BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. Order/AA/MG/2019-20/6610-6614]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995.

In respect of

1. **Sunshine India Land Developers Limited**
2. **Rajesh Kumar Dixit**
3. **Rabindra Kumar Gupta**
4. **Babu Lal Gupta**
5. **Santosh Kumar Sahu**

In the matter of Sunshine India Land Developers Limited

BACKGROUND OF THE CASE

1. Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") observed that Sunshine India Land Developers Limited (hereinafter referred to as '**Noticee 1/ Sunshine/ by Name**') which is an unlisted company has issued Optional Fully Convertible Debentures (herein after referred to as '**OFCD**') and raised money from more than 49 persons during the Financial Year 2010-11. The aforesaid issuance of OFCDs by the Noticee 1 would qualify as a public issue of securities invoking the applicability of Section 67 of the Companies Act, 1956 (herein after referred to as '**Companies Act**'). SEBI (Issue of Capital and

Disclosure Requirement) Regulation, 2009 (hereinafter referred to as **'ICDR Regulations'**) requires the company to comply with certain requirements before making public issuances of securities including convertible debt instruments. It is alleged that the Company has failed to comply with the ICDR Regulations with respect to the issuance of the aforesaid OFCDs. In view of the same, SEBI initiated adjudication proceedings against the Notice for violation of the provisions of certain Regulations of ICDR Regulations.

APPOINTMENT OF ADJUDICATING OFFICER

2. The undersigned was appointed as the Adjudicating Officer vide order dated May 14, 2019, under section 19 read with section 15I(1) of the SEBI Act, 1992 (hereinafter referred to as "**SEBI Act**") and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995, (hereinafter referred to as "**Adjudication Rules**") to conduct the adjudication proceedings in the manner specified under Rule 4 of the Adjudication Rules read with section 15I (1) and (2) of SEBI Act, and if satisfied that penalty is liable, impose such penalty as deemed fit in terms of Rule 5 of the Adjudication Rules and Section 15HB of the SEBI Act.

SHOW CAUSE NOTICE, REPLY AND HEARING

3. A Show Cause Notice dated November 01, 2019 (herein after referred to as '**SCN**') was issued to the Noticees under Rule 4(1) of the Adjudication Rules to show-cause as to why an inquiry should not be initiated against the Noticees and why penalty should not be imposed upon the Noticees under Section 15HB of the SEBI Act for the violations alleged to have been committed by the Noticees. The details in respect of the alleged violation by the Noticees are as given below:

a. *Sunshine was incorporated April 22, 2010 and it is an unlisted public company. The administrative office of the company is situated at Sahu Theatre Building, Hazratganj, Lucknow and Registered Office Address is 33/1, N.S. Road, Marshall House, Room No. 933E, Kolkata- 700001. The equity capital of the Noticee 1 is Rs. 2,57,00,000/- and there are total twelve (12) shareholders. The details of past and present directors & Promoters are provided in Table – 1-*

Table - 1

Name of director	*Designation*	*DIN/ DPIN*	*PAN*	*Residential Address*	*Date of appointment*	*Date of cessation*
Rabindra Kumar Gupta	*Director and Promoter*	*00040300*	*AGYPG7916P*	*SS-121, Sector C-1, Kanpur Road, LDA Colony, Lucknow, Uttar Pradesh - 226012*	*22.04.2010*	-
Babu Lal Gupta	*Director and Promoter*	*00174241*	*AIJPG5834B*	*178/181, Golaganj, Lucknow, Uttar Pradesh- 226018*	*22.04.2010*	-
Rajesh Kumar Dixit	*Director and Promoter*	*00029686*	*AEAPD5536L*	*14/411, Indira Nagar, Lucknow, Uttar Pradesh- 226016*	*22.04.2010*	-
Pramod Misra	*Promoter*	*01121762*	*AMVPM4814F*	*Village- Narainpur, Post – Harauni, Lucknow, Uttar Pradesh -226005*	-	-
Ram Samujh Mishra	*Promoter*	*01840069*	*AJZPM9544P*	*L-1/27, Vineet Khand, Gomti Nagar, Lucknow, Uttar Pradesh - 226010*	-	-
Shiv Shankar Yadav	*Promoter*	*01773787*	*ABVPY5288N*	*S-284, Shakti Nagar, P.O. Indra Nagar, Lucknow, Uttar Pradesh- 226016*	-	-
Amit Srivastava	*Promoter*	*01773752*	*BGKPS2165K*	*R/o 11/173, Indra Nagar, Lucknow, Uttar Pradesh– 226 016*	-	-
Santosh Kumar Sahu	*Director*	*02403414*	*ACQPS1873B*	*41/517, Seth Ram Jas Road Narhi, Lucknow, Uttar Pradesh - 226001*	*22.07.2010*	*15.01.2013*

b. *It is observed that the Noticee 1, which is an unlisted company has issued OFCDs and raised total amount of Rs. 29,29,75,000/- from 23,757 persons during the Financial Year 2010-11. Further, it is also observed that the aforesaid amount raised by the Noticee 1, is already refunded to the investors. SEBI further, observed that as the Noticee 1 has raised money from 23,757 persons, i.e. more than 49 persons, by issuance of OFCDs during the F.Y. 2010-11, thereby invoking the applicability of Section 67 of the Companies Act, 1956 on the issuance of OFCDs. The relevant text of Section 67 (Corresponding provision- Section 42 of companies Act, 2013 which is effective from April 01, 2014) of the Companies Act, 1956 is produced below for reference-*

> *"67(1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether*

selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(2) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of sub- section (1) or sub- section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or
(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation …

Provided that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:

Provided further that nothing contained in the first proviso shall apply to non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956)."

c. *In view of the above, it is alleged that the aforesaid issuance of OFCDs by the Noticee 1 would qualify as a public issue of securities under the first proviso to Section 67(3) of the Companies Act, 1956 and thus the aforesaid issuance of OFCDs by the Noticee 1, were required to comply with the provisions of ICDR Regulations.*

d. *ICDR Regulations requires the company to comply with certain requirements before making public issuances including convertible debt instruments. The requirements of the relevant provisions are described in the Table - 2:*

Table - 2

Sl. No.	***Relevant ICDR Regulation***	***Requirements***
1	*Regulation 4(2) and 7*	*To make application for listing of securities to a stock exchange.*
2	*Regulation 5*	*To appoint one or more SEBI registered merchant bankers and other intermediaries.*
3	*Regulation 6*	*To file draft offer document with the Board.*
4	*Regulation 20(1)*	*To obtain a credit rating for the issuance of debt and convertible instruments.*
5	*Regulation 25 and 26*	*To satisfy the conditions of initial public offer.*
6	*Regulation 36*	*To ensure lock-in of minimum promoters' contribution.*
7	*Regulation 37*	*To ensure lock-in of pre-issue capital.*

Sl. No.	Relevant ICDR Regulation	Requirements
8	Regulation 46	To close the issue within a maximum of 10 working days.
9	Regulation 57	To ensure that the offer document/RHP contains the details specified in that regard.
10	Regulation 59	To refrain from offering any incentive to any person making application for allotment of specified securities

e. *It is alleged that the Company has failed to comply with the ICDR Regulations mentioned in Table – 2, with respect to the issuance of the aforesaid OFCDs. Further, Section 56 of the Companies Act, 1956 imposes the liability for the compliance, on the company, every director, and persons responsible for the issuance of the prospectus. The relevant text of Section 56 (Corresponding Provision- Section 33(1) of Companies Act, 2013 which is effective from September 12, 2013) of the Companies Act, 1956 is produced below for reference-*

> *Under Section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of that Act. Further, as per Section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in or debentures of a company, unless the form is accompanied by abridged prospectus, contain disclosures as specified.*

f. *Therefore, it is alleged that the directors who were present during the period when the Company had made the offer and allotted OFCDs, shall also be liable for violation of Regulation 4(2) & (7), 5, 6, 20(1), 25, 26, 36, 37, 46, 57 and 59 of ICDR Regulations.*

g. *In view of the above facts and observations, it is alleged that the Noticee 1 to 5 i.e. the Company and the directors for the relevant period, have violated Regulations 4(2) & (7), 5, 6, 20(1), 25, 26, 36, 37, 46, 57 and 59 of ICDR Regulations.*

4. The SCN issued to the Noticees were duly served upon the Noticees. The Noticees vide letter dated November 15, 2019 submitted reply to the SCN wherein the Noticees *inter alia* made the following submissions-

   i. Sunshine India Land Developers Limited is an unlisted public company.

   ii. The company had vide special resolution passed in its extraordinary general meeting held on June 10, 2010, approved the issue of Optionally Fully Convertible Debentures

(OFCDs), a hybrid instruments to the select group of persons. The information memorandum along with the copy of the resolution was filed with the concerned Registrar of Companies at Kanpur vide SRN. 8793388 dated 28.06.2010 on the Ministry of Company Affairs (MCA) portal for authorization u/s 81(1A) of the Act for issue of shares to persons other than the existing shareholders of the Company on the conversion of OFCD's as per terms of the issue of a private placement. The Red Herring Prospectus (RHP) was filed with ROC on the same date. The certificate of registration dated 28th June 2010 was duly received from ROC Kanpur. The company while making the compliance of the aforesaid private placement was guided by the legal assumption I interpretation of the provisions of the erstwhile Companies Act 1956, that the issue being a special hybrid instrument under private placement basis without envisaging any listing in stock exchanges I public issue, would not come under the SEBI regulations cited in your SCN. The company complied with provisions of Companies Act 1956 and ad the registration of RHP with ROC Kanpur and filed required forms and documents.

iii. *The company suo moto in January 2011 closed the issue and filed the final Prospectus with the Registrar Companies Kanpur for registration u/s 608(9) of Companies Act, 1956 vide SRN B79054219 dated 10/07/2013. The amount of Rs. 29,29,75,000.00 (Rupees Twenty Nine lakh Seventy Five thousand) raised through the aforesaid issue was also refunded to the investors by 30.06.2014 with due interest.*

iv. *However, since 2014 i.e. after the refund of money raised by the company, there were several letters from SEBI calling for information and clarifications over the period, about the extant matter vide its letters no.(s) Letter No. ERO/OW/RKP/M-8235/2014 dated November 28, 2014, Reminder Letter No. ERO/OW/RKP/M-8317/2014 dated December 06, 2014, Letter No. ERO/OW/LS/M-8359/2014 dated December 15, 2014, Letter No. ERO/NA/OW/M-2613/1-4/2016 dated July 19, 2016, Letter No. ERO/NA/OW/M-2746/3/2016 dated August 12, 2016, Letter No. ERO/NA/OW/M-4309/1/2016 dated December 19, 2016, Letter No. ERO/NA/OW/M-5003/1/2017 dated April 27, 2017, Letter No. SEBI/ERO/AS/OW/SILDL/M- 381/2-4/2019 dated*

April 16, 2019, Letter No. ERO/NA/OW/M-5003/2/2017 dated April 27, 2017, Letter No. ERO/NA/OW/M-5003/3/2017 dated April 27, 2017.

v. *The company had most religiously replied to all these letters giving detailed information about the OFCD issue and also various documents and certifications as called for in support of its submissions. The copies of these replies are enclosed as Annexure to this letter.*

vi. *It is very pertinent and vital to mention that on suo motu closure of the issue the final prospectus was duly submitted to ROC for registration u/s 608 (9) of CA, 1956. In this document detailed information about the OFCD issue including the total amount and the number of actual investors of OFCD issue was categorically mentioned. No adverse communication was received by the company at that time.*

vii. *The Company and its Directors never intended to go for any public issue of shares/debentures coming under the purview of SEBI Rules /Regulations. It was a hybrid instrument titled as OFCD's with option of full conversion of shares. But the business scenario for real estate was not favorable then and it did not go as per the expectations of the management.*

viii. *Thus, when the management on suo mote basis decided to stop the acceptance of bonds in January 2011 and also on its own motion decided to refund the money spontaneously to the bondholders with due interest. It was all with bona fide intentions.*

ix. *It was the bona fine intention of the management that they themselves initiated the process of refunds and nowhere such instruction were received/ perceived in any manner whatsoever from any Government/ regulatory Authority.*

x. *The company had raised a minuscule amount of Rs. 29,29,75,000.00 from 23757 number of small investors as compared to the general sizes of public issues at that time. It was a small company and had remained so.*

xi. *The investors did not exercise the option of the conversion of debentures into shares solely as per their choice on the market condition and the returns they were promised. Thus de facto there was not any case of conversion of the bonds to shares of the company.*

xii. *But the Company's intention was very clear and it was never be meant to be a public issue of shares I debentures coming within the purview of SEBI Rules/ Regulations as contained in ICDR Regulations 2009. And the terms of issue were very clearly mentioned in the Application form and also in the Information Memorandum.*

xiii. *The Company believed, it had actually followed the requisite procedure prevailing at that time for such issue of OFCD. It had submitted the RHP for approval and registration with ROC Kanpur. All information was furnished therein. On closure of the issue the final prospectus was duly submitted as per the statutory provisions/ rules. It also contained all information including the size of the issue and number of investors.*

xiv. *It had no intention to deceive/default. The Company has/had never received any complaint whatsoever from the investors in this regard.*

xv. *Thus, the Company has no mala fide intention to dodge or circumvent any Rule or Regulations or of any default/deceit to the investors. At that time the management of the company (a small company with limited resources) were not having detailed knowledge of the nitty-gritty of the Rules/ Regulations and the procedural requirements as quoted in your SCN. Thus, if there was any violation of the Rule quoted by you in adherence to the laid down procedure, it was purely unintentional. It was possibly because of wrong/ different interpretation and recommendation tendered to the company while deciding upon the issue of OFCD. These were at best inadvertent procedural lapses which were inadvertent/ unintentional and the Company and its Directors had/have not taken any advantage of the same.*

xvi. *Thus going by the substantive nature of the alleged violations (materiality concept) and the small size of the company and the issue, the Honorable Adjudicating Authority may take a lenient view of the lapses and thus be acquitted from the imposition of penalties.*

xvii. *The company is in a moribund shape without any third party liability to investors/lenders and neither the company nor its directors have wherewithal to make any heavy penalty payment. So the good self of the Honorable Adjudicating Authority is reverently and fervently requested to impose the minimum fine penalty, if so inevitable in the circumstances of the case as narrated in our submissions.*

5. Thereafter, in the interest of principles of natural justice, an opportunity of personal hearing was granted to the Noticees on December 19, 2019 vide hearing notice dated December 04, 2019. The Noticees, vide email dated December 13, 2019, confirmed that the Authorized Representative of the Noticee (hereinafter referred to as '**AR**') will attend the hearing and *inter alia* made following additional submissions.

   i. *The Company suo moto opted for closure of the issue in January 2011, in just about six months' time without any regulatory intervention/direction. The Company had paid back all the money received from the investors through foreclosure of the bonds/scheme with assured returns without charging pre-closure penalties as elaborated in our letters duly supported by documentary evidences like vouchers, bank statements, certificates from two peer certified independent Chartered Accountants who were empanelled by RBI for bank audits, etc. Thus, there was no loss caused to any investor, on the contrary all the investors received the assured returns even with premature closure of the OFCDs. There are /were no complaints from the investors and the Company has no liability towards the OFCDs issued.*
   ii. *It is very pertinent to mention that the Company had /has never defaulted in meeting the liabilities under the OFCDs issued. Rather, it had met the entire liability with assured returns calculated up to the date of payment without even charging premature closure penalties / charges. The investors were contacted /approached through the agents through a door to door campaign for early repayment.*
   iii. *The Company had never used the funds so raised through OFCDs and the funds remained with the Bank and the same were used in meeting the liabilities. Besides the share capital funds and other sources were also used to repay the investors with returns assured. Thus, neither the Company, nor the Directors had derived any unfair advantage out of the funds so raised. This was explained in our letter dated May 03, 2017 and other letters. The Company's and Directors' actions were bona fide, truthful and honest. A copy of the bank statement of the Company is enclosed in support of the evidence.*

iv. *Due to the above reasons and circumstances, we reverently and earnestly plead for the* ***minimum penalty*** *as the alleged violations are not of substantive nature causing loss to the investors or otherwise, and are rather procedural omissions and are not mala fide in content or intentions as explained above. The Company is not having any outside liability and is in a moribund state with very low net-worth.*

The AR attended the hearing on the scheduled date and time.

CONSIDERATION OF ISSUES

6. I have carefully perused the charges levelled against the Noticee, his reply and the documents / material available on record. The issues that arise for consideration in the present case are :

   (a) Whether the Noticee has violated Regulations 4(2) & (7), 5, 6, 20(1), 25, 26, 36, 37, 46, 57 and 59 of ICDR Regulations?

   (b) Does the violation, if any, attract monetary penalty under Section 15HB of the SEBI Act?

   (c) If so, what would be the quantum of monetary penalty that can be imposed on the Noticee after taking into consideration the factors mentioned in section 15J of the SEBI Act?

7. Before proceeding further, I would like to refer to the relevant provisions of the Regulations 4(2) & (7), 5, 6, 20(1), 25, 26, 36, 37, 46, 57 and 59 of ICDR Regulations as below:

Relevant provisions of ICDR Regulations, 2009:

> ***General conditions.***
> ***4.*** *(1) ……….*
> *(2) No issuer shall make a public issue or rights issue of specified securities:*

(a) if the issuer, any of its promoters, promoter group or directors or persons in control of the issuer are debarred from accessing the capital market by the Board;

(b) if any of the promoters, directors or persons in control of the issuer was or also is a promoter, director or person in control of any other company which is debarred from accessing the capital market under any order or directions made by the Board;

(c) if the issuer of convertible debt instruments is in the list of wilful defaulters published by the Reserve Bank of India or it is in default of payment of interest or repayment of principal amount in respect of debt instruments issued by it to the public, if any, for a period of more than six months;

(d) unless it has made an application to one or more recognised stock exchanges for listing of specified securities on such stock exchanges and has chosen one of them as the designated stock exchange:

Provided that in case of an initial public offer, the issuer shall make an application for listing of the specified securities in at least one recognised stock exchange having nationwide trading terminals;

(e) unless it has entered into an agreement with a depository for dematerialisation of specified securities already issued or proposed to be issued;

(f) unless all existing partly paid-up equity shares of the issuer have either been fully paid up or forfeited;

(g) unless firm arrangements of finance through verifiable means towards seventy five per cent. of the stated means of finance, excluding the amount to be raised through the proposed public issue or rights issue or through existing identifiable internal accruals, have been made.

(7) In case of a rights issue of specified securities referred to in sub-regulation (6) above, the promoters or promoter group of the issuer, shall not renounce their rights except to the extent of renunciation within the promoter group.

….

Appointment of merchant banker and other intermediaries.

5. *(1**)** The issuer shall appoint one or more merchant bankers, at least one of whom shall be a lead merchant banker and shall also appoint other intermediaries, in consultation with the lead merchant banker, to carry out the obligations relating to the issue.*

(2) The issuer shall, in consultation with the lead merchant banker, appoint only those intermediaries which are registered with the Board.

(3) Where the issue is managed by more than one merchant banker, the rights, obligations and responsibilities, relating inter alia to disclosures, allotment, refund and underwriting obligations, if any, of each merchant banker shall be predetermined and disclosed in the offer document as specified in ***Schedule I****.*

Provided that where any of the merchant bankers is an associate of the issuer, it shall declare itself as a marketing lead manager and its role shall be limited to marketing of the issue.

(4) The lead merchant banker shall, only after independently assessing the capability of other intermediaries to carry out their obligations, advise the issuer on their appointment.

*(5) The issuer shall enter into an agreement with the lead merchant banker in the format specified in **Schedule II** and with other intermediaries as required under the respective regulations applicable to the intermediary concerned:*

Provided that such agreements may include such other clauses as the issuer and the intermediary may deem fit without diminishing or limiting in any way the liabilities and obligations of the merchant bankers, other intermediaries and the issuer under the Act, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, the Depositories Act, 1996 and the rules and regulations made thereunder or any statutory modification or statutory enactment thereof:

Provided further that in case of ASBA process, the issuer shall take cognisance of the deemed agreement of the issuer with Self Certified Syndicate Banks.

*(6) An issuer shall, in case of an issue made through the book building process, appoint syndicate members and in the case of any other issue, appoint bankers to issue, at all mandatory collection centres as specified in **Schedule III** and such other collection centres as it may deem fit.*

(7) The issuer shall appoint a registrar which has connectivity with all the depositories:

Provided that if issuer itself is a registrar to an issue registered with the Board, then another registrar to an issue shall be appointed as registrar to the issue:

Provided further that the lead merchant banker shall not act as a registrar to the issue in which it is also handling the post issue responsibilities.

***Explanation:** For the purpose of this regulation, in case of a book*

Filing of offer document.

***6.** (1) No issuer shall make,*

(a) a public issue; or

(b) a rights issue, where the aggregate value of the specified securities offered is fifty lakh rupees or more,

*unless a draft offer document, along with fees as specified in **Schedule IV**, has been filed with the Board through the lead merchant banker, at least thirty days prior to registering the prospectus, red herring prospectus or shelf prospectus with the Registrar of Companies or filing the letter of offer with the designated stock exchange, as the case may be.*

(2) The Board may specify changes or issue observations, if any, on the draft offer document within thirty days from the later of the following dates:

(a) the date of receipt of the draft offer document under sub-regulation (1); or

(b) the date of receipt of satisfactory reply from the lead merchant bankers, where the Board has sought any clarification or additional information from them; or

(c) the date of receipt of clarification or information from any regulator or agency, where the Board has sought any clarification or information from such regulator or agency; or

(d) the date of receipt of a copy of in-principle approval letter issued by the recognised stock exchanges.

(3) If the Board specifies changes or issues observations on the draft offer document, the issuer and lead merchant banker shall carry out such changes in the draft offer document and comply with the observations issued by the Board before registering the prospectus, red-herring prospectus or shelf prospectus, as the case may be, with the Registrar of Companies or filing the letter of offer with the designated stock exchange.

(4) The issuer shall, simultaneously while registering the prospectus, red herring prospectus or shelf prospectus with the Registrar of Companies or filing the letter of offer with the designated stock exchange or before the opening of the issue, file a copy thereof with the Board through the lead merchant banker.

(5) The lead merchant banker shall, while filing the offer document with the Board in terms of sub-regulation (1) and sub-regulation (4), file a copy of such document with the recognised stock exchanges where the specified securities are proposed to be listed.

(6) The offer document filed with the Board under this regulation shall also be furnished to the Board in a soft copy in the manner specified in ***Schedule V****.*

Additional requirements for issue of convertible debt instruments.

20. *(1) In addition to other requirements laid down in these regulations, an issuer making a public issue or rights issue of convertible debt instruments shall comply with the following conditions:*

(a) it has obtained credit rating from one or more credit rating agencies;

(b) it has appointed one or more debenture trustees in accordance with the provisions of section 117B of the Companies Act, 1956 and Securities and Exchange Board of India (Debenture Trustees) Regulations, 1993;

(c) it has created debenture redemption reserve in accordance with the provisions of section 117C of the Companies Act, 1956;

(d) if the issuer proposes to create a charge or security on its assets in respect of secured convertible debt instruments, it shall ensure that:

(i) such assets are sufficient to discharge the principal amount at all times;

(ii) such assets are free from any encumbrance;

(iii) where security is already created on such assets in favour of financial institutions or banks or the issue of convertible debt instruments is proposed to be secured by creation of security on a leasehold land, the consent of such financial institution, bank or lessor for a second or pari passu charge has been obtained and submitted to the debenture trustee before the opening of the issue;

(iv) the security/asset cover shall be arrived at after reduction of the liabilities having a first/prior charge, in case the convertible debt instruments are secured by a second or subsequent charge.

Reference date.

25. *Unless otherwise provided in this Chapter, an issuer making a public issue shall satisfy the conditions of this Chapter as on the date of filing draft offer document with the Board and also as on the date of registering the offer document with the Registrar of Companies.*

Conditions for initial public offer.

26. *(1) An issuer may make an initial public offer, if:*
(a) it has net tangible assets of at least three crore rupees in each of the preceding three full years (of twelve months each), of which not more than fifty per cent. are held in monetary assets:

Provided that if more than fifty per cent. of the net tangible assets are held in monetary assets, the issuer has made firm commitments to utilise such excess monetary assets in its business or project;
Provided further that the limit of fifty per cent. on monetary assets shall not be applicable in case the public offer is made entirely through an offer for sale.]
(b) it has a minimum average pre-tax operating profit of rupees fifteen crore, calculated on a restated and consolidated basis, during the three most profitable years out of the immediately preceding five years.
(c) it has a net worth of at least one crore rupees in each of the preceding three full years (of twelve months each);
(d) the aggregate of the proposed issue and all previous issues made in the same financial year in terms of issue size does not exceed five times its pre-issue net worth as per the audited balance sheet of the preceding financial year;
(e) if it has changed its name within the last one year, at least fifty per cent. of the revenue for the preceding one full year has been earned by it from the activity indicated by the new name.

(2) An issuer not satisfying the condition stipulated in sub-regulation (1) may make an initial public offer if the issue is made through the book-building process and the issuer undertakes to allot, at least seventy five percent of the net offer to public, to qualified institutional buyers and to refund full subscription money if it fails to make the said minimum allotment to qualified institutional buyers.
(3) An issuer may make an initial public offer of convertible debt instruments without making a prior public issue of its equity shares and listing thereof.
(4) An issuer shall not make an allotment pursuant to a public issue if the number of prospective allottees is less than one thousand.
(5) No issuer shall make an initial public offer if there are any outstanding convertible securities or any other right which would entitle any person with any option to receive equity shares:
Provided that the provisions of this sub-regulation shall not apply to:

(a) a public issue made during the currency of convertible debt instruments which were issued through an earlier initial public offer, if the conversion price of such convertible debt instruments was determined and disclosed in the prospectus of the earlier issue of convertible debt instruments;
(b) outstanding options granted to employees pursuant to an employee stock option scheme framed in accordance with the relevant Guidance Note or Accounting Standards, if any, issued by the Institute of Chartered Accountants of India in this regard.
(c) fully paid-up outstanding convertible securities which are required to be converted on or before the date of filing of the red herring prospectus (in case of book-built issues) or the prospectus (in case of fixed price issues), as the case may be.

(6) Subject to provisions of the Companies Act, 1956 and these regulations, equity shares may be offered for sale to public if such equity shares have been held by the sellers for a period of at least one year prior to the filing of draft offer document with the Board in accordance with sub-regulation (1) of regulation 6:

Provided that in case equity shares received on conversion or exchange of fully paid-up compulsorily convertible securities including depository receipts are being offered for sale, the holding period of such convertible securities as well as that of resultant equity shares together shall be considered for the purpose of calculation of one year period referred in this sub-regulation:

Provided further that the requirement of holding equity shares for a period of one year shall not apply:

(a) in case of an offer for sale of specified securities of a government company or statutory authority or corporation or any special purpose vehicle set up and controlled by any one or more of them, which is engaged in infrastructure sector;

(b) if the specified securities offered for sale were acquired pursuant to any scheme approved by a High Court under sections 391-394 of the Companies Act, 1956, in lieu of business and invested capital which had been in existence for a period of more than one year prior to such approval.

c) if the specified securities offered for sale were issued under a bonus issue on securities held for a period of at least one year prior to the filing of draft offer document with the Board and further subject to the following, -

(i) such specified securities being issued out of free reserves and share premium existing in the books of account as at the end of the financial year preceding the financial year in which the draft offer document is filed with the Board ; and

(ii) such specified securities not being issued by utilization of revaluation reserves or unrealized profits of the issuer.

(7) An issuer making an initial public offer may obtain grading for such offer from one or more credit rating agencies registered with the Board.

***Explanation:** For the purposes of this regulation:*

(I) "net tangible assets" mean the sum of all net assets of the issuer, excluding intangible assets as defined in Accounting Standard 26 (AS 26) issued by the Institute of Chartered Accountants of India;

(II) "project" means the object for which monies are proposed to be raised to cover the objects of the issue;

(III) In case of an issuer which had been a partnership firm, the track record of distributable profits of the partnership firm shall be considered only if the financial statements of the partnership business for the period during which the issuer was a partnership firm, conform to and are revised in the format prescribed for companies under the Companies Act, 1956 and also comply with the following:

(a) adequate disclosures are made in the financial statements as required to be made by the issuer as per Schedule VI of the Companies Act, 1956;

(b) the financial statements are duly certified by a Chartered Accountant stating that:

(i) the accounts and the disclosures made are in accordance with the provisions of Schedule VI of the Companies Act, 1956;

(ii) the accounting standards of the Institute of Chartered Accountants of India have been followed;

(iii) the financial statements present a true and fair view of the firm's accounts;

(IV) In case of an issuer formed out of a division of an existing company, the track record of distributable profits of the division spun-off shall be considered only if the requirements regarding financial statements as provided for partnership firms in Explanation III are complied with;

(V) "bid-ask spread" means the difference between quotations for sale and purchase;

(VI) The term "infrastructure sector" includes the facilities or services as specified in ***Schedule X.***

Lock-in of specified securities held by promoters.

36. *In a public issue, the specified securities held by promoters shall be locked-in for the period stipulated hereunder:*

(a) minimum promoters' contribution 81[including contribution made by alternative investment funds, referred to in proviso to clause (a) of sub-regulation (1) of regulation 32,] shall be locked-in for a period of three years from the date of commencement of commercial production or date of allotment in the public issue, whichever is later;

(b) promoters' holding in excess of minimum promoters' contribution shall be locked-in for a period of one year:

Provided that excess promoters' contribution as provided in proviso to clause (b) of regulation 34 shall not be subject to lock-in.

Explanation: *For the purposes of this clause, the expression "date of commencement of commercial production" means the last date of the month in which commercial production in a manufacturing company is expected to commence as stated in the offer document.*

Lock-in of specified securities held by persons other than promoters.

37. *In case of an initial public offer, the entire pre-issue capital held by persons other than promoters shall be locked-in for a period of one year:*

Provided that nothing contained in this regulation shall apply to:

(a) equity shares allotted to employees under an employee stock option or employee stock purchase scheme of the issuer prior to the initial public offer, if the issuer has made full disclosures with respect to such options or scheme in accordance with ***Part A of Schedule VIII****;*

(b) equity shares held by a venture capital fund or alternative investment fund of category I [or category II or a foreign venture capital investor:

Provided *that such equity shares shall be locked in for a period of at least one year from the date of purchase by the venture capital fund or alternative investment fund or foreign venture capital investor.*

Explanation*: For the purpose of clause (b), in case such equity shares have resulted pursuant to conversion of fully paid-up compulsorily convertible securities, the holding period of such convertible securities as well as that of resultant equity shares together shall be considered for the purpose of calculation of one year period and convertible securities shall be deemed to be* *fully paid-up, if the entire consideration payable thereon has been paid and no further consideration is payable at the time of their conversion.*

Period of subscription.

46. *(1) Except as otherwise provided in these regulations a public issue shall be kept open for at least three working days but not more than ten working days including the days for which the issue is kept open in case of revision in price band.*
(2) In case the price band in a public issue made through the book building process is revised, the bidding (issue) period disclosed in the red herring prospectus shall be extended for a minimum period of three working days:

Provided that the total bidding period shall not exceed ten working days.

Manner of disclosures in the offer document.

5*7. (1) The offer document shall contain all material disclosures which are true and adequate so as to enable the applicants to take an informed investment decision.*
(2) Without prejudice to the generality of sub-regulation (1):
(a) the red-herring prospectus, shelf prospectus and prospectus shall contain:
(i) the disclosures specified in Schedule II of the Companies Act, 1956; and
(ii) the disclosures specified in ***Part A of Schedule VIII****, subject to the provisions of* ***Parts B and C*** *thereof.*
(b) the letter of offer shall contain disclosures as specified in ***Part E of Schedule VIII***

Provided that in the case of a further public offer or a rights issue, the offer document shall be deemed to be in compliance with the provisions of this regulation, if suitable references are made to the updated disclosures in the offer document referred to in regulation 51A of these regulations.

Prohibition on payment of incentives.

59. *No person connected with the issue shall offer any incentive, whether direct or indirect, in any manner, whether in cash or kind or services or otherwise to any person for making an application for allotment of specified securities:*
Provided that nothing contained in this regulation shall apply to fees or commission for services rendered in relation to the issue.
Explanation: *For the purpose of this regulation, the expression "person connected with the issue" includes a person connected with the distribution of the issue.*

8. The first issue for consideration is whether the Noticee has violated the provisions of Regulation 4(2) & (7), 5, 6, 20(1), 25, 26, 36, 37, 46, 57 and 59 of ICDR Regulations. I note that the Noticees have not disputed facts of the case. I note

from the SCN that the Noticee 1, which is an unlisted company has issued OFCDs and raised total amount of Rs. 29,29,75,000/- from 23,757 persons during the Financial Year 2010-11. The aforesaid issuance of OFCDs by the Noticee 1 would qualify as a public issue of securities under the first proviso to Section 67(3) of the Companies Act.

9. The Noticees in their reply have submitted that issuance of OFCDs by the Noticee 1, was never meant to be a public issue. In order to ascertain whether an issue of securities is a 'public issue' or done on 'private placement', it is necessary to make a reference to Section 67(3) of the Companies Act, 1956, which reads as under:

"67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(2) ...
(3) No offer or invitation shall be treated as made to the public by virtue of sub- section (1) or sub- section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-
(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or
(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation …
Provided *that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:*
Provided further *that nothing contained in the first proviso shall apply to non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956)."*

10. In terms of Section 67(3), as amended by the Companies (Amendment) Act, 2000, with effect from December 13, 2000, no offer or invitation shall be treated as made to the public by virtue of sub-sections (1) or (2), as the case may be, if the offer or invitation can properly be regarded, in all circumstances - (a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or (b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation. More importantly, in terms of the first proviso to the aforesaid section, the provisions of Section 67(3) shall not apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. Therefore, the number of subscribers becomes relevant to conclude whether an issue of shares are for public or on a private placement basis. In view of the same, if an offer of securities are made to fifty or more persons, it would be deemed to be a public issue.

11. The Hon'ble Supreme Court of India in the matter of *Sahara India Real Estate Corporation Limited & Others* Vs. *SEBI and another* (Civil Appeal Nos. 9813 and 9833 of 2011; decided on August 31, 2012) ('the Sahara case') had *inter alia* held that –

"Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the "section of the public".

Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections (1) and (2), that is to any section of the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections

67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.

The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. …
Resultantly, if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue, even if it is of domestic concern or proved that the shares or debentures are not available for subscription or purchase by persons other than those received the offer or invitation.…

I may, therefore, indicate, subject to what has been stated above, in India that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. …"

12. Considering the number of persons from whom monies were raised by the Noticee 1, by issuing OFCDs, which is definitely more than 49 persons, it can be concluded that the Noticee 1 had made a public issue of OFCD in terms of the first *proviso* to Section 67(3) of the Companies Act where the "offer" or "invitation to subscribe for shares or debentures' is made to fifty persons or more, then it has to be construed as a public offer. As the issue of OFCDs made by the Noticee 1 was public issue, it was required to comply with the provisions of ICDR Regulations.

13. I note that the ICDR Regulations requires the Noticee 1, to comply with certain requirements before making public issuances including convertible debt instruments. The requirements of the relevant provisions are described in the Table – 2 of the SCN and this order. It was alleged in the SCN that the Noticees have violated Regulation 4(2) & (7), 5, 6, 20(1), 25, 26, 36, 37, 46, 57 and 59 of ICDR Regulations. I note from the reply of the Noticees that they have not denied alleged violations. On a plain reading of the aforesaid Regulations, I find that the

Regulations 4(2) & (7), 5, 6, 20(1), 25, 26, 36, 37 and 46 of ICDR Regulations are applicable on the issuance of OFCDs by the Noticee 1. However, I note that the Regulation 57 of ICDR Regulations mandates an issuer of securities to ensure that the offer document/RHP contains all material disclosures. I note that in the instant matter as offer document was not filed with SEBI, the issue of disclosing all material information in the offer document does not arise. Further, the Regulations 59 of ICDR Regulations mandates that no person connected with the issue, shall offer any incentive for making an application for allotment of specified securities. In this regard, I note that no document has been brought on record to establish such a violation. In view of the above, I find that the Regulations 57 & 59 of ICDR Regulations are not applicable on the issuance of OFCDs by the Noticee 1. Therefore, the allegation of violations of Regulations 57 & 59 of ICDR Regulations does not stand established against the Noticees.

14. The Noticees, in their reply have submitted that the issue of OFCDs was never meant to be a public issue or coming within the purview of SEBI Rules/ Regulations as contained in ICDR Regulations. In this regard, I note that as the OFCDs were issued to 23,757 persons, i.e. more than 49 persons, it was deemed to be public issue. Same has already been discussed in earlier paragraphs. Therefore, the submission of the Noticees are devoid of any merit.

15. The Noticees have also submitted that the violations were inadvertent/ unintentional and they have not taken any advantage of the same. In this regard, I note that in *Appeal No. 78 of 2014 of Akriti Global Traders Ltd. Vs. SEBI*, the Hon'ble SAT vide *Order dated September 30, 2014* had observed that: *"…..Argument of appellant that the delay was unintentional and that the appellant has not gained from such delay and therefore penalty ought not to have been imposed is without any merit, because, firstly, penal liability arises as soon as provisions under the regulations are violated and that penal liability is neither*

dependent upon intention of parties nor gains accrued from such delay." In view of the same, aforesaid submissions of the Noticees are not acceptable.

16. The Noticees have further submitted that they were not having detailed knowledge of the Rules/Regulations and the procedural requirements as quoted in the SCN. In this regard, I note that *Ignorantia juris non excusat* is a well-known legal principle which means that ignorance of law is not an excuse. The Hon'ble SAT in *Appeal No. 438 of 2015 of Mega Resources Limited vs. SEBI*, in *Order dated September 07, 2017* observed that: "…*ignorance of law will not excuse the appellant to escape the liability of violating the law..*." Hence, this argument of the Noticees does not stand good.

17. In view of the above, I find that the allegation of violation of Regulations 4(2) & (7), 5, 6, 20(1), 25, 26, 36, 37 and 46 of ICDR Regulations by the Noticee 1 stand established. Further, the Noticees 2 to 5, who were the directors of the Noticee 1 during the relevant period, are also found to have violated the aforesaid provisions as alleged in the SCN. The Hon'ble Supreme Court of India in the matter of SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216(SC) held that –

> *"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant…".*

18. Therefore, I am convinced that it is a fit case for imposition of monetary penalty on the Noticee under the provisions of Section 15HB of the SEBI Act, which reads as under:

<u>SEBI Act</u>

15HB. Penalty for contravention where no separate penalty has been provided.-

Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board there under for which no separate penalty has been provided, shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees.

19. While determining the quantum of penalty under Section 15HB of the SEBI Act, it is important to consider the relevant factors as stipulated in Section 15J of the SEBI Act which reads as under:-

Factors to be taken into account by the adjudicating officer.

15J. While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
(b) the amount of loss caused to an investor or group of investors as a result of the default;
(c) the repetitive nature of the default.

Explanation.—For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E,clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section.

20. In the instant case, it is not possible from the material on record to quantify the amount of disproportionate gain or unfair advantage resulting from the non-compliance of ICDR Regulation, in respect of deemed public issue or the consequent loss caused to investors as a result of the default. From the available records, violation by the Noticees was not observed to be repetitive in nature. I note from the examination report that the Noticee 1 has refunded the entire amount raised through OFCDs to the original investors in cash or through bank payments.

I also note that a letter of one peer reviewed Chartered Accountant dated May 15, 2017, is placed on record wherein it is certified that the Noticee 1 has refunded monies to 23,757 investors of OFCDs.

ORDER

21. Having considered all the facts and circumstances of the case, the material available on record, the factors mentioned in Section 15J of the SEBI Act and in exercise of the powers conferred upon me under Section 15-I of the SEBI Act read with Rule 5 of the Adjudication Rules, I hereby impose a monetary penalty payable jointly and severally, of ₹ 25,00,000/- (Rupees Twenty Five Lakh only) on the Noticees viz. Sunshine India Land Developers Limited, (2) Shri Rajesh Kumar Dixit, (3) Shri Rabindra Kumar Gupta, (4) Shri Babu Lal Gupta and (5) Shri Santosh Kumar Sahu under the provisions of Section 15HB of the SEBI Act.

22. I am of the view that the said penalty is commensurate with the lapse/omission on the part of the Noticee. The Noticee shall remit / pay the said total amount of penalty within 45 days of receipt of this order in either of the way, such as by following the path at SEBI website www.sebi.gov.in, ENFORCEMENT > Orders > Orders of AO > PAY NOW; OR by using the web link https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html. In case of any difficulties in payment of penalties, the Noticee may contact the support at portalhelp@sebi.gov.in.

23. The said confirmation of e-payment made in the format as given in table below should be sent to "The Division Chief, EFD - DRA- III, Securities and Exchange Board of India, SEBI Bhavan, Plot no. C- 7, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051" and also to e-mail id:- tad@sebi.gov.in

1. Case Name:	
2. Name of payee:	
3. Date of payment:	
4. Amount paid:	
5. Transaction no.:	
6. Bank details in which payment is made:	
7. Payment is made for: (like penalties/ disgorgement/ recovery/ settlement amount and legal charges along with order details)	

24. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, recovery proceedings may be initiated under section 28A of the SEBI Act for realization of the said amount of penalty along with interest thereon, inter alia, by attachment and sale of movable and immovable properties.

25. In terms of the provisions of Rule 6 of the Adjudication Rules, a copy of this order is being sent to the Noticees viz. Sunshine India Land Developers Limited, (2) Shri Rajesh Kumar Dixit, (3) Shri Rabindra Kumar Gupta, (4) Shri Babu Lal Gupta and (5) Shri Santosh Kumar Sahu and also to the Securities and Exchange Board of India.

Date: January 28, 2020

Place: Mumbai

Dr. ANITHA ANOOP

CHIEF GENERAL MANAGER &

ADJUDICATING OFFICER