



CO-PUBLISHED ARTICLE

# REAL ESTATE-BACKED ICOS IN THAILAND

THE COUNTRY IS SEEKING A CONCRETE DIRECTION FOR THE REGULATION  
OF EMERGING ASSETS AS CRYPTOCURRENCY TRADING HEATS UP





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## THAILAND



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The Securities and Exchange Commission of Thailand (SEC) remains highly active in implementing new laws and regulations to keep up with the fast-growing developments in fintech businesses. Since April 2020, the SEC has issued several notifications amending the previous notifications under the Emergency Decree on Digital Asset Businesses, one of which is in regard to the initial coin offering (ICO). Such amendments introduced the innovative real estate-backed ICO, another type of asset-backed ICO, which came into effect on 1 May 2020, marking the beginning of a new digital era for the real estate industry in Thailand.

Thailand's real estate-backed ICO is conceptually similar to the real estate investment trust (REIT), which uses a trust mechanism by which a trustee holds the title deed of a property on behalf of the unit holders of the trust. However, the trust used in the real estate-backed ICO is different from that of the REIT in that it is a passive one, since it is established by the issuer only to hold ownership in the title deed or certificate of land utilisation, or to hold shares in a special purpose vehicle (SPV) that holds the title deed or certificate of land utilisation.

The shares held by the passive trustee, however, must not be less than 75% of the total issued shares, and not less than 75% of the total voting rights of the SPV. The SEC has recently added another required characteristic of a passive trust used in the real estate-backed ICO to be in line with REIT, which invests in the right to lease a real estate or right of possession in a real estate with the certificate of land utilisation.

The trustee in a REIT, on the other hand, has more rights, duties and responsibilities in managing the trust on behalf of the investors, other than just holding the ownership in the immovable property on behalf of the investors (a passive trustee).

Nevertheless, as with other REITs, the trustee of a trust established by an issuer under the real estate-backed ICO must hold the immovable property for the ben-

efit of the digital token holders, to prevent the immovable property of the SPV from being disposed of, transferred or encumbered without the trustee's approval, in accordance with the trust deed. Apart from duties listed in the recent notification issued by the SEC in regard to trustee of a real-estate backed ICO that has come into effect as of 1 March 2021, the real-estate backed ICO trustee will need to monitor if the issuer is managing the property in accordance with the prospectus, business plan and applicable laws.

Pursuant to the current law, an issuer who wishes to tokenise its immovable property via a real estate-backed ICO must be a juristic entity. Such immovable property must be fully completed and ready to be utilised. Based on the recent amended notification issued on 1 March 2021, the real estate to be tokenised must not be a single condo unit or house and must constitute more than 80% in number or investment value of the project or in aggregate of not less than THB500 million (US\$16.4 million).

For example, an issuer must tokenise more than 80% of the total number of villas or condo units in the project. If a project consists of large villas, houses or penthouse units, which are substantially high in value, the aggregate total value should be more than 80% of the total investment value of that project or in aggregate of at least THB500 million in order to be eligible for tokenisation.

The reason behind this rule is mainly because the SEC, together with the Bank of Thailand, view that if they allow a single condo unit or house to be tokenised via the real estate-backed ICO, many developers may use this mechanism to dump their unsold assets in the market, while the investors continue to bid-up the price of an asset beyond any real, sustainable value. This may inevitably lead to an economic or asset bubble, which may likely burst when the prices crash and demand falls.

Another legal requirement under the real estate-backed ICO is that the issuer

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must remain as the property manager of the tokenised real estate asset, or, if necessary, outsource a professional property manager to manage the tokenised real estate asset under its control. Based on this requirement, it appears that the most suitable issuer under the real estate-backed ICO is inevitably a real estate developer with some experience in property management or the real estate industry. This somewhat deviates from the main objective of the general ICO, which targets startups with no good track record or experience in the tokenised business.

Prior to tokenising the real estate asset, the issuer must go through the due diligence process via the selected ICO portal. The issuer must also submit the business plan, forecasted expenditure and budget, types of digital tokens to be issued to the investors – i.e., utility tokens, investment tokens or hybrid tokens (a mixture of utility and investment tokens) – and draft prospectus, or white paper, disclosing all the information that the public needs to know about the investment. The ICO Portal will conduct a due diligence investigation on both the issuer and the asset purported to be tokenised, as well as, the related documents.

To elaborate more on the types of the digital tokens, an issuer can choose whether to issue either: A utility token, which is a token to be utilised for services and/or goods that will be rendered and/or sold in the future; or an investment token with profit sharing in return once the project is complete (a project-based ICO), all of which are not-ready-for-use types of tokens.

An issuer can also issue a hybrid one, which is a cross between utility and investment tokens. With regard to the real-estate backed ICO, this is a type of asset-backed ICO where real estate is used to back up the ICO as security for return on investment, e.g., a rental income from leasing out such real estate. Nevertheless, the issuer of such a digital token is allowed to set its own terms and conditions attached to the digital token, but, unlike securities, the investors will not have any actual stake in the company that owns the asset, and will only have limited voting rights in such real estate project. All of these digital tokens are subject to the Emergency Decree on Digital Asset Businesses.

At the time of writing, the SEC had recently held a public hearing in regard to the proposed amendments of laws in order to eliminate the overlapping of laws between a securities token offering (STO), which is currently governed under the Securities and Exchange Act, and an ICO, which is subject to the Emergency Decree on Digital Asset Businesses. The SEC views that the real estate-backed or certain asset-backed ICO is similar to a REIT

or securities under the Securities and Exchange Act, which may cause confusion as to which law it falls under.

As such, the SEC plans to amend the laws under the Emergency Decree on Digital Asset Businesses and elevate the required standard of an ICO portal to be as high as that of a financial adviser. The business operators on the exchange side will also need to amend their listing rules, trading rules and other codes of conduct to be more stringent, as if such digital assets are securities.

While these sporadic amendments of the laws keep causing confusion to existing business operators or startups, Thailand's SEC is known to be very flexible in facilitating fintech businesses, and is very open-minded in receiving feedback from the public, related private sectors, institutions and government authorities in order to issue the most pragmatic laws that suit all fintech business operators.

That being said, the existing laws and regulations may be amended from time to time by the SEC, so everyone will need to keep themselves up-to-date with any future changes to fintech laws.



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