and timely financing support, payment delays and delays in getting regulatory clearances etc.

6. Measuring the degree of conflict between the interests of homebuyers and project developers in golden balance is a matter under consideration of the highest Court and the IPAI is not taking a view as to what deviations in the State Rules are appropriate or excessive as compared to corresponding Central Act and Rules.
7. This is purely an academic study based on desk research documenting and analyzing the deviations in the Central and State regimes under the RERA Act. This is part of our steady endeavor to study various areas of governance from legislative, policy and implementation mechanism perspectives.

**Subhash Chandra Pandey**  
**President, Institute of Public Auditors of India**

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## EXECUTIVE SUMMARY

1. The Institute of Public Auditors of India has conducted a study of the deviations in State Rules vis-à-vis Central Rules and State Rules vis-à-vis Central Act in the implementation of the RERA Act. It was certainly not the legislative intent and provision of the RERA Act that all the State Rules have to be exact replicas of the Central Rules. Grant of Rule-making powers to appropriate government means that there different Rules are expected to differ in detail. However, the subordinate legislation by governments must be within the confines of the Act passed by the Parliament.
2. There are thus several differences in which provisions are formulated on specific aspects in different Rules. Not all such differences can directly affect interests of homebuyers. For example, variations in provisions concerning appointment, remuneration and functioning of Chairman, Members and officials of RERAs are important from the viewpoint of study of governance system but cannot be directly analysed in terms of impact on homebuyers' welfare.
3. We have culled out some significant deviations in State RERA Rules vis-à-vis Central Rules and Central Act affecting homebuyers' interests. Major deviations fall in the following categories.
4. We begin by highlighting some homebuyer-friendly State Rules that are better than the Central Rules. Maharashtra stands out by omitting to prescribe terms/conditions and rates for compounding of offences under the Act or mandating refund within 30 days, the shortest period prescribed under all Rules.
5. The RERA Act does not prescribe anything about the promoter's obligation regarding discrimination among allottees. However, Haryana stands out by requiring disclosure

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of promoter indebtedness (as debt equity ratio) and mandating no discrimination among homebuyers merely on grounds of sex, caste, creed, colour or religion.

6. Further, Haryana RERA Rules stand out by providing for disclosure of debt to asset ratio of the promoter (Rule 3(1) (b)). This is an important transparency initiative. The disclosure indicates the relative role of debt vs promoter's own funds in financing the project. There are presently no entry barriers on to who can launch real estate project and what risk capital he has to necessarily bring before accepting deposits from homebuyers or sourcing bank finance. Stringent eligibility criteria factoring the financing strength of the promoter prior to grant of registration under RERA Act can go a long way in promoting consumer interest.
7. Haryana Rules prescribe the compounding amount to be 5-10 percent of the estimated cost of the real estate project or cost of the plot, apartment or building, as the case may be. Haryana Rules are most homebuyer-friendly in this respect.
8. Now on the State Rules that dilute provisions enhancing homebuyers' interests.
9. Significant deviations in State RERA Rules vis-à-vis Central Rules and the RERA Act have been categorised according to following aspects of the law concerning homebuyers' protection:
  - Exempting incomplete projects from mandatory registration under the RERA Act
  - Major variations in penalties for non-compliance with the Act
  - Time period for refund by Promoter
  - Promoter's liability for rectification of structural defects

**In some States, projects that were incomplete on May 1, 2017 were granted exemption from mandatory registration under the RERA Act.**

10. Barring some exemptions clearly specified in the RERA Act, all real estate projects which were incomplete/ongoing as on May 1, 2017 were mandated by the RERA Act to be registered with the RERA having territorial jurisdiction over the site of the

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project. However, in a clear deviation from the intent and provisions of the RERA Act, some State Rules chose to define 'ongoing projects' in a way that some projects were freed from the requirement of compulsory registration under the RERA Act even though the projects were incomplete on May 1, 2017.

11. Andhra Pradesh, Chhattisgarh, Haryana, Karnataka, Kerala, Punjab and Uttar Pradesh diluted the plain meaning of the term 'projects ongoing as on May 1, 2017' to grant exemption to several projects that had not received completion certificate by May 1, 2017.
12. All projects with size above 500 square foot square metre and 8 apartments beyond that projects were to be covered under RERA Act. However, in a clear deviation from the RERA Act, Kerala Rules extended the scope of exemption by increasing the limits to 1000 square metres and 12 apartments depriving several home buyers from the protection of the RERA Act.

#### **Significant variations in provisions for compounding of criminal liability of promoters**

13. Section 70 of the RERA Act enables compounding of offences under the Act by the court 'on such terms and conditions and on payment of such sums as may be prescribed'. The RERA Act provides for jail term up to three years or fine which may extend UPTO 10% of the estimated cost of the real estate project, or both, for carrying our real estate business without RERA registration. In extreme case, there can be a 3 year jail term plus fine equal to 10% of project cost. It is thus presumed that compounding amount to be paid is a legal substitute for both penalties - upto 3 years jail term or fine upto 10% of the project cost - which can be imposed on defaulting promoter.
14. Haryana Rules prescribe the compounding amount to be 5-10 percent of the estimated cost of the real estate project or cost of the plot, apartment or building, as the case may be. Haryana Rules are most homebuyer-friendly in this respect.

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15. Maharashtra Rules do not contain any provision prescribing the terms and conditions and the sums to be paid for compounding of offences under the Act.
  16. Delhi Rules prescribe a fixed level of compounding amount at '10% of the estimated cost of the real estate project or cost of the plot, apartment or building, as the case may be'. The same Rule has been prescribed in Bihar Rules.
  17. However, Karnataka, Punjab and Uttar Pradesh have diluted the compounding provision with the permissible amount of compounding set at 'UPTO 10% of the estimated cost of the real estate project or cost of the plot, apartment or building, as the case may be'. So technically, offence can be compounded by the court even at a token sum of rupee one!
  18. Gujarat and Rajasthan Rules have provided for a fixed rate of compounding of offence @5% of the estimated cost of the real estate project or cost of the plot, apartment or building, as the case may be. This can be viewed as a significant variation from the Delhi Rule provision of 10% or Haryana Rules provision of 5-10 per cent.

#### **Time period for refund by Promoter**

19. The Rules notified by the Central Government (DELHI Rule 16) prescribe a time limit of 45 days for the refund of any money alongwith interest and compensation - payable by the promoter to the allottee in terms of Act or the rules and regulations made thereunder - from the date it becomes due. Several States like Gujarat and UP prescribe the same time limit of 45 days. Bihar, Himachal Pradesh and Karnataka prescribe 60 days. Haryana and Punjab prescribe 90 days. The shorted period for refund – 30 days – is prescribed by Maharastra, better than the 45 days under Central Rules.

#### **Defect liability**

20. In case of any structural defects arising within five years of handing over the possession of project to buyers, developers will be liable to rectify such defects

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without further charge within 30 days or pay compensation as adjudicated by the Adjudicating Officer, RERA.

21. Most State Rules do not provide clear and implementable rules about this important aspect homebuyers' rights.
22. Kerala Rules (Rule 14(3)) reduced the defect liability period from 5 years to 2 years in a clear deviation from the Central Act. Haryana RERA Rule 12 on Defect Liability limits the liability of the promoter by stipulating that the promoter shall not be liable for any such structural/ architectural defect induced by the allottee(s), by means of carrying out structural or architectural changes from the original specifications/ design

### **Conclusions**

23. Major deviations made under State Rules that adversely impact consumer interests are in terms of exempting certain projects from registration under the RERA Act that were incomplete on May 1, 2017 and diluting the criminal liability by allowing compounding of offences on easier terms. The transparency requirements also vary across States both in terms of Rules and observed data on RERA websites. There is a lot of divergence in the scope, accessibility, ease of use, frequency of updation of all the relevant disclosures supposed to be made on the RERA websites.
24. There are also some positive deviations which are more in favour of consumers like disclosure of promoter's indebtedness or obligating promoters not to discriminate among allottees on the basis of time of allotment of any apartment, plot or building, merely on grounds of sex, caste, creed, colour or religion. (Haryana Rules).
25. There is an apparent ambiguity arising from concurrent application of Section 88 and 89 of the RERA Act. Section 88 of the RERA Act states that application of other laws is not barred. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. However, the very next Section, Section 89 of the RERA Act mandates that the Act shall have overriding effect. The provisions of this Act shall have effect, notwithstanding anything inconsistent



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therewith contained in any other law for the time being in force. This calls for a review of the provisions.

26. There are of course issues other than these deviations which may point to certain voids now felt in the Act itself. For example, there are no entry barriers on to who can launch a real estate project and what risk capital the project promoter has to necessarily bring before being allowed to accept deposits from homebuyers or to source bank finance. Stringent eligibility criteria factoring the financing strength of the promoter prior to grant of registration under RERA Act can go a long way in promoting consumer interest. In this direction, Haryana RERA Rules stand out by providing for disclosure of promoter's indebtedness (debt to asset ratio of the promoter) (Rule 3(1) (b)). This is a welcome transparency initiative. The disclosure indicates the relative role of debt vs promoter's own funds in financing the project. A more substantive legislative provision would be prescribing borrowing limits or requirement of minimum amount of risk capital to be maintained at all times by the promoter.
27. Reforming and rationalising RERA Act and Rules made by States under the RERA Act – based on the experience gained in implementation during nearly last 5 years – appears necessary. The existing RERA Act is crafted in the interests of home buyers but has been diluted somewhat by some States in Rules that are more favorable to real estate project developers rather than home buyers. Homebuyers' agony is aggravated because of a weak enforcement mechanism in a multitude of cases evidenced by the caseload in RERAs, Consumer and Insolvency courts and regular courts.

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# Implementation of the Real Estate Regulation and Development Act, 2016

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### **Background of the Study**

1. A batch of Writ Petitions were filed in the Hon. Supreme Court under Article 32 of the Constitution, raising the grievance that in the absence of a uniform or model builder-buyer agreement and agent-buyer agreement, homebuyers are left to the mercy of housing project developers in respect of the terms and conditions which are imposed at the time of entering into such agreements. It was submitted that homebuyers are thus left to be exploited as a result of one-sided agreements loaded in favor of developers.
2. The Real Estate Regulation and Development Act, 2016 (Act no. 16 of 2016, hereafter referred to as the RERA Act) has been enacted to protect the interests of homebuyers.
3. Basic law of contracts is governed by Indian Contract Act, 1872. The Transfer of Property Act, 1882 is a special law dealing with rights and liabilities of parties under specialized contracts of gift, exchange, transfer, sale, mortgage of immovable property covers to safeguard the interests of sellers and buyers against defaults by the other side. The RERA Act, 2016 goes further to legislate special protection for retail buyers pitted against large sellers in asymmetric contracts for sale of 'plots, apartments or buildings'.
4. The RERA Act is intended to regulate a special class of contracts where business entities seek to arrange land and construct multi-unit housing complexes, largely financed through advances taken from potential homebuyers by advance booking of flats yet to be constructed. Homebuyers typically obtain bank loans – incentivised by tax concessions and subsidies in some cases - and sometimes these loans are secured under tripartite

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arrangements between the banker, homebuyer and seller, creating charges and encumbrances on the property not yet in existence.

5. On February 14, 2022, Hon. Supreme Court passed orders in a public interest litigation (Ashwini Kumar Upadhyay vs Union Of India, Writ Petition Civil no 1216 of 2020) directing a review of the Rules made by the State Governments under the RERA Act, 2016 so as to identify provisions therein that are different from the Rules made by the Central Government for Union Territories. The petitioners have raised the apprehension that the protections available to homebuyers under State Rules are weaker than those under the Central Rules.

### **Rollout of the RERA Act**

6. Broad structure of the RERA Act is as follows:
  - Chapter I: Sections 1-2 Commencement and Definitions)
  - Chapter II: Sections 3-10 Registration of real estate projects and registration of real estate agents)
  - CHAPTER III: Sections 11-18 Functions and duties of promoters
  - CHAPTER IV: Section 19 Rights and duties of allottees
  - CHAPTER V: Sections 20–39 on setting up of real estate regulatory authorities; Section 40 on recovery of interest or penalty or compensation and enforcement of order etc.
  - CHAPTER VI: Sections 41–42 on setting up of Central Advisory Council
  - CHAPTER VII: Sections 43–58 on setting up of the Real Estate Appellate Tribunal
  - CHAPTER VIII: Sections 59-72 on offences, penalties and adjudication),
  - CHAPTER IX: 73-78 on finance, accounts, audits and reports
  - CHAPTER X: 79-80 on miscellaneous matters
7. The RERA Act received the assent of the President of India on March 25, 2016. The Act provided for individual Sections of the Act to come into force on such date as may be notified by the Central Government. Sections 2, 20–39, 71–78 and 81–92 were notified

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for commencement with effect from May 1, 2016 and Sections 3-19, 40, 59-70, 79-80 were notified for commencement with effect from May 1, 2017.

8. The provisions enforced w.e.f. from May 1, 2016 related to setting up of real estate regulatory authorities and adjudicating officers, their functions and powers and delegation of powers to Appropriate Government to frame Rules and have general superintendence over respective RERA in their territorial jurisdiction like the power to supersede, issue directions, call for reports/returns. The provisions enforced w.e.f. from May 1, 2017 related to registration of real estate projects and registration of real estate agents; functions and duties of promoters; rights and duties of allottees; recovery of interest or penalty or compensation and enforcement of orders; offences, penalties and adjudication etc.
9. So the institutional mechanism was intended to be put in place w.e.f May 1, 2016 and it was to start registering projects that were 'incomplete' as on May 1, 2017 and start exercising oversight on such registered projects.

**Interim Orders of the Hon. Supreme Court dated February 14/April 18, 2022 (WRIT PETITION Civil no 1216 of 2020)**

10. It has been contended before the Hon. Supreme Court (Ashwini Kumar Upadhyay vs Union Of India WRIT PETITION Civil no 1216 of 2020) that the States have enacted such Rules under the RERA Act which dilute the originally intended protections to the interests of homebuyers thereby defeating the intent and provisions of the Parliamentary Act. The Court noted that on 4 November 2016, the Secretary to the Government of India in the Ministry of Housing and Urban Poverty Alleviation addressed a communication to all the Chief Secretaries stating that the Union government being the appropriate government for Union Territories without Legislatures has notified the Real Estate (Regulation and Development) (General) Rules 2016 and the Real Estate (Regulation and Development) (Agreement for Sale) Rules 2016. All the States were requested to forward copies of the rules as notified by them.

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**11.** Ms Aishwarya Bhati, ASG submitted that in some states, such as Maharashtra there are variations occasioned by conditions prevalent and schemes such as the Slum Rehabilitation scheme. The states undoubtedly have to make provisions which tailor to conditions prevalent in each of them. But the basic protections afforded to purchasers must be across the country in accordance with the salutary purpose of the RERA.

**12.** Central Government has now been asked by the Supreme Court to study the deviations the States have made that defeat or dilute the RERA Act. ( *“At the present stage, it is necessary for the Ministry of Housing to apprise the Court on whether the rules which have been framed by the States (i) contain the essential norms which have been adopted by the Union government in the Rules of 2016 referred to above; and (ii) whether there are any deviations which detract from the rights of flat purchasers. The exercise should, in our view, be carried out by the Union Ministry of Housing which shall scrutinize the State rules and place a report before this Court on whether they comply with the substratum of the Rules of 2016 which have been framed by the Union government. Any provisions which deviate from the rules framed in 2016 must be identified State-wise so that they can be rectified. We also request Mr Devashish Bharuka, learned counsel to assist this Court as Amicus Curiae. Mr Bharuka shall also assist in carrying out the above exercise.”*)

**13.** The West Bengal had passed its own Act which was, however, declared unconstitutional by the Supreme Court. The State of West Bengal has been directed by the Supreme Court to immediately implement the RERA.

**14.** On 2 March 2022, the Secretary in the Union Ministry of Housing and Urban Affairs wrote to the Chief Secretaries of the States/UTs calling for the following information:

- (i) the latest copy of the agreement for sale rules notified by the State/UT under the RERA; and

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(ii) a comparison sheet between the said rules and the rules framed by the Union Ministry of Housing and Urban Affairs for UTs without a legislature.

15. The Court was apprised of the fact that five States initially responded to the letter. Following this, a comparison sheet was prepared by the Ministry which was circulated on 12 April 2022 to all the States/UTs, whose responses were requested. The matter rested at that stage. The Court has directed all the States/UTs to reply to MoHUA by 15 May 2022 and to list the matter in the third week of July.

#### **Analysis of deviations in State RERA Rules vis-à-vis Central Rules and Central Act**

16. We have studied the Rules notified by the States purportedly under the RERA Act. with a view to identify the deviations in State Rules vis-à-vis Central Rules and State Rules vis-à-vis Central Act in the implementation of the RERA Act. Significant deviations in State RERA Rules vis-à-vis Central Rules and the RERA Act are discussed below.

#### **Exemption to incomplete projects from mandatory registration under the RERA Act**

17. The RERA Act expected all projects incomplete/ongoing as on May 1, 2017 to be mandatorily brought within the discipline of the Act by requiring their mandatory registration by August 1, 2017.

18. Under Section 3(1) of the RERA Act brought into force w.e.f. May 1, 2017, real estate projects that were ongoing as on May 1, 2017 (i.e., for which the completion certificate had not been issued) were mandated to be registered with the jurisdictional RERA within a period of three months, i.e., by August 1, 2017. Under Section 3(2) of the Act, certain categories of projects were exempted from the requirement of registration. Hence, barring some exemptions clearly specified in the RERA Act, all real estate projects which were incomplete/ongoing as on May 1, 2017 were mandated by the RERA Act to be registered with the RERA having territorial jurisdiction over the site of the project.

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19. However, in a clear deviation from the intent and provisions of the RERA Act, some State Rules chose to define 'ongoing projects' in a way that some projects were freed from the requirement of compulsory registration under the RERA Act even though the projects were incomplete on May 1, 2017.
20. RERA Act adopted a very simple criteria to determine which project required mandatory registration under the Act: Whether it had received completion certificate by May 1, 2017 or not. For all 'buildings', there is a well-defined legal process of issue of 'completion certificate' by a local authority vested with the power to verify whether the building complies with all laws, rules and regulations applicable to construction of buildings. These compliances typically include compliance to master plan of the area/locality, building plan, fire safety, access to water/electricity, sewerage facilities, parking facility, circulation space around and such other requirements before building may be allowed to be inhabited and used.
21. The RERA Act took cognizance of this practice of issuing 'completion certificates' and required all projects where completion certificate had not been issued by May 1, 2017 to register under the Act.
22. Specific deviations made by some States are detailed below.
23. **Andhra Pradesh** RERA Rule 2(1)(o) provides for mandatory registration of all ongoing projects where completion certificate was pending as on May 1, 2017 but exempts such of these projects from mandatory registration where roads, open spaces, amenities and services had been handed over to the local authority in layout projects, or where all slabs were laid in housing projects, or where all developmental works had been completed and sale/lease deeds of 50% of the apartments/houses/plots had been executed, or where development works had been completed and application had been filed to the competent authority for issue of completion or occupancy certificate.
24. **Chhattisgarh** Rule 2(1)(g) similarly provide that "ongoing project" would mean a project where development is going on and for which completion certificate has not been issued

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but excludes such projects which fulfill any of the following criteria on the date of notification of these rules,- (i) where services have been handed over to the Local Authority for maintenance; (ii) where common area and facilities have been handed over to the Association or the Residents' Welfare Association/ Society for maintenance; (iii) where all development work have been completed and sale/ lease deeds of sixty percent of the apartments/ houses/ plots have been executed; or (iv) where all development works have been completed and application has been filed with the Competent Authority for issue of completion certificate

**25. Haryana** RERA Rules notified on 28.07. 2017 also narrowly define “on going projects” in a manner that several projects which should otherwise be registered under the RERA Act are allowed to remain unregistered and thus out of the purview of the Act. Rule 2(o) defines “on going project” means a project for which a license was issued for the development under the Haryana Development and Regulation of Urban Area Act, 1975 on or before the 1st May, 2017 and where development works were yet to be completed on the said date, but does not include:

- (i) any project for which after completion of development works, an application under Rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 or under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the Competent Authority on or before publication of these rules (28.07. 2017) and
- (ii) that part of any project for which part completion/completion, occupation certificate or part thereof has been granted on or before publication of these rules(28.07. 2017). However, the promoter must register with RERA within 30 days of rejection of his application for issue of completion/part completion certificate (Rule 4(5))



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**26. Karnataka** RERA Rules (Rule no. 4(1) Explanation) similarly provide for mandatory registration of all ongoing projects where completion certificate was pending as on May 1, 2017 but exempts such of these projects from mandatory registration where

- (i) in respect of layouts where the streets and civic amenities sites and other services have been handed over to the local authorities and planning authority for maintenance;
- (ii) in respect of apartments where the common areas and facilities have been handed over to the registered Association consisting of majority of allottees;
- (iii) where all development works have been completed as per the Act and certified by the competent agency and sale/ lease deeds of 60% of the apartments/ houses/ plots have been registered and executed;
- (iv) where all development works have been completed as per the Act and certified by the competent agency and application has been filed with the competent authority for issue of completion certificate/ occupation certificate
- (v) where partial occupancy certificate is obtained to the extent of the portion for which the partial occupancy certificate is obtained.

**27. Kerala** RERA Rules provide for mandatory registration of all ongoing projects where completion certificate was pending as on May 1, 2017 but exempts such of these projects from mandatory registration where the promoter has received all requisite approvals/permits for the development of the real estate project prior to commencement of the Act.

**28. Uttar Pradesh** RERA Rules similarly provide for mandatory registration of all 'ongoing projects' where completion certificate was pending as on May 1, 2017 but exempts such of these projects from mandatory registration where:

- (i) services have been handed over to the local authority for maintenance
- (ii) where common areas and facilities have been handed over to the association or resident's welfare association for maintenance

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- (iii) all development works have been completed and sale/ lease deeds of 60% of apartments/plots/houses have been executed; and
  - (iv) where all development works have been completed and application has been filed with the competent authority for issue of completion certificate.

**29. Punjab** RERA also narrowly define “on going projects” in a manner that several projects which should otherwise be registered under the RERA Act are allowed to remain unregistered and thus out of the purview of the Act. also narrowly define “on going projects” in a manner that several projects which should otherwise be registered under the RERA Act are allowed to remain unregistered and thus out of the purview of the Act. Ongoing Project means the Real Estate Projects which are ongoing in which development and developmental works are defined in Section 2(s) and Section 2(t) of the Act are still under way, excluding the area of portion of the Real Estate Project for which partial completion or occupation certificate, as the case may be, has been obtained by the promoter of the project.

**30.** It would be seen that some States have gone beyond the mandate given under the RERA Act and exempted several projects which were nearing completion and had applied for completion certificate from the scope of RERA Act. (Incidentally, THE DRAFT of REAL ESTATE (REGULATION & DEVELOPMENT) BILL, 2011 and the Bill introduced in Rajya Sabha in 2013 had sought to keep all such promoters out of the purview who had sought all permissions and received all requisite approvals for the development of immovable property one year prior to the commencement of the Act. However, the Act as finally passed in 2016 was more stringent to cover all projects which had not received completion certificate on the date of commencement of the Act.)

**31.** It could be argued that once project developers have applied for completion certificate, any delay in issue of completion certificate may not be held against them. While this appears quite logical it is a moot point whether a State Government issuing Rules as authorised under a Central Act can deviate from the unambiguous provisions of the Act

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or such Rules would be deemed ultra vires. Further, the buyers in these exempted projects were deprived of RERA Act relief and remedies in case non-compliances were observed during inspection by local authorities as part of the process of issue of the completion certificate. Some States like Uttar Pradesh have since then issued orders about 'deemed' issue of completion certificate in case the authority has delayed the issue beyond a prescribed period. For a real estate developer of a non-compliant building, the 'deemed' completion certificate would be a major relief while the buyers would be forced to accept possession of 'non-compliant' building.

### **Size of projects mandated to be registered with RERA**

**32.** Section 3(2) of the RERA Act exempted certain projects from the requirement of mandatory registration.

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases: Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

(c) where renovation or repair or re-development is undertaken without any marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

**33.** Thus, all projects with size above 500 square foot square metre and 8 apartments beyond that projects were to be covered under RERA Act. However, in a clear deviation from the RERA Act, Kerala Rules extended the scope of exemption by increasing the limits to 1000 square metres and 12 apartments depriving several home buyers from the protection of the RERA Act.

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### **Variation in penalties for non-compliance with the Act**

34. Section 59(2) of the Act contains punishment for non registration, Section 64 contains penalty for failure to comply with orders of Appellate Tribunal by promoter, Section 66 contains penalty for failure to comply with orders of Appellate Tribunal by real estate agent and Section 68 contains the penalty for failure to comply with orders of Appellate Tribunal by Allottee. Under Section 59(1) of the RERA Act if an unregistered promoter who advertises markets, books, sells or offers to sell, or invites persons to purchase in any manner any plot, apartment or building, shall be liable to a penalty that may extend up to ten per cent. of the estimated cost of the real estate project as determined by the Authority having territorial jurisdiction over the site where the project is located.
35. Further Under Section 59(2) of the RERA Act, any unregistered promoter who does not comply with the cease and desist orders to stop marketing and/or pay penalty, continues selling/marketing activities shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten per cent of the estimated cost of the real estate project, or with both.
36. Thus, penalty/fine aggregating upto 20% of the estimated cost of the project and imprisonment upto 3 years are the deterrent legislative sanctions contemplated by the RERA Act on unregistered real estate developers carrying out their business without registration. It is important to note that any relaxation granted to real estate project promoters from mandatory registration has a clear bearing on the reduction in their criminal liability under Section 59 of the RERA Act.
37. Thus, the RERA Act provides for imprisonment for a term which may extend up to three years, or fine which may extend up to 10% of the estimated cost of the real estate project, or both, for carrying our real estate business without RERA registration.
38. Section 70 of the RERA Act enables compounding of offences under the Act by the court 'on such terms and conditions and on payment of such sums as may be prescribed'.

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**39.** Since the RERA Act provides for fine, which may extend UPTO 10% of the estimated cost of the real estate project with or without jail term upto 3 years, it is presumed that compounding amount to be paid is a legal substitute for both upto 3 years jail term or fine upto 10% of the project cost. In extreme case, there can be a 3 year jail term plus fine equal to 10% of project cost

**40.** Significant variations were noticed in this important aspect of criminal liability of promoters.

- a) **Maharashtra** Rules do not contain any provision prescribing the terms and conditions and the sums to be paid for compounding of offences under the Act.
- b) **Delhi** Rules prescribe a fixed level of compounding amount at '10% of the estimated cost of the real estate project or cost of the plot, apartment or building, as the case may be'. The same Rule has been prescribed in Bihar Rules.
- c) However, **Karnataka, Punjab and Uttar Pradesh** have diluted the compounding provision with the permissible amount of compounding set at 'UPTO 10% of the estimated cost of the real estate project or cost of the plot, apartment or building, as the case may be'. So technically, offence can be compounded by the court even at a token sum of rupee one!
- d) **Haryana** Rules (Rule 27) provide for compounding amount set at 5 to 10 percent of the estimated cost of the real estate project or cost of the plot, apartment or building, as the case may be.
- e) **Gujarat** Rules prescribe that the court may compound any offence on payment of 5% of the estimated cost of the real estate project or cost of the plot, apartment or building, as the case may be. Further, the State Government may, by notification in the official gazette, amend the compounding rates for different offences. Gujarat Rules allow the imprisoned promoter being set free on payment of the compounding amount.

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- f) **Chhattisgarh** Rules prescribe that the money to be paid for compounding shall be proportionate to the term of imprisonment subject to maximum of 10% of the estimated cost. Further, the State Government may, by notification in the official gazette, amend the rates specified in the table.
  - g) **Rajasthan** Rules specify that the court may compound any offence on payment of 5% of the estimated cost of the real estate project or cost of the plot, apartment or building, as the case may be. Rajasthan Rules allow the imprisoned promoter being set free on payment of the compounding amount.
  - h) **Himachal Pradesh** Rule 30 remains the same as that in Delhi, except that amount to be accepted by court for compounding punishment under section 68 is not mentioned.
  - i) **Delhi** Rules require a promoter, allottee or real estate agent to comply with the order compounding the offence within period specified by court, which shall not be more than 30 days from the date of compounding. On complying with such order and payment of money, the person in custody shall be set at liberty and no proceedings shall be instituted or continued against him in any court of law.
  - j) **Uttar Pradesh** Rules are same in this respect as the Delhi RERA Rules except that UP Rules allow the imprisoned promoter being set free on payment of the compounding amount.
  - k) **Karnataka** Rules, however, allow 60 days' time to comply with the conditions imposed by the court while permitting the compounding.
  - l) **Gujarat, Karnataka and Rajasthan, Uttar Pradesh** Rules allow the imprisoned promoter being set free on payment of the compounding amount.

#### **Rate of Interest payable by promoter or allottee to each other**

41. Section 2 (za) of the RERA Act defines "interest" as follows: 'Interest' means the rates of interest payable by the promoter or the allottee, as the case may be. *Explanation.*—For the purpose of this clause— (i) the rate of interest chargeable from the allottee by the

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promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default; (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

42. Thus the RERA Act establishes reciprocity in the matter of interest rate. A defaulting promoter is liable to pay interest at the same rate as that payable by the allottee under the agreement between them. However, a question remains as to what would be the applicable interest rate? It is normally expected that the builder-buyer agreement would carry specific provisions about interest rates but what if particular agreements are silent about applicable interest rate.

43. GUJARAT RERA Rules specify interest rate equal to the rate prevalent as per the directives of the Reserve Bank of India as the Marginal Cost of Lending (MCLR) Rate or the State Bank of India Prime Lending Rate (PLR) plus two percent in case there is no mutually agreed contractual rate between the parties.

44. **Delhi and Maharashtra** have the following identical provision regarding applicable interest rate: *Interest payable by promoter and allottee.- The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest Marginal Cost of Funds based Lending Rate plus two per cent. In case the State Bank of India Marginal Cost of Funds based Lending Rate is not in use it would be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

45. **Uttar Pradesh** Rules do not specify the applicable interest rate although Rule 15 is supposed to provide for it as per the Rule heading. However, the content of the Rule contain irrelevant material. (Rule 15 in UP RERA Rules seems a misprint as the heading and content do not match. The heading of the Rule says “Rate of interest payable by the

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promoter and the allottee". However, the content of the Rule provide for backup of a digital copy of the promoter's website)

#### **Non-financial discrimination among allottees**

**46.** The RERA Act does not prescribe anything about the promoter's obligation regarding discrimination among allottees. However, Rule 3(3) of Haryana RERA Rules requires the promoter to submit a declaration stating that the promoter shall not discriminate against any allottee at the time of allotment of any apartment, plot or building, as the case may be on the grounds of sex, caste, creed, colour, religion etc. (The promoter may of course have differential pricing of units/ apartments/ plots. So price-based discrimination is allowed.)

#### **Time period for refund by Promoter**

**47.** Section 19(4) of the RERA Act provides that the allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made there under.

**48.** The Rules notified by the Central Government (DELHI Rule 16) prescribe a time limit of 45 days for the refund of any money alongwith interest and compensation - payable by the promoter to the allottee in terms of Act or the rules and regulations made there under - from the date it becomes due.

**49.** Several States like Gujrat and UP prescribe the same time limit of 45 days. Bihar, Himachal Pradesh and Karnataka prescribe 60 days. Haryana and Punjab prescribe 90 days. The



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shorted period for refund – 30 days – is prescribed by Maharashtra, better than the 45 days allowed under central Rules.

### **Extension of registration**

**50.** Most State Rules allow an application for extension of registration being made not less than three months prior to expiry of registration. Maharashtra and Gujarat (Rule 7) do not mention the three months time limit. Section 6 of the RERA Act provides for maximum 1 year extension in the registration but several States have modified and allowed extension of registration without restricting total permissible extension to one year.

**51.** Haryana RERA Rule 6 prescribes the procedure for extension of registration without specifying total permissible extension to one year. The Rules read with the Act would imply that such a cap on maximum extension of registration exists.

**52.** Given the general state of affairs and environmental changes, limiting the power of RERA not to grant total extension of registration beyond one year appears quite stifling. In practice, similar time limits provided under the Insolvency and Bankruptcy Code, 2016 have proved to be impractical warranting judicial intervention to extend time limits. However, it is a moot point whether State governments can stipulate provisions in the Rules notified by them under authority delegated under the Act which are in direct conflict with very specific and clear provisions of the Act.

### **Disclosure of project related information on website**

**53.** Section 34 of the RERA Act lists out *inter alia* the following functions of the RERA

(b) to publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted;

(c) to maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which

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has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public;

(d) to maintain a database, on its website, for public viewing, and enter the names and photographs of real estate agents who have applied and registered under this Act, with such details as may be prescribed, including those whose registration has been rejected or revoked;

Section 84 (2) of the RERA Act authorises the Appropriate Government to notify Rules for ‘for carrying out the provisions of the Act’ and in particular the Rules may prescribe the details to be published on the website as under clause (b) and under clause (d) of section 34;

**54.** The transparency requirements vary across States and there is a lot of divergence in the scope, accessibility, ease of use, frequency of updation of all the relevant disclosures supposed to be made on the RERA websites.

#### **Disclosure of promoter indebtedness**

**55.** There are no entry barriers on to who can launch real estate project and what risk capital he has to necessarily bring before accepting deposits from homebuyers or sourcing bank finance. Stringent eligibility criteria factoring the financing strength of the promoter prior to grant of registration under RERA Act can go a long way in promoting consumer interest.

**56.** In this direction, Haryana RERA Rules stand out by providing for disclosure of debt to asset ratio of the promoter (Rule 3(1) (b)). This is an important transparency initiative. The disclosure indicates the relative role of debt vs promoter’s own funds in financing the project. A more substantive legislative provision would be prescribing borrowing limits or requirement of minimum risk capital to be maintained at all times by the promoter.

#### **Promoter’s liability for rectification of structural defects**

**57.** In case of any structural defects arising within five years of handing over the possession of project to buyers, developers will be liable to rectify such defects without further charge within 30 days or pay compensation as adjudicated by the Adjudicating Officer,

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RERA. (Section 11 (4) The promoter shall—(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made there under or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

**58.** Section 14 (3) of the RERA Act casts an obligation on the promoter to rectify all structural defects brought to their notice within 5 years from the date of handing over possession. In the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation. Most State Rules do not provide clear and implementable rules about this important aspect homebuyers' rights.

**59.** **Kerala** Rules (Rule 14(3) reduced the defect liability period from 5 years to 2 years in a clear deviation from the Central Act. **Haryana** Rule 12 on Defect Liability limits the liability of the promoter by stipulating that the promoter shall not be liable for any such structural/ architectural defect induced by the allottee(s), by means of carrying out structural or architectural changes from the original specifications/ design:

**Apparent conflict between Section 88 and 89 - RERA Act to have overriding effect but its provisions are supplemental and not in derogation of other laws**

**60.** Section 88 of the RERA Act states that Application of other laws is not barred. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. However, Section 89 of the Act states that the Act to have overriding effect. The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

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## Conclusions

61. As analysed above, major deviations in the State Rules that adversely impact consumer interests are in terms of exempting certain projects from registration under the RERA Act that were incomplete on May 1, 2017 and diluting the criminal liability by allowing compounding of offences on easier terms. The transparency requirements also vary across States both in terms of Rules and observed data on RERA websites. There is significant divergence in the scope, accessibility, ease of use, frequency of updation of all the relevant disclosures supposed to be made on the RERA websites.
62. There are also some positive deviations which are more in favour of consumers like disclosure of promoter's indebtedness or obligating promoters not to discriminate among allottees on the basis of time of allotment of any apartment, plot or building, merely on grounds of sex, caste, creed, colour or religion. (Haryana Rules).
63. The existing RERA Act is crafted in the interests of home buyers but has been diluted somewhat by some States in Rules that are more favorable to real estate project developers. Homebuyers' agony is aggravated because of a weak enforcement mechanism in a multitude of cases evidenced by the caseload in RERAs, Consumer and Insolvency courts and regular courts. Reforming the RERA Act and Rules made by States under the Act thus appears necessary, based on the experience gained in implementation during nearly last 5 years.
64. There are of course issues other than these deviations which may point to certain voids now felt in the Act itself. For example, there are no entry barriers on to who can launch real estate project and what risk capital he has to bring before accepting deposits from homebuyers or sourcing bank finance. Stringent eligibility criteria factoring the financing strength of the promoter prior to grant of registration can go a long way in promoting consumer interest. Haryana Rules require indication of promoter's indebtedness in a welcome transparency measure. More substantive measures to ensure higher risk capital being brought by promoters need consideration.