

## **DISCUSSION NOTE – BORROWINGS BY TRUSTS AND ENFORCEMENT**

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This note proposes to address the following concerns raised by the Ministry of Finance, Department of Economic Affairs, in relation to the subject of trusts, and specifically real estate investment trusts (“REITs”) and infrastructure investment trusts (“InvITs”, together with REITs, the “Trusts”)

- (i). availing loans from banks and financial institutions.
- (ii). investment by foreign portfolio investors (“FPIs”) in debt securities issued by Trusts; and
- (iii). the legal framework for enforcement options for such financing.

### **I. INTRODUCTION AND BACKGROUND**

1. India’s attractiveness for a portfolio investor closely mirrors its attractiveness as a business destination. As the quality of businesses and the business environment have improved over the years, it has become very tough for serious global investors to ignore India. The continued independence and transparency of the Reserve Bank of India (“RBI”) and the Securities and Exchange Board of India (“SEBI”) have played an integral part in bolstering investor sentiment towards India. Foreign portfolio investment has become an important source of augmenting debt investment in the economy both in the infrastructure and real estate sector, by notifying the Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014 (the “SEBI REIT Regulations”) and the Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014 (the “SEBI InvIT Regulations”, together with the SEBI REIT Regulations, the “SEBI Regulations”)
2. The Trust structure is akin to a holding company structure for typical Indian companies. There is a holding company-subsidary relationship between the Trusts and its underlying special purpose vehicles or holding companies and such debt issuances would be in the ordinary course of business. Further, these Trusts provide a comprehensive holding and regulated framework with underlying income generating assets – which have been amongst the most secure asset class for banks and NBFCs in India. Accordingly, allowing FPIs to invest in a Trust, which is an aggregation of income producing assets is a “derisked” and appropriate structure
3. Given the asset-heavy nature of the business and investments required for successful operations, debt is an important component of the capital structure of a Trust.
4. Apart from banks and financial institutions, FPIs are key capital providers to Indian corporates and specifically real estate sector and hence appropriate amendments should be made to regulations to enable FPIs to invest in debt securities issued by a Trust and enable borrowings by REITs from banks.
5. Please note that not only are both FPIs and Banks are allowed to invest in the debt securities of underlying SPVs below a Trust and given the Trust only institutionalises the framework for governance and ownership, but also invest in the units of Trusts.
6. In the subsequent sections, we have highlighted the legal and regulatory considerations that provide safeguards and allow for enforcement of security by lenders, if required, resulting from a security invocation event in relation to borrowing by Trusts.

### **II. BORROWINGS BY TRUSTS**

#### ***A. Nature of Trusts and Regulatory Recognition of Borrowings by Trusts***

1. Under Section 3 of the Indian Trusts Act, 1882 (“Trusts Act”), a “trust” is an obligation annexed to the ownership of property. The “beneficial interest” or “interest” of the beneficiary is his right against the trustee as owner of the trust-property. Hence, under the Trusts Act, the trustee is recognized as

the legal owner of the trust property and holds the trust property in its own right for the benefit of the beneficiaries.

2. In terms of the Trusts Act, a trust has four ingredients – i.e. trust property or trust monies, the author of the trust, the trustee of the trust and the beneficiaries of the trust. Given that a trust is not a juristic person and can neither own property nor sue or be sued in its own name<sup>1</sup>, all the obligations of the trust are carried out by the trustee which may sue and be sued in respect of the obligations of the trust. The trustee is the legal owner of the trust and the trust property vests in him<sup>2</sup>.
3. The scope of activities to be carried out by a trustee are governed by, *firstly*, the Trusts Act, and *secondly*, the terms and conditions of the instrument which creates the trust, i.e. the trust deed. The trustee must at all times abide by the directions in the document establishing the trust<sup>3</sup> and has a fiduciary duty<sup>4</sup> towards its beneficiaries. Therefore, a trustee is duty-bound to act in accordance with the provisions of the Trusts Act and the trust deed.
4. The trustee owns the trust properties for the benefit of the beneficiaries, and not on their behalf<sup>5</sup>. A trustee is also free to operate the trust in the manner it deems fit, so long as the action of the trustee is within the four walls of what the Trusts Act and the trust deed permit the trustee to do. The other consideration for a trustee is whether such action is for the benefit of the beneficiaries. Lastly, as set out above, such action should not be forbidden by law or should not be contrary to any provisions of law. Given that the trustee is the legal owner of the trust properties, it is also free to act in relation to the trust properties using these guiding principles.
5. While the Trust Act prescribes the general contours of the rights, duties and obligations of a trustee, it does not provide an exhaustive list of actions which a trustee is permitted to take. Instead, as set out above, the test is a negative one – that the purpose of the trust should not be an unlawful one. So long as the purpose of the trust is lawful, the Trusts Act does not provide an indicative or exhaustive list of what such purposes may be.
6. The Trusts Act does not contain any provisions that either permit or prohibit trusts from availing loans. This is entirely governed by the powers conferred on the trustee in terms of the trust deed entered into by the trustee of the Trust. If a trust deed explicitly permits the trustee to avail loans for the benefit of the beneficiaries, the trustee is entitled to raise such debt. In case a borrowing is made pursuant to such provision in the trust deed: (a) the trustee will be the borrower on record; (b) the proceeds of the loan shall be applied towards the lawful purpose of the trust; and (c) in the event of a default in repayment of the loan, the trust properties shall be available to the trustee for applying towards the repayment of the loan and the lenders as set out in the commercial understanding.
7. The obligation of a trustee is that of a ‘fiduciary duty’ which requires the highest order of care. The highest risk that a trustee is exposed to is that the trustee should not breach or not even appear to breach the terms of the trust. In the event of a breach, a trustee is liable to make good the loss which the trust property or the beneficiary has sustained<sup>6</sup>. Hence, in the event that the trust deed specifically provides that a trustee may undertake certain actions, towards a lawful purpose, for the benefit of the beneficiaries, a trustee is bound to act in accordance with such provisions of the trust deed, and a

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<sup>1</sup> *Abdul Rehman v. Trustees of the Maniar Jamat, Ahmedabad*; AIR 1968 Guj 184

<sup>2</sup> *Hukum Chand Gulabchand Jain v. Fulchand Lakshmidhand Jain and Ors.*; AIR 1965 SC 1692 wherein it was held that trustee cannot be said to have taken a loan from himself as a trustee is in charge of the trust funds

<sup>3</sup> Section 11 of the Indian Trusts Act, 1882

<sup>4</sup> Fiduciary duty or relationship is where one person is under a duty to act for the benefit of the other on matters within the scope of the relationship and requires the highest duty of care, as stated in *Sri Marcel Martins v. M. Pinter and Ors.*; AIR 2012 SC 1987

<sup>5</sup> *W.O.Holdsworth and Ors. v. The State of Uttar Pradesh*; AIR 1957 SC 887

<sup>6</sup> Section 23 of the Indian Trusts Act, 1882

refusal of the trustee to act in accordance with such provisions may be considered to be a breach of the terms of the trust.

8. **Suggestions**

8.1. In light of the above, it is amply clear that Trusts do inherently have the power to borrow (acting through their trustee). In this vein, listed Trusts are permitted issue listed debt securities in accordance with the SEBI Regulations and the Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2012 (“**SEBI ILDS Regulations**”), which prescribe certain conditions (which are highlighted below). Recently, the Reserve Bank of India (“**RBI**”) has also permitted InvITs to avail loans from banking companies subject to certain conditions. RBI had also recognised this as part of the ECB Master Directions until January, 2019 by explicitly including REITs and InvITs as “eligible borrowers” under the ECB Master Directions (from 2015- December 2018).

8.2. We further understand based on discussions with market participants, even currently various Trusts including, educational trusts and hospital trusts avail of lending from various lenders including banks and NBFCs. It is also important that whilst considering and providing certainty for future transactions (as would be the case with any amendments), the Government should also ensure that any transactions that have already been undertaken are not called into question. It is important to provide therefore that any such amendments are for the purpose of providing certainty in respect of REITs and InvITs and do not prejudice the legality or enforceability of past or future transactions where trusts have been borrowers.

8.3. However, we understand that some discussions are being had in relation to the ability of Trusts to borrow. In this regard, we understand that the Government is considering amendments as suggested in **Annexure I** to the Trusts Act to provide certainty to investors and lenders. We have also provided our thoughts in Annexure I in this regard.

8.4. The government may also consider seeking a confirmation of the above from appropriate constitutional legal functionaries.

8.5. ***Current RBI, IRDAI, PFRDA and other restrictions***

8.5.1. ***Foreign Exchange Management (Debt Instruments) Regulations, 2019 (“FEMA DI Regulations”)***: In terms of FEMA DI Regulations, FPIs are permitted to subscribe to debt instruments as prescribed in Schedule I of the FEMA DI Regulations. Further, FPIs are permitted to invest in the units of Trusts. In order to permit FPIs to invest in the debt securities issued by Trusts, we request you to consider amending Schedule I to include “*debt securities issued by Investment Vehicles*”.

8.5.2. ***IRDAI and PFRDA***: Currently, both pension funds and insurance companies are permitted to invest in the units issued by Trusts. In order to permit insurance companies and pension funds to invest in the debt securities issued by Trusts, we request that the investment conditions applicable to pension funds and insurance companies be amended to specifically allow investment in debt securities issued by Trusts.

8.5.3. ***ECB Master Directions – clarification to specifically include InvITs and REITs as eligible borrowers***: RBI had also recognised Trusts as “eligible borrowers” under the ECB Master Directions until January, 2019 (from 2015- December 2018). However, under the extant Master Direction – External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorized Dealers and Persons other than Authorized Dealers (“**ECB Master Directions**”), eligible

borrowers include those entities which are permitted to receive foreign direct investment. Kindly consider amending the ECB Master Directions to specifically include InvITs and REITs as “*eligible borrowers*”.

### ***B. Regulatory Safeguards available to Trusts***

1. In terms of the SEBI Regulations, the manager is the entity responsible for undertaking day to day activities of the Trusts, which is governed by a board of directors comprising of at least 50% of independent directors. Additionally, the SEBI Regulations require that certain decisions including in relation to borrowing (50% or 75% of the unitholders present and voting, subject to the leverage limits), related party transactions (50% of the unitholders present and voting) are required to be approved by the unitholders of the Trusts (being the beneficiaries).
2. In terms of various applicable laws, the ability of Trusts to borrow has been widely recognised. Please note that the above principle of the liabilities of beneficiaries of a trust (or unitholders of Trusts) are also enshrined under various legislations. In terms of the SEBI Regulations, Trusts are permitted to borrow monies. The SEBI Regulations prescribe certain limits up to which the Trusts on consolidated basis may avail borrowings (70% of the InvIT assets for InvITs and 49% of the REIT assets for REITs) subject to certain conditions, including approval of the unitholders and credit rating for any borrowing above 25% of the Trusts’ assets on consolidated basis. Please note that the above limits as prescribed under the SEBI Regulations are applicable to the Trusts, the Holdcos held by the Trust and the SPVs held by the Trust on aggregated and consolidated basis. Accordingly, since the borrowing limit is on a consolidated basis (i.e. Trusts, the Holdcos held by the Trust and the SPVs held by the Trust), there would be no instance of additional exposure.
3. Under the SEBI Regulations, it is the trustee who holds the assets for the benefit of the unit holders. On the other hand, a ‘unit’, by definition, represents the beneficial interest in the Trusts, and not the ownership interest in the Trusts or its assets. The rights of unitholders under the SEBI Regulations are similar to, and only on a slightly higher pedestal than the rights of beneficiaries in a typical trust, by virtue of the requirements of seeking unitholders’ approval in relation to certain matters. Further, similar to that of shareholders a company, the liability of unitholders of Trusts is limited to their investment in the Trusts.
4. As such, lending to Trusts would enable lenders to diversify their portfolio by adding low risk completed, income generating assets with the added protection of a credit rating. Additionally, the SEBI Regulations also require that certain credit rating is obtained by the Trust and in respect of the borrowings availed by the Trust prior to availing such borrowings. Such ratings are required to be obtained from SEBI registered credit rating agencies.

### ***C. Servicing of Debt and Liability for Repayment***

1. The repayment of borrowings which are taken on behalf of the trust are on the trust properties – therefore on default it is the trust (represented by the trustee), and not the trustee<sup>7</sup> which is considered to be liable, and the repayment is made out of the assets of the trust. Even in this case, the unitholders of the trust do not have any additional liability or obligation to contribute towards the repayment either before, or after the occurrence of an event of default. In this context, the unitholders of a Trust are akin to the shareholders of a company, and the liability of unitholders in case of a default by a Trust is similar to the liability of shareholders in the event of default in repayment by the company.
2. Please note that the above principle of the liabilities of beneficiaries of a trust (or unitholders of a Trust) are also enshrined under various legislations, including Section 23 of the Trusts Act which states that “*the liability is squarely on the trustee*” and the SEBI Regulations which provides that

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<sup>7</sup> Unless there is a breach of trust by the trustee, in which the trustee itself and its assets could be liable.

Trust and the parties to the Trust (i.e. the trustee, the sponsor groups, the manager and the project manager, as applicable) which are responsible to the unitholders for their acts of commission or omissions. Further, neither the SEBI Debt Issue Guidelines, nor the SEBI ILDS Regulations, ascribe any liability on the unitholders of a Trust which has issued debt securities.

3. Specifically, in the context of Trusts, please note that in terms of the SEBI Regulations, it is mandatory that the SPVs are controlled by the Trusts in all circumstances other than as may be required under law or under concession agreements. Accordingly, any repayment shall effectively be made through the monies earned by the SPVs. Lending at the Trusts level would also ensure that the debt of the Trusts may be serviced through the proceeds of all SPVs simultaneously. In the case of Trusts, it would be under the lenders' control to ensure that protection measures are built in for the purposes for of seeking recourse from the SPVs.
4. Further, please do consider that Trusts are generally rated higher than any one individual asset, and lenders at the Trust level, based on their internal credit requirements, may seek an appropriate security package from the assets of the Trust including cross collateralization and or from any or all of the SPVs controlled by the Trust.
5. Being regulated entities which are set up with the protection of the interests of the investors in mind, Trusts are even better suited to act as borrowers as compared to registered trusts which have the general flexibility to avail loans for the benefit of their beneficiaries.

### **III. ENFORCEMENT OPTIONS AND THE INSOLVENCY AND BANKRUPTCY CODE**

1. At the outset it is important to note that the lenders to Trusts have robust and enforceable legal remedies available to them to recover the debt, and any security, created and perfected properly, is fully enforceable.
2. In India, the various enforcement or recovery mechanisms available to lenders are under (i) the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“**SARFAESI Act**”); and (ii) the Recovery of Debts and Bankruptcy Act, 1993 (the “**RDB Act**”); (iii) the Code of Civil Procedure (“**Civil Code**”); (iv) Commercial Courts Act, 2015 (the “**Commercial Courts Act**”) and (v) the Indian Arbitration and Conciliation Act, 1996 (the “**Arbitration Act**”)
3. *The SARFAESI Act:*
  - 3.1. A statutory mechanism is available for to lenders for the purpose enforcement of security interest by a secured creditor without the intervention of a court or tribunal pursuant to a security agreement between the secured creditor and the borrower.
  - 3.2. This mechanism can be only invoked by a "secured creditor", specifically: (i) any bank or financial institution or any consortium of banks or financial institution; (ii) debenture trustee appointed by a bank or financial institution; (iii) asset reconstruction companies; (iv) debenture trustee appointed by any company for secured debt securities; and (v) any other trustee holding securities on behalf of a bank or financial institution in whose favour security interest is created.
  - 3.3. Further, “financial institution” is defined under the SARFAESI Act and includes, (i) a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956); (ii) any institution specified by the Central Government under sub-clause (ii) of clause (h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993); (iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958); (iiia) a debenture trustee registered with the Board and appointed for secured debt securities; (iiib) asset reconstruction company, whether acting

as such or managing a trust created for the purpose of securitisation or asset reconstruction, as the case may be; (iv) any other institution or non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act.

- 3.4. Therefore, any financial institution which is a secured creditor is lending to a borrower (as defined in the SARFAESI Act) has the benefit of the Act. The underlined portion above appears to be wider than the language included in limb (iv) of the definition of secured creditor which includes a debenture trustee appointed by a company (emphasis supplied) for debt securities, and is not restricted to a company but can cover any debt securities for which a debenture trustee is appointed. Since debt securities issuances by Trusts require the appointment of a debenture trustee, based on the above definition of financial institution, both banks and debenture trustees for the debt securities issued by Trusts would be classified as secured creditors in terms of the SARFAESI Act.
- 3.5. Further, under the SARFAESI Act, the term borrower means “*any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of an asset reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through issue of debt securities*”.
- 3.6. In the case of a REIT or an InvIT, the borrowing by the Trust (on whose behalf the Trustee acts), may be classified as the borrower for the purposes of the SARFAESI Act. If this is the case, then the relevant Ministries may consider whether the Debenture Trustees acting for debt securities issuances by Trusts should already have the benefit of the SARFAESI Act.
- 3.7. **Suggestions**

Having said that, if the above interpretation is supported by the relevant Ministries (and hence no amendment is required to the SARFAESI Act), it would be important to provide certainty to investors and other regulators. This can be considered in two ways:

- (i) Rules may be prescribed in accordance with the SARFAESI Act confirming the above understanding and for the purposes of laying down the process to be followed for enforcement of security interest provided to Trusts; and/or
- (ii) as part of any amendments proposed to the Trusts Act, the amendment as suggested in Annexure II may be made to the SARFAESI Act. Such an amendment would provide clarity even if the above interpretation is not acceded to by the Ministries but there is a broad consensus to provide the benefit of the SARFAESI Act.

The Government may also consider any other options at its disposal.

#### 4. *The RDB Act*

- 4.1. The RDB Act was enacted to ensure for expeditious adjudication and recovery of debts due to lenders. The options for recovery under the RDB Act are available only to banks and financial institutions and no other class of lenders including public trusts and foreign lenders. Please note, however, in terms of the RDB Act, financial institutions include a debenture trustee registered with the Board and appointed for secured debt securities (being the debenture trustee for debt securities issued by Trusts) being a financial institution will be able to utilize the recovery process under the RDB Act.

- 4.2. Therefore, for adjudication and recovery of debts due to banks and financial institutions the benefit of the RDB Act is available. The underlined portion includes a debenture trustee appointed by a company (emphasis supplied) for debt securities. Since debt securities issuances by Trusts require the appointment of a debenture trustee, based on the above definition of financial institution, both banks and debenture trustees for the debt securities issued by Trusts would be able to avail benefits of the RDB Act.
- 4.3. Further, under the RDB Act, the term debt means “debt” means “*any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application and includes any liability towards debt securities which remains unpaid in full or part after notice of ninety days served upon the borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of debt securities*”.
- 4.4. Further, the definition of debt securities is as prescribed by SEBI, which in terms of the SEBI ILDS Regulations includes debt securities issued by Trusts.
- 4.5. In the case of a REIT or an InvIT, the borrowing by the Trust (on whose behalf the Trustee acts), may be classified as the borrower for the purposes of the RDB Act. If this is the case, then the relevant Ministries may consider whether the Debenture Trustees acting for debt securities issuances by Trusts should already have the benefit of the RDB Act.
- 4.6. **Suggestions**

Having said that, if the above interpretation is supported by the relevant Ministries (and hence no amendment is required to the RDB Act), it would be important to provide certainty to investors and other regulators. This can be considered in two ways:

- (iii) Rules may be prescribed in accordance with the RDB Act confirming the above understanding and for the purposes of laying down the process to be followed for enforcement of security interest provided to Trusts; and/or
- (iv) as part of any amendments proposed to the Trusts Act, the amendment as suggested in Annexure II may be made to the RDB Act. Such an amendment would provide clarity even if the above interpretation is not acceded to by the Ministries but there is a broad consensus to provide the benefit of the RDB Act.

The Government may also consider any other options at its disposal.

## 5. *Other measures:*

- 5.1. In addition to the above, the civil courts in India may be approached for the resolution of any civil dispute by any party, including lenders. Further, as one of the initiatives by the Government to ensure Ease of Doing Business in India, as a measure to streamline the procedures relating to commercial litigation including summary judgment of claims in case of commercial disputes introduced the Commercial Courts Act, 2015.

- 5.2. Further, in the event the agreement provides for arbitration, parties (i.e. lenders and borrowers) may also use arbitration for the purpose of recovery or enforcement or both.
- 5.3. In light of the above, we understand that for the purposes of recovery by all lenders, enforcement proceedings before civil courts and commercial courts and resolution through arbitration are commonly used and available.
6. These remedies are also available to lenders to Trusts, including bondholders and security trustees or debenture trustees.
7. *Insolvency and Bankruptcy Code*
- 7.1. The Insolvency and Bankruptcy Code, 2016 (the “**Insolvency Code**”) is a mechanism by which lenders may obtain resolution by way of reconstruction of companies, limited liability partnerships, partnership. It is strictly not a method of enforcement, but a method to restructure all the liabilities of the notified debtors. The Insolvency Code does not apply to trusts, co-operative societies and body corporates. Additionally, the Insolvency Code does not explicitly provide a mechanism for recovery or enforcement by lenders but may be a consequence of restructuring process.
- 7.2. However, it is pertinent to note that the absence of a such applicability does not in itself prevent effective enforcement against the security or the ability of the lenders to enforce to recover the loans advanced by, or moneys owed to, them in respect of the debt securities. Accordingly, we may consider any changes to the Insolvency Code subsequently.

**ANNEXURE I**

**PROPOSED AMENDMENTS TO THE TRUSTS ACT AND COMMENTS**

<b>S. No.</b>	<b>Proposed Changes</b>	<b>Comments</b>	<b>Rationale</b>
1.	A “Business Trust” shall mean a Trust as defined under Section 2(13A) of the Income Tax Act, 1961	A “Business Trust” shall mean <del>a Trust as defined under Section 2(13A) of the Income Tax Act,</del> infrastructure investment trusts and real estate investment trusts registered with SEBI in terms of the Securities and Exchanges Board of India (Infrastructure Investment Trusts) Regulations, 2014 or the Securities and Exchanges Board of India (Real Estate Investment Trusts) Regulations, 2014	The changes suggested are to ensure that the definition is aligned with the SEBI Regulations.
2.	Any business trusts as defined in Section [.] shall be registered with any Regulator/Authority and shall comply with the Regulations made by the concerned Regulator/Authority. Such business trusts may carry the business as may be permitted under the said Regulations and shall, subject to the said Regulations and provision in Trust Deed, be entitled to borrow by way of NCD or otherwise and in such manner and to such extent as may be permitted by the said Regulations. Further such business trusts, subject to the provisions in Trust Deed, are permitted to offer security as per terms as may be decided by the Trustee and in accordance with the said Regulations.	<del>Any</del> business trusts as defined in Section [.] shall be registered <del>with such competent regulatory or statutory authorities any Regulator/Authority</del> and shall comply with the Regulations made by the concerned <del>competent regulatory or statutory authorities Regulator/Authority</del> . Such business trusts may <del>carry the business as may be permitted under the said Regulations and shall</del> , subject to the said Regulations and provisions <del>of the in</del> Trust Deed, be entitled to borrow <del>monies, including</del> by way of <del>issuance of non-convertible debentures NCD</del> or otherwise and in such manner and to such extent as may be <del>provided under permitted by</del> the said Regulations. Further, such business trusts, subject to the provisions <del>of the in</del> Trust Deed, are permitted to <del>offer provide</del> security to lenders in terms of the facility documents <del>as per terms as</del>	Modified for language consistency, including alignment with comments from SEBI.

S. No.	Proposed Changes	Comments	Rationale
		may be decided by the Trustee <del>and in accordance with the said Regulations.</del>	
3.	<p>Provided that the aggregate amount of borrowings shall not exceed the total units outstanding as per the last audited balance sheet or any amount prescribed by the Regulations under which the business trust is registered, whichever is lower.</p> <p>Provided further that the aggregate borrowings of the business trust may exceed the total units outstanding with the approval of the unitholders/beneficiaries by way of a Special Resolution. The Special Resolution shall mention the maximum borrowings that can be undertaken by the business trust.</p>	<p><del>Provided that the aggregate amount of borrowings shall not exceed the total units outstanding as per the last audited balance sheet or any amount prescribed by the Regulations under which the business trust is registered, whichever is lower.</del></p> <p><del>Provided further that the aggregate borrowings of the business trust may exceed the total units outstanding with the approval of the unitholders/beneficiaries by way of a Special Resolution. The Special Resolution shall mention the maximum borrowings that can be undertaken by the business trust.</del></p> <p>Provided that the total consolidated borrowings and deferred payments of the business trusts shall be to the extent and subject to the conditions prescribed under the applicable Regulations.</p>	Please note that the SEBI InvIT Regulations and the SEBI REIT Regulations prescribe the limits up to which an InvIT or REIT may borrow and the conditions to avail such borrowing including obtaining credit rating and unitholder approval. Accordingly, to ensure that the requirements of the SEBI InvIT Regulations and the SEBI REIT Regulations, as applicable, are followed, the said changes proposed are to ensure consistency between the SEBI InvIT Regulations and the SEBI REIT Regulations and the Trusts Act at all times.
4.	Notwithstanding anything to the contrary, the lender shall be entitled to proceed against the Trustee (acting on behalf of the Trust) in respect to such loan/security and shall be entitled to take all such action as is permitted by law, in case of breach of any terms and conditions of the loan/NCDs.	Notwithstanding anything to the contrary, the lender shall be entitled to proceed against the Trustee (acting on behalf of the Trust) in respect to such loan/security and shall be entitled to take all such action as is permitted by law, in case of breach of any terms and conditions of the loan/NCDs.	No changes required.

**ANNEXURE II**

**SUGGESTED AMENDMENTS TO THE SARFAESI ACT AND THE RDB ACT**

<b>S. No.</b>	<b>Existing Clause</b>	<b>Proposed Changes</b>	<b>Rationale</b>
<b>SARFAESI Act</b>			
1.	Section 2(1)(f) defines borrower as:  (f) “borrower” means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of an asset reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through issue of debt securities;	Section 2(1)(f) to amended as follows:  (f) “borrower” means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of an asset reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through issue of debt securities  <b>It is clarified borrowers include infrastructure investment trusts and real estate investment trusts registered with SEBI in terms of the Securities and Exchanges Board of India (Infrastructure Investment Trusts) Regulations, 2014 or the Securities and Exchanges Board of India (Real Estate Investment Trusts) Regulations, 2014;</b>	While Trusts (through the trustee) are already considered as borrowers. For the sake of abundant clarity, the proposed changes would specifically also recognise Trusts, as borrowers for the purposes of the SARFAESI Act.
<b>RDB Act</b>			

S. No.	Existing Clause	Proposed Changes	Rationale
2.	<p>Section 2(1)(g) of the RDB Act defines debt as:</p> <p>(g) debt means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application and includes any liability towards debt securities which remains unpaid in full or part after notice of ninety days served upon the borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of debt securities”</p>	<p>Section 2(1)(g) to be amended as follows:</p> <p>(g) debt means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application and includes any liability towards debt securities which remains unpaid in full or part after notice of ninety days served upon the borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of debt securities</p> <p>It is clarified debt includes debt availed by infrastructure investment trusts and real estate investment trusts registered with SEBI in terms of the Securities and Exchanges Board of India (Infrastructure Investment Trusts) Regulations, 2014 or the Securities and Exchanges Board of India (Real Estate Investment Trusts) Regulations, 2014;”</p>	<p>While Trusts (through the trustee) are already considered as persons availing the debt. For the sake of abundant clarity, the proposed changes would specifically also recognise Trusts availing debt for the purposes of the RDB Act.</p>